

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

MISCELLANEOUS CIVIL APPLICATION NO. 165 OF 2020

(Arising from Reference No. 01 of 2020 and Originating from Bill of Cost No. 20/2017)

**MAGORI ALLY NYABANGE ROSE @ TANNA ALLY NYABANGEAPPLICANTS
VERSUS**

ATHUMAN ALLY NYABANGE

*(Administrator of the Estate of the Late
WARIOBA NYABANGE)*



..... **RESPONDENT**

RULING

27/05/2021 & 29/06/2021

W. R. MASHAURI, J;

This is an application by the applicants Magori Ally Mabange and Rose @ Tanna ally Mabange (The applicants) for leave to appeal to the Court of Appeal of Tanzania against the decision of this court Hon. Manyanda, J. in reference No. 01 of 2020. The application is preferred under section 5(I) (c) of the Appellate Jurisdiction Act Cap. 141 R.E. 2019.

It is supported by an affidavit sworn by Magori Ally Nyabange (The 1st applicant) upon authorized by Rose @ Tanna Ally Nyabange to depose on her behalf.

It is common ground that, upon won their case in the original action with costs, the applicants respectively filed bill of costs application in the High Court of Tanzania at Mwanza claiming costs in the tune of Tshs. 18,900,000/=.

In his ruling he delivered on 16/11/2020, Hon. Manyanda, J taxed the award of costs of Tshs. 18,900,000/= they had claimed to the tune of Tshs. 9,450,000/=, the remained awarded costs remained intact.

The applicants were aggrieved with the taxation of Tshs. 18,900,000/= to the tune of Tshs. 9,450,000/=. They have now filed this application for leave to appeal to the Court of Appeal on the grounds and reason set forth in the affidavit deponed by Mr. Magori Ally Nyabange which they have annexed to their application.

The applicants in this application are enjoying the services of Mr. Emmanuel John learned counsel and the respondent Athuman Ally Nyabange (Administrator of the estate) of the deceased Warioba Nyabange is enjoying the services of Mr. Dutu Chengwa learned counsel.

When the hearing of this application was opened by the court, Mr. Emmanuel John, learned counsel for the applicants submitted that, this application is emanating from reference No. 01 of 2020 delivered on

16/11/2020 Hon. Manyanda, J. That, at law, an appeal to the Court of Appeal is not automatic.

Any person aggrieved by the High court decision in a reference cause must seek and obtain consent of the High court. That, the guidance's have been set in the case of **British Broadcasting Corporation v/s Eric Sikujua Ng'amaro** Civil Application No. 138 of 2004 CAT DSM Registry (unreported) in which Hon. Nsekela, JA said: -

"leave is grantable where the proposed appeal stands reasonable chances of success, or where but of necessarily the proceedings as a whole reveal such disturbing features as to require the guidance of the Court of Appeal. The purpose of the provision is therefore to spare the court the specter of unmalting matters and to enable it to give adequate attention to cases of true public importance"

That, in this application the disturbing features have been specified by the applicant at paragraph 5 of the affidavit to wit: -

1. Whether it was proper to grant Shs. 9,450,000/= as instruction fee while the case was not that much complex the case was as ruled by hon. Manyanda, J. in his ruling bill of costs. No 01 of 2020.
2. Whether it was proper for the High court to give its decision without considering the whole governing Taxation procedure.

That, when you read his ruling (annexture 'A') page 8, Hon. Manyanda, J. did not indicate which features he used to reach the same conclusion.

3. Whether it was proper to highlight the features governing Taxation without applying them in the ruling, he delivered on 16/11/2020.

At page 7, of the typed ruling, there are several features stated by Hon. Manyanda, J but they were not applied despite of being highlighted by the Hon. Judge.

Having so submitted the learned counsel for the applicants prayed the court to grant the application with costs.

In his reply, Mr. Emmanuel John, learned counsel for the respondent submitted that, the essence of this application is based under paragraph 5 of the applicant's affidavit where he has tried to highlight three grounds which according to him raise contentious and arguable issues fit to be determine by the Court of Appeal.

That, when the court is dealing with such application, as this one before this court, is not required to determine the application on merits or otherwise of the substantive issues before the appeal is heard. What the court is expected to do is to determine whether the proposed issues raised

are contentious and arguable issues before the High court and fit to be determined by the Court of Appeal. The essence is to reduce case to be filed in the Court of Appeal for determination.

That, under paragraph 5 of the applicant's affidavit, the proposed grounds are:

1. Whether it was proper to grant Tshs. 9,450,000/= as instruction fee.

That this ground was dealt with by Hon. Manyanda, J. in reference No. 01 of 2020 as shown at page 7, where he found the claimed amount of Tshs. 18,900,000/= to be on the high side and reduced the same to Tshs. 9,450,000/= upon considering the case to be of not to such much complex. That, the parties conducted such research. That's why the actual amount which was initially granted by the Taxing Master was Tshs. 18,900,000/=.

