IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 242 OF 2020

(Arising from the decision in Civil Appeal No. 154 of 2018 before Hon. Mlyambina J, dated 20th December 2020)

GODWIN LYAKI .....1st APPLICANT

BONIFACE AUGUSTINE ..... 2nd APPLICANT

VERSUS

ARDHI UNIVERSITY..... RESPONDENT

RULING

13th April 2021 & 07th May, 2021.

E. E. KAKOLAKI J

By way of chamber summons supported by affidavits of both Samson Edward Mbamba advocate for the applicants and the applicants themselves, and in pursuance of the provisions of sections 11(1) and 5(1) of the Appellate Jurisdiction Act, [Cap. 141 R.E 2002] (AJA) this Court has been moved for the following orders:

(1) The Hon. Court be pleased to grant the applicant an extension of time to apply for leave to appeal against the decision of Hon. Mlyambina J. made on 20th December, 2019 in Civil Appeal No. 145 of 2018.

(2) Subject to the grant of prayer (1) above, Court be pleased to grant leave to appeal against the said order.

(3) Costs of the suit be provided for.

(4) Any other order as the Hon. Court shall deem fit to grant.

The application which has two limbs of prayers was vehemently challenged by the respondent for being omnibus application and want of merits by filing her counter affidavit. Both parties are represented and with leave of the court agreed to dispose of the application by way of written submission. The applicants are represented by Mr. Samson Edward Mbamba learned advocate whereas the respondent enjoys the services of Ms. Lucy Kimaryo learned State Attorney.

The brief background history of the matter that gave raise to this application can be simply stated as hereunder. The applicants had once enrolled for Postgraduate Diploma in Construction Economics and Management (PGD-CEM) and successfully graduated at the respondent's institution. During admission process the two had promised to submit their Advanced Diploma Certificate from Dar es salaam Institute of Technology (DIT) but failed to so do until when they graduated and awarded the said PGD-CEM. After graduation the 1st Applicant applied and was successfully enrolled for Masters of Science program before his award of PGD-CEM was withdrawn by the Senate and deregistered from masters program with effect from 06/12/2012 after the respondent had learnt from DIT that the applicants were disqualified from being enrolled for the said programmes having failed to pass their exams at DIT.

Aggrieved with that decision the applicants successfully sued the respondent before Resident Magistrates Court of Dar es salaam at Kisutu in Civil Case No. 428 of 2012 whereby the trial court decided in their favour by ordering the respondent to release their withdrawn awards. Discontented the respondent successfully appealed to this Court vide Civil Appeal No.154 of 2018 whereby in its judgment dated 20/12/2019 found the Resident Magistrates Court of Dar es salaam at Kisutu was not clothed with jurisdiction to entertain judicial review matter as the same is bestowed to the High Court only when exercising its supervisory jurisdiction over lower courts and Tribunals on the public bodies including the respondent. Dissatisfied with that decision the applicants through their advocate who on 06/01/2020 filed a Notice of Appeal to the Court of Appeal. Subsequent to that on 15/01/2020 they filed with this Court a letter requesting for certified copies of proceedings, judgment, decree and exhibits duly endorsed for appeal purposes, the letter which was followed by the reminder letters on the 05/02/2020 and 07/05/2020 when the judgment was supplied to him. After receipt of the said necessary documents the applicants believing to be out of time filed the present application seeking both extension of time to file the application for leave to appeal to the Court of Appeal and grant of the leave to so appeal.

As the first limb of prayers in this application determines the life of the second limb, I will start with the first limb. Under the provisions of section 11(1) of AJA this Court has discretionary powers to grant the application by the applicant notwithstanding that the time for giving the notice or making the application has already expired but upon good cause being assigned. The said provision reads thus:

11.-(1) Subject to subsection (2), the High Court or, where an appeal lies from a subordinate court exercising extended powers, the subordinate court concerned, may extend the time for giving notice of intention to appeal from a judgment of the High Court or of the subordinate court concerned, for making an application for leave to appeal or for a certificate that the case is a fit case for appeal, notwithstanding that the time for giving the notice or making the application has already expired.

