

**IN THE HIGH COURT OF TANZANIA
(IN THE DISTRICT REGISTRY)
AT MWANZA**

MISC. CIVIL APPLICATION NO.32 OF 2021

*(Arising from Civil Appeal No.20 of 2008 HC of Tanzania District
Registry of Mwanza. Originating from Resident Magistrate Court in Civil Case
No. 19 of 2005)*

**THE MANAGING DIRECTOR
KENYA COMMERCIAL BANK (T) LIMITED1ST APPLICANT**

ALBERT ODONGO 2ND APPLICANT

VERSUS

SHADRACK J NDEGE RESPONDENT

RULING

Last order: 07.06.2021

Ruling date: 08.06.2021

A.Z.MGEYEKWA, J

This application is brought under section 5 (1) (c) of the Appellate Jurisdiction Act, Cap. 141 [R.E 2019]. The applicant seeks leave to appeal to the Court of Appeal of Tanzania to impugn the decision of this Court in Civil Appeal No.20 of 2008 delivered on 16th March, 2021. The application is supported by an affidavit deposed by Mr. Libert Rwazo, the applicant.

The respondent is feverishly opposed to the application. In a counter-affidavit sworn by Deya Paul Outa, learned Advocate for the respondent.

When the matter was called for hearing before this court on 7th June, 2021, the application pitted Mr. Kyarija, learned counsel for the applicant, against Mr. Deya Outo learned advocate for the respondent.

It was Mr. Kyariga who started to kick the ball rolling. He urged this court to adopt the applicant's affidavit and form part of his submission. The learned counsel for the applicant stated that grant of leave to appeal to the Court of Appeal is not automatic but on conditional, it can only be granted where the grounds of appeal raise arguable issues of appeal. He went on to state that the grounds should merit a serious judicial consideration by the Court of Appeal of Tanzania. Mr. Kyariga fortified his submission by citing the case of **Bulyanhulu Gold Mine Ltd & 2 Others v Petroleum (T) Ltd**, Civil Application No. 364/16 of 2017.

He asserts that the applicant specifically on paragraph 11 of his affidavit had raises arguable grounds which attracts the attention of the Court of Appeal this court to paragraph 11 of the applicant's affidavit. Mr. Kyariga asserts that on grounds 11 (a) to (c) of the applicant's they are complaining that this court has raised an issue *suo mottu*. He went on to assert that this ground is arguable as from the pleadings, the employee of Kenya Commercial Bank Ltd and Managing Director and Relation

Manager cannot vicariously liable for the actions of his fellow employee. Stressing, he argued that vicarious liability is applicable in the Master and Servant relationship while in the instant application both are employees.

Mr. Kyariga prayed to combine the grounds (a) to (j) appearing in paragraph 11 of the affidavit. He asserts that the judge erred in law to hold that the second appellant was liable for tort defamation without considering the evidence. To substantiate his submission he referred this court to exhibit P4, a letter which the respondent complained that it contained defamatory words. He lamented that the letter was not defamatory as it was not publicized but the same was circulated within the bank to the intended person.

Closing his submission, Mr. Kyariga prayed to combine grounds number 1 and 3 appearing in the applicant's affidavit that the judge erred in law holding that suing the managing director for Kenya Commercial is the same as suing the Kenya Commercial Bank of Tanzania Ltd. He stated that according to the Companies Act of 2002, the Kenya Commercial Bank can sue and be sued on its own, and hence suing the Managing Director is not the same as suing the entire cooperation. He added that the Managing Director is not a cooperate company and does not own property. Thus they want to call upon the Court of Appeal of Tanzania to decide on the issue.

On the strength of the above submission, Mr. Kyraiga beckoned upon this court to consider if the raised issues are arguable before the Court of Appeal of Tanzania and grant their application with costs.

Responding, the learned counsel for the respondent urged for this court to adopt the respondent's counter affidavit and form part of his submission. Mr. Outa submitted that the cited authorities are correct but the application does not relate to the cited case of **Nubhain Rattansa v Minister of Water Construction, Energy, Land, and Environment & Another** [2005] TLR 220. The appellant's learned counsel stated that an application for leave to appeal to the Court of Appeal is granted if it is a fit case for further consideration. He went on to argue that the court has to scrutinize and see if it is a fit case to merit the attention of the Court of Appeal of Tanzania.

Mr. Outa continued to submit that that the application is supported by an affidavit which is in alternative. He complained that the applicant has placed this court with a burden to choose the grounds which merits the attention of the Court of Appeal of Tanzania which makes the affidavit suspicious. Thus, it was his view that this court cannot grant the application since it cannot choose for the parties.

Mr. Outa spiritedly contended that the applicant's affidavit contains 23 grounds and they did not pinpoint areas that are contested. He went on to

submit that the first appellant is disassociating himself from the second appellant which means that the second appellant is liable on his own. Thus, he argued that for that matter the applicants, therefore, were required to be represented by different advocates and this creates a problematic application which the court cannot grant.

On the strength of the above argumentation, Mr. Outa urged this court to find that the instant application is improper the same should not be granted with costs.

In his long rejoined which I have cut it short, the learned counsel for the applicant submitted that the judge did not hold that the Managing Director of Kenya Commercial Bank is liable and instead hold that the Kenya Commercial Bank Tanzania Ltd is liable, that is the applicant's concern and they want the Court of Appeal of Tanzania to address this point. Insisting, Mr. Kyariga stated that the Managing Director is an employee of the bank. He added that all 23 grounds are arguable and raise contentious issues of law and fact.