After taking into consideration of the complexity of the matter, Hon. Manyanda, J. reduced the amount to Tshs. 9,450,000/=, on that regard, the Hon. Judge had therefore considered the amount as well as the complexity of the amount and reduced the amount to Tshs. 9,450,000/= which was almost half to the Total amount that was granted by the Taxing Master.

That, it is principle at law that, the general level of remuneration of the advocate must be such as to attract worth recruits to "*unhonorable profession.*"

The learned advocate further submitted that, another principle which says that: -

There must be, so far as practicable legal assistance in the award both to do justice between one person and another and so a person contemplating litigation can be advised by the advocate very approximately on the kind of the case contemplated, is likely to be potential liability for costs. That, in the case of **Premchand (T) Ltd and Another v/s Quarry Services of East Africa Ltd and Others** (1972) EA 162. Upon cited the said case the learned counsel said that, the amount granted by Hon. Manyanda, J. is not the issue to be determined by the Court of Appeal.

That, in ground 2 the applicant is complaining that the Hon. Judge raised such points to be considered in Taxation but the Hon. Judge did not consider them. That, at page 6 of the typed ruling the Hon. judge admitted to be true that, the scale used by the Taxing Master are within scales that created by the law. In his opinion the fact that the scales are within the prescribed scales. They cannot therefore preclude the Taxing Master to take

into consideration other factors. That, the Hon judge also highlighted other factors to be considered and at the end of the day the Hon. judge pronounced the amount. That, had the Hon. Judge not considered the factors he raised he would not be able to reduce the amount from Tshs. 18,900,000/= to Tshs. 9,450,000/=.

That, in short, there is in this matter no contentious and arguable issue raised to be considered by the Court of Appeal. Having so submitted, the learned counsel for the respondent prayed the court to dismiss this application with costs.

In rejoinder Mr. Emmanuel John learned counsel for the applicant promised to be brief. He submitted in respect of the first issue and/or ground that, the applicant's complaint is that, the phrase by the Hon. Judge that the matter was not that much complex negates the complexity of the matter to be a simple case and being simple to that much he reduced the Taxed amount of Tshs. 18,900,000/= to Tshs. 9,450,000/= being halfway to the initial Taxed amount by the Taxing Master.

In respect of grounds No. 2 and 3 the learned counsel referred the court to former submission in respect of the same grounds No. 2 and 3. That

is the Taxing Master who highlighted them and it is not known why the Hon. Judge awarded the said amount.

That, most of the issues raised by counsel for the respondent have touched the merits of the appeal of which is yet reached. He prayed the court to grant the application.

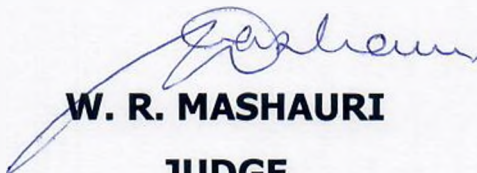
The issue is whether the grounds for the application raised by the applicant are arguable issues and therefore fit for reference to the Court of Appeal for determination.

It is an established principle that, leave is grantable where the proposed grounds stand reasonable chances of success or where, but not necessarily that, the proceedings as a whole reveal such disturbing features as to require the guidance of the Court of Appeal, the purpose of the provision is to spare the court the specter of unmalting matters and to enable it to give adequate attention to cases of true public importance. (see **Harbarn Haji Mosi v/s Omary Hilal Seif** Civil Reference No. 19 of 1997 (unreported)).

At law, in Civil Proceedings an appeal shall lie to the Court of Appeal with leave of the High court or of the Court of Appeal against every other decree, order, judgment, decision or finding of the High court.

On my side, upon carefully followed the submissions by learned counsel for both parties in support of their respective affidavit and counter-affidavit, speaking for my sake, the issues raised by the applicant cannot be taken as frivolous, vexatious or useless. It is my considered view that, the raised issues are contentious and arguable based on the disputed provisions of the remuneration and Taxation of costs rules. I accordingly grant leave to appeal to the Court of Appeal sought.




W. R. MASHAURI
JUDGE

29/06/2021

Date: 29/06/2021

Coram: Hon. W. R. Mashauri, J

Applicant:


Respondent:

B/c: Elizabeth Kayamba

Mr. Mwanaupanga, Advocate: I appear for the applicant. The matter comes for ruling and we are ready.

Court: Ruling delivered in court in presence of Mr. Mwanaupanga learned counsel for the applicant and in absence of the respondent this 29/06/2021 respondent to be informed of the outcome.




W. R. MASHAURI
JUDGE
29/06/2021