Despite of the requirement by the applicant to state good cause to warrant the court grant him extension of time, the law does not define what amounts to good cause as there is no fast and hard rule since that depends on the circumstances facing the applicant at the time and the reasons advanced. See the case of **Osward Masatu Mwizarubi Vs. Tanzania Fish Processing Ltd**, Civil Application No. 13 of 2010, (CAT-unreported). In assigning good cause the applicant has the duty of accounting for each and every day of delay as it was stated in the case of **Alman Investment Ltd Vs Printpack Tanzania and Others**; Civil Application No. 3 of 2003 (Unreported) where the Court stated that:

"Applicant ought to explain the delay of every day that passed beyond the prescribed period of limitation."

Under rule 45(a) of the Court of Appeal Rules of 2009, any party seeking leave of this Court to appeal to the Court of Appeal must do so within thirty (30) days from the date of the decision. It provides thus:

45. In civil matters:-

(a) notwithstanding the provisions of rule 46(1), where an appeal lies with the leave of the High Court, application for leave may be made informally, when the decision against which it is desired to appeal is given, or by chamber summons according to the practice of the High Court, ***within thirty days of the decision****; or*

In this matter the reason advanced by Mr. Mbamba advocate for the applicants accounting for the delay to file the application for leave within 30 days is that the requisite documents for appeal purposes were not supplied to the applicants until 07/05/2020. The leaf of court dispatch was attached to the affidavit. In rebuttal the respondent raised some issues that the applicants preferred this application with omnibus prayers which is barred under the law and that the delayed days for filing the application for leave have not been accounted for by the applicants. On omnibus prayers Ms. Kimaryo for the respondent relied on the cases of **Rutagatina C.L. Vs. The Advocate Committee and Clavery Mtindo Ngalapa**, Civil Application No. 98 of 2010 (CAT-unreported) and **Mohamed Salmin Vs. Jumanne Omary Mapesa**, Civil Application No. 103 of 2014 (CAT-unreported) where the omnibus applications are discouraged by the law. On failure to account for the delayed days she referred the court to the case of **Lyamuya Construction Company Ltd Versus Board of Registered Trustee of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (Unreported – CAT), stating that even if the copy of judgment was obtained late still no specific reasons were assigned for the delay. It was therefore her submission that the applicants through their advocate failed to show diligence in pursuing their matter as lack of diligence or negligence on

the part of counsel is not an excuse and has never been good reason for extension of time. He referred the court to the case of **Evans Buhire and Other Vs. National Insurance of Tanzania and Others**, Misc. Land Applicant No. 638 of 2016 (HC-unreported).

Having considered both parties' submissions, the issue before me for determination is whether applicants have supplied sufficient reasons to warrant this court grant them extension time. For proper determination of this issue it is imperative to establish when the time started running against the appellants so as to see whether the reasons for the delay are with justification. In so doing the law applicable in computation of time limitation under the circumstances of this matter in my opinion is the Law of Limitation Act, [Cap. 98 R.E 2019] (LLA), as the Court of Appeal Rules, 2009 is not applicable to this court. Section 19(2) of LLA provides that in computing the period of limitation in an application for leave to appeal, the period of time spent by the applicant for obtaining the copy of judgment or order intended to be appealed against shall be excluded. Section 19(2) of LLA provides thus:

> *19(2) In computing the period of limitation prescribed for an appeal, an application for leave to appeal, or an application for review of judgment, the day on which the judgment complained of was delivered, and* ***the period of time requisite for obtaining a copy of the decree or order appealed from or sought to be reviewed, shall be excluded****. (Emphasis supplied).*