Submitting on the alternative grounds, Mr. Kyariga stated that paragraphs 1 - 10, 12 & 13 of the applicant's affidavit were not disputed and paragraph 11 of the applicant's affidavit states the intended grounds which can also be raised as an alternative thus in his view, the affidavit is competent. He stressed that the applicant has raised 23 grounds because

at the Court of Appeal of Tanzania a party cannot raise a new issue. The learned counsel for the applicant reiterated their prayers and urged this court to grant their application.

Having heard the submissions of the learned counsel for the applicant and the respondent for and against the application, I will determine *whether the application is meritorious*. A review of the rival depositions is centered on one grand question for settlement by the Court. This is as to *whether the application demonstrates a sufficient ground or a disturbing feature that requires the attention of the Court of Appeal of Tanzania*.

The issue for determination takes into account the settled position of the law to the effect that grant of leave to appeal to the Court of Appeal is not a matter of a mere formality. A party intending to be allowed to appeal must demonstrate, with material sufficiency, that the intended appeal carries an arguable case that merits the attention of the Court of Appeal. Thus, a grant of leave is granted if *prima facie* grounds are meriting the attention of the Court of Appeal. In other words, there must be based on solid grounds which are weighty enough to engage the minds of the Court of Appeal. It is trite law that leaves to appeal to the Court of Appeal is granted if *prima facie* grounds are meriting the attention of the Court of Appeal as it was held in the case of **Sango Bay v Dresdner Bank A.G** [1971] EA 17, it was held that:-

*“ Leave to appeal will be granted where **prima facie** it appears that there are grounds which merit serious judicial attention and determination by a superior Court.”*

Equally, in the case of **Gaudensia Mzungu v IDM Mzumbe**, Civil Application No. 94 of 1994 (unreported), the Court of Appeal of Tanzania held that:-

“ Leave will be granted if, prima facie there are grounds meriting the attention and decision of the Court of Appeal.”

These decisions are in consonance with the decision cited by the counsel for the applicant; **Bulyanhulu Gold Mine** (supra); and the cited case by the learned counsel for the respondent; **Nubhain Rattansa** (supra). The Court of Appeal in Nubhain Rattansa held that:-

“ An application for leave will be granted if it is a fit case for further consideration by the Court of Appeal...”

Applying the above holding, the Court of Appeal emphasized that the disturbing features must be in the form of serious points of law that warrant the attention of the Court of Appeal. Gathering from these decisions, it is clear that it is within this Court's discretion to refuse to grant leave where the Court is of the view that the application for leave falls short of meeting the requisite threshold for its grant. The same was held in the cited case of **Nurbhain Rattansi (supra) v Ministry of Water Construction**

Energy Land and Environment and Another, Civil Application No. 3 of 2004 TLR [2005] 220 and in the case of **Saidi Ramadwani Mnyanga v Abdallah Salehe** [1996] TLR 7 4).

Guided by the above authorities, I have to say that, the case referred to this court must be looked at its context rather than authority against the success of the intended appeal. The applicant's learned counsel has raised several points of law which he thinks are meriting the attention of the Court of Appeal of Tanzania to determine their appeal. One of them is that this court in its judgment has raised an issue *suo mottu*. In the case of **Grupp vs. Jangwani Sea Breeze Lodge Ltd**, Commercial case No.93 of 2002 (unreported) my brother Massati, J (as he then was) expressed the matter this way:-

"... I have no jurisdiction to go into merits or deficiencies of the judgment or orders of my sister judge in this application. All that I am required to determine is whether there are arguable issues fit for the consideration of the Court of Appeal...."

Based on the above authority, I have noted that both learned counsels have submitted in length on the issue of vicarious liability, Master and Servant relationship. The respondent's Advocate insisted that the applicant has raised 23 grounds which creates doubt; whether all merits the Court of Appeal to determine the said appeal. Again, he insisted that

reading the applicant's affidavit the applicant on paragraph 11 (k) has brought alternative grounds. He lamented that the applicant left it for the court to choose for the applicant.

In my view, the alternative grounds are not a good reason for this court to disregard the applicant's affidavit. There is no impairment for the applicant to raise alternative grounds, as long as he has raised grounds on point of law which attracts the attention of the Court of Appeal of Tanzania the same suffice. Therefore, it is my findings that the applicant's Advocate has raised arguable issues which he thinks are good grounds to attract the attention of the Court of Appeal to determine their appeal.

The applicant's Advocate's main reason to appeal against this court judgment is for the Court of Appeal of Tanzania to determine among others; whether it was proper for this court to hold that suing a Managing Director of Kenya Commercial Bank is equally to sue Kenya Commercial Bank which is a corporate entity operating under Companies Act of 2002. The facts in the instant application and without expressing any opinion show that the applicant has demonstrated sufficient ground to invoke the appellate jurisdiction of the Court of Appeal of Tanzania. I do not think the grounds raised in the applicants' affidavit and Mr. Kyariga's submission are not serious enough to be determined by the Court of Appeal.

In the upshot, I will, in the circumstances, exercise my discretion under section 5 (1) (c) of the Appellate Jurisdiction Act, Cap. 141 [R.E 2019] and grant leave to appeal to the Court of Appeal.

Order accordingly.

DATED at Mwanza this 8th June, 2021.




A.Z MGEYEKWA

JUDGE

08.06.2021

Ruling delivered on 8th June, 2021 via audio teleconference whereas Mr. Idrisa Juma, learned counsel for the applicant and Mr. Outa, learned counsel for the respondent were remotely present.


A.Z MGEYEKWA

JUDGE

08.06.2021