

**IN THE HIGH COURT OF TANZANIA**

**IN THE DISTRICT REGISTRY**

**AT DAR ES SALAAM**

**MISC. CIVIL APPLICATION No. 656 OF 2017**

(Under section 5(1) (c) of the Appellate Jurisdiction Act. Cap. 341 R.E 2002, Rule 45 (a) & 47 of CA Rules, 2009 & Order XLIII Rule 2 of the Civil Procedure Code Cap. 33 R.E 2002)

**MASUMIN PRINTWAYS & STATIONERS LTD.....APPLICANT**

Versus


**DIAMOND MOTORS.....RESPONDENT**

**RULING**

3/11/ 2020- 9/4/2021

I need not repeat what predicament this Application carries, concerning the missing the copy of the impugned ruling by **Hon. Munissi J**; who amidst prayers by **Counsel Marealle** holding brief for Counsel for the Applicant, dismissed the same on two grounds, to wit;

- **The Applicant had been paid the decretal sum**
- **Loss of interest**

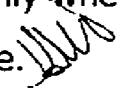
I addressed the objection raised towards this same Application on the **19<sup>th</sup> of March, 2020** paving way for the hearing of the substantive Application as I do now. 

The Application is for **Leave to Appeal** to the **Court of Appeal of Tanzania** against that missing decision in **Misc. Civil Application No. 441 of 2016** in which the Court is moved under the law above highlighted. Accompanying the same, is the Affidavit sworn by Counsel **Protas Zake** whereas; Counsel **Tairo** for the Respondent with his Counter Affidavit sworn by one, **Rachel Cosmas**. Written submissions were prayed for and, granted and, I see both in compliance. Reading through the Applicants submissions drafted by **Counsel Protace Zake**, I find a lot of irrelevance from **paragraphs 1 – 15** as I will embark with what follows under **paragraph 16** of **page 3** onwards. Rightly captured is what, the preview of both the law, as well as practice has, when **Leave** is sought. Counsel cites the case of **Harban Haji Mosi & Another vs. Omar Hilal Seif & Another, Civil Reference No. 19 of 1997** and, **British Broadcasting Corporation vs. Eric Sikujua Ng'maryo, Civil Application No. 133 of 2004** just to highlight the few. The rationale drawn behind granting, he states, is the presence of '**point of law and, or prima facie**' case that, needs the attention of the Court of Appeal following dismissal of the Application by **Hon. Munissi J;**, basically for denying parties to be heard and, second; is the raising of the same **Suo Moto**.

Opposing, **Counsel Tairo** in his lengthy submissions commenced by contextualizing the concept of '**Leave**' in **page 3**, relying on the recent Court of Appeal decision in the case of **National Bank of Commerce vs. Maisha Musa Uledi (Life Business Centre), Civil Application No. 410 of 2019** stressing what the case of **British Broadcasting** (supra) held, in terms of tests to be applied, when considering grant or not, for **Leave**. That, the

Affidavit should reflect merits for consideration and, two; the discretion by Court. **Counsel Tairo** finds none of the above test has been proved, considering all the facts being purely hearsay, absence of Affidavit by **Counsel Marealle** who absented herself in Court when dismissal was granted, lack of sufficient reasons for extending time in the previous Application, right to be heard was afforded to both parties, consideration of many and, previous adjournments, validity of payment alleged to have been effected. However and, in total rebut, **Counsel Tairo** contends that, nothing **Suo Motu** was raised by the Judge, as the matter was heard on merits. He is of a firm view that, the Appeal intended is frivolous and, vexatious as nothing tangible is available to demonstrate points of law to warrant attention of the Court of Appeal. He prayed for dismissal with costs.

In a brief rejoinder, **Counsel Zake**, termed the long submissions as “**tautological verbosity, repetitive, and, academic**”, hence wasting the Court’s valuable time. He insists to have demonstrated good and, sufficient cause towards the Application as seen in **paragraph 12** of the Affidavit supported with the cases. It is purely Application for Leave as opposed to Extending Time he observed, as the Respondent attempts to address the merits or otherwise of the intended Appeal, which is wrong. While maintaining the same **National Bank of Commerce** case (supra) Counsel distinguished that, the application is not frivolous.

I appreciate the efforts and, inputs shared by both parties and, would wish to clearly point out here that, matters of **Leave to Appeal to Court of Appeal** are simply considered only when there is likely argument of law or points. Nothing less nothing more. 

**Harbani Haji Mosi and Another vs. Omar Hi/at Seif and Another in Civil Reference No. 19 of 1997 (Unreported) Lugakingira J.A** (as he then was) who held alia that:-

**"In order for the Application for Leave to Appeal to the Court of Appeal to be granted the following factors must be present:**

- 1. The proposed Appeal stands reasonable chances of success.**
- 2. Where but not necessarily the proceedings as a whole reveal such disturbing features as to require the guidance of the Court of Appeal.**  
**(Emphasis is mine).**

In light of the case of **Principal Secretary, Ministry of Defence & National Service vs. Devram Valambhia [1992] TLR 185** the **Court of Appeal** re-stated the above holding;

**"In our view when the point at issue is one alleging illegality of the decision being challenged, the Court has the duty...for the purpose to ascertain the point and, the alleged illegality be established, to take appropriate measure to put the matter and record right".**

In view of the prevailing circumstances, and, without much further ado, I find the Application with merit as I grant, **'Leave to Appeal'** to the Court of Appeal of Tanzania, as prayed. They are arguable and triable issues requiring attention, consideration and, determination by the Superior Court.

Costs in due course.

Accordingly ordered.



**J. A DE-MELO**

**JUDGE**

**9/4/2021**