In this matter it is uncontroverted fact that the judgment sought to be impugned was delivered on the 20/12/2019, the Notice of Appeal issued on

the 06/01/2020 and the letter requesting for copies of judgment, proceedings and order and its reminders lodged in court on the 15/01/2020, 5/02/2020 and 07/05/2020 respectively. The request letter was lodged well within 30 days from the date of judgement. The requested judgment as per the attached leaf of dispatch was issued to the applicants on the 07/05/2020 and this application filed on the 14/05/2020. Applying the provisions of section 19(2) of LLA to the facts of this matter it is noted this application was filed seven (7) days after receipt of the copy of judgment by the applicant which is a necessary documents for the purposes of applying for leave to appeal to the Court of Appeal. It is trite law that the applicant awaiting to be supplied with the necessary documents for the purposes of applying for leave to appeal to the Court of Appeal need not file an application for extension of time if the application is filed within 30 days from the date of receipt of the requested documents. See the cases of **Alex Senkoro and 3 Others Vs. Eliambuya Lyimo** (As Administrator of the Estate of Fredrick Lyimo, Deceased), Civil Appeal No. 16 of 2017 (CAT-unreported) and **Director of Public Prosecutions Vs. Mawazo Saliboko @ Shagi & Fifteen Others**, Criminal Appeal No. 2017. The Court of Appeal in **Alex Senkoro and 3 Others** (supra) when considering the applicability of section 19(2) and (3) of LLA on automatic exclusion of the period of time spent for obtaining a copy of judgment or decree sought to be impugned held that under such circumstances the appellant need not file an application for extension of time. The Court had this to say:

> *"We entertain no doubt that the above sub-sections expressly allow automatic exclusion of the period of time requisite for obtaining a copy of the decree or judgment appealed from the*

computation of the prescribed limitation period. ***Such an exclusion need not be made upon an order of the court in a formal application for extension of time****. Indeed, that stance was taken recently in* ***Mohamed Salimini v. Jumanne Omary Mapesa****, Civil Appeal No. 345 of 2018 (unreported) where the Court affirmed that section 19 (2) of the LLA obliges courts to exclude the period of time requisite for obtaining a copy of the decree appealed from."*

It is worth noting that the party does not enjoy the automatic right of exclusion where the appeal is filed outside the prescribed time limitation for filing the appeal, meaning after obtaining the necessary copies of judgment and or decree or order appealed against. This position of the law was taken by the Court of Appeal in the case of **Mawazo Saliboko @ Shagi & Fifteen Others** (supra) when interpreting the provision of section 379 (1) (b) of the Criminal Procedure Act, [Cap. 20 R.E 2019] on the automatic exclusion of the time requisite for obtaining the judgment or order sought to be impugned, where the High Court judge had said it was not automatic, had this to state:

"The learned Judge was of the view that, though the appellant filed the appeal within 45 days after being served with the copy of the proceedings, he ought to have applied for extension of time to do so because he was time-barred from the date of the impugned decision. On our part, we are of the decided view that the intention of the legislature under the proviso to section 379 (1) (b) of the CPA was to avoid multiplicity of applications, and delay to disposal of cases. That is why it provided for automatic

exclusion of the time requisite to obtain a copy of proceedings, judgment or order appealed from, ***this is different where the intending appellant finds himself out of 45 days to file an appeal after receipt of the copy of proceedings.*** *"*
(Emphasis added)

In view of the above cited cases and principles of the law, since in this matter the applicants lodged the application for leave to appeal within 30 days from the date of receiving the impugned judgment and since there was no need for them to file the application for extension of time, I hold the requirement for them to supply sufficient cause is dispensed with. Therefore the assertion by the respondent that the appellants filed application with omnibus prayers dies a natural death as I dismiss it. I further hold that the application for leave to appeal to the court of appeal was filed within time.

Having so found I now move to the second limb of prayer by the applicants for grant of leave to appeal to the Court of Appeal. It was Mr. Mbamba's contention that in the judgment sought to be impugned to the Court of Appeal there is point of law of sufficient importance, meriting attention of the Court of Appeal so as to issue its guidance accordingly. He argued as there is no statute that expressly declared the order or decision of the respondent as public body to be final and unchallengeable by way of normal suit the honourable judge was not justified to hold that the trial court had no jurisdiction to entertain that matter, for being a judicial review case. He faulted the appellate court judge for raising suo motu the point of fraud and base his decision therefrom without affording appellants with an opportunity to be heard hence illegality of the decision. He cited the excerpt from page 11 to 12 of the typed judgment where this Court stated thus:

"I must observe in a passing way that: Illegal Academic Certificate cannot entitle a person for other academic entry. "haramu haizai haramu". If such person by fraud or out of knowledge of the academic vetting machinery succeeds to use such Illegal Certificate to another level, even to Doctoral level or even foe employment purposes, it is as much as wasting his time, money and energy because all the academic success that stems from Illegal Certificate are a nullity. Condoning Illegal Certificate to be used for academic registration is equal to entertaining decadency behaviour in our good society. A court worth of its meaning cannot dare to do so."

In view of the above submission Mr. Mbamba urged the court to grant the applicants leave so as to pave their way to the Court of Appeal to consider the raised points which according to him are of sufficient importance.

Opposing the prayers Ms. Kimaryo for the respondent contended that the alleged part of the decision faulted by the appellant does not constitute the heart of the decision as it was an obiter dictum with no legal force which cannot be appealed against. She cited the court's basis for its decision to be found at page 10 of the typed judgment to be:

"This Court is of profound view that the Resident Magistrates Court of Dar es salaam at Kisutu lacks Judicial Review powers which is bestowed to the High Court only when exercising its supervisory jurisdiction over lower courts, Tribunal and other Public bodies including appellant."

It was Ms. kimaryo's submission that the cited part of the decision by the appellants being obiter dictum had no effects on the determination of the suit. To support her stance she referred the Court to the case of **Donald Patrick Vs. Mtendaji wa Kijiji Kiriba**, Civil Appeal No. 1 of 2020 (HC-unreported). In summing up it was her submission that the appellants have failed to show that there is arguable points as the alleged in the obiter dictum which according to her is not disturbing feature requiring guidance of the Court of Appeal as provided under the Law Reform (Fatal Accidents and Miscellaneous Provision) Act [Cap. 310 R.E 2002]. She invited the court to dismiss the application with costs.

In his rejoinder submission Mr. Mbamba on the issue of the point of sufficient importance countered, the point as to when a person can access judicial review and when not, remains a point of sufficient importance that requires determination by the Court of Appeal by directing a proper way to be taken. On the alleged obiter dictum by the respondent he argued, the issue of fraud being discussed by the honourable judge had negative inference to the applicants' moral capability therefore condemning applicants without affording them with right to be heard is an illegality meriting the attention of the Court of Appeal. Apart from the above arguments Mr. Mbamba reiterated his submission in chief and invited the court to grant the prayers as sought.

I have considerably taken time to peruse the pleadings, submissions and the authorities relied upon by both parties. It is evident to me there is no specific guidelines or factors to be taken into account when considering the application for leave to appeal to the Court of Appeal as factors varies basing on the points for consideration raised by the applicant. Despite of that fact

case laws have tried to give some light on that. In the case of **Gaudensia Mazungu Vs. The IDM Mzumbe,** Civil Application No. 94 of 199 (CAT-unreported) where the Court of Appeal on the factors to be considered observed that:

> *"Again, leave is not granted because there is an arguable appeal. There is always an arguable appeal.* ***What is crucially important is whether there are prima facie grounds meriting an appeal to this court.*** *"*[Emphasis supplied]

Leave can therefore be granted if it established to the court's satisfaction that there are prima facie grounds or merits in the intended appeal whether factual or legal worth of consideration by the Court of Appeal as it was also rightly stated in the case of **Wambele Mtimwa Shamte Vs. Asha Juma**, Civil Application No. 45 of 1999 (CAT-unreported), where the Court of Appeal stated the following:

> *"Unfortunately, it is not provided what factors are to be taken into account when considering whether or not to grant leave to appeal to this court. However, it is obvious that leave will only be granted if the intended appeal has some merits whether factual or legal."*

Yet in another case of **Harban Haji Mosi and Shauri Haji Mosi Vs. Omari Hilal Seif and Another**, [2001] TLR 409, the Court of Appeal observed that:

> *"Leave is grantable* ***where the proposed appeal stands reasonable chance of success or where, but not***

necessarily, the procedures as a whole reveal such disturbing features as to require guidance of the Court of Appeal*. The purpose of the provision is, therefore, to spare the Court the spectre of unmeriting matters and to enable it to give adequate attention to cases of true public importance."* [Emphasis is added]

In summing up the case of **Rutagatina C.I Vs. The Advocate Committee and Clavery Mtindo Ngalapa**, Civil Application No. 98 of 2010 (CAT-unreported) summarised it all when stated thus:

> *"Application for leave is usually granted if there is good reason, normally on a point of law or point of public importance."*

What is discerned from the above cited cases is that it is not sufficient for the applicant to allege there is arguable appeal, as the alleged arguable points must be of sufficient importance meriting attention of the Court of Appeal. And that the points are of factual or legal or public importance. In this matter the alleged point worth of determination by the Court of Appeal is when can a person access judicial review and when not, simply because the honourable judge said the trial court had no jurisdiction to try the matter as the same was falling under parameters of judicial review. My conviction on the point is that the same is not such a disturbing feature as to require guidance of the Court of Appeal as there is a number of authorities both of this court and Court of Appeal on the point. See the cases of case of **Harun s/o Nchama and Another Vs. Republic** (1982) TLR 274 where it was observed that:

(i) Where a statute expressly declares an order to be final no offence can lie against such order.

(ii) **It is only by way of an application for judicial review that the order complained against could be challenged for illegality or want of jurisdiction by way of such prerogative orders as certiorari**. (emphasis supplied)

Similarly in the case of **Tanzania Air Services Limited Vs. Minister for Labour, Attorney General and The Commissioner for Lands** (1996) TLR 117 this Court deliberating on the issue as to whether administrative decision can be challenged and how, had this to say:

> *"The provision that the Minister's decision is final and conclusive does not mean that the decision cannot be reviewed by the High Court; indeed no appeal will lie against such decision but aggrieved party may come to the High Court and ask for prerogative orders."*

As to the second point raised by the applicants I agree with Ms. Kimaryo that the cited part of the decision by the appellants is obiter dictum with no legal effect as it does not form part of the decision, thus cannot be appealed against. It is therefore falling short of qualification to be considered as a point of sufficient importance at this leave stage. The main purpose of leave stage in my considered opinion is to filter matters of utmost sufficient importance so as to afford the Court of Appeal to utilize its precious time to adjudicate cases of true public importance. To grant leave to the applicants' raised points therefore in my opinion will amount to suffocating the Court of

Appeal with vexatious matters and deny other parties with matters of sufficient importance to access the Court of Appeal.

In view of the foregoing I find the applicants have failed to convince this court that they have not only arguable appeal but also points of sufficient importance meriting attention of the Court of Appeal. The application is therefore without merit and is hereby dismissed with costs.

It is so ordered.

DATED at DAR ES SALAAM this 07th day of May, 2021.

E. E. KAKOLAKI

JUDGE

07/05/2021

Delivered at Dar es Salaam today on 07th day of May 2021 in the presence of Mr. Godfrey Mpandikizi advocate holding brief for Mr. Samson Mbamba advocate for the applicants, 2nd applicant in person and Ms. Asha Livanga, court clerk and in the absence of the respondent.

E. E. Kakolaki

JUDGE

07/05/2021