

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

**MISC. CIVIL APPLICATION No. 59 OF 2021**

*(Originating from High Court Civil Appeal No. 08 of 2021)*

**VUMI MGUNILA.....APPLICANT**

**VERSUS**

**MAYUNGA NJILE.....RESPONDENT**

**RULING**

*Last Order date: 04.08.2021*

*Ruling Date: 27.08.2021*

**M. MNYUKWA, J.**

By way of Chamber summons supported by an affidavit sworn by Elias R. Hezron, the applicant's learned counsel, moved this court for leave to appeal to the Court of Appeal against the decision of this Court in Civil Appeal No. 08 of 2021 which was dismissed by Rumanyika, J, on 18<sup>th</sup> May 2021. Aggrieved, he resolved to prefer an appeal to the Court of Appeal, thus he had to obtain leave to appeal in terms of section 5(1) (c) of the Appellate Jurisdiction Act, Cap.141 [R.E 2019] read together with Rule 45 (a) of the Court of Appeal Rules, 2009.



The matter was argued by way of written submission pursuant to the court's order dated 04.08.2021 of which both parties complied.

The applicant enjoyed the service of Mr. Elias R. Hezron, learned Advocate and the respondent enjoyed the service of Mr. Innocent Michael, learned Advocate.

In his submission, Mr. Hezron pressed me to grant leave to appeal to the Court of Appeal of Tanzania against the Judgment of this court dated 18<sup>th</sup> May 2021 which dismissed the Civil Appeal No. 09 of 2021. He enlightens that in an application for leave, the Court is guided to consider whether there are disturbing features that require the guidance of the Court of Appeal. Insisting he cited the case of **Harban Haji Mosi & Another vs Omari Hillal Seif and Another** (2001)TLR 409. He prayed this court to adopt his affidavit to form part of his submissions. The affidavit raised three legal issues as follows.

First, whether the Hon. High Court Judge was legally justified to assume that the delivery notes exhibit DO1 were issued in the year 2016 without any proof to that effect. On this ground, he claims that the court of law needs to rely on proved facts before it and not making an assumption on the existence of facts not pleaded. He avers that, on page 5 paragraph 2 of the judgment, the trial judge assumed facts that were



not proved before the court and this attracts the attention of the Court of Appeal.

Second, whether the Hon. High Court Judge was legally justified to rely on the delivery Notes, Exhibit DO1 which had no names and signature of the parties. On this issue, he claims that the trial court relied on exhibits that do not have names and signatures of parties though he acknowledges the discrepancies. He therefore, find this to be a triable issue by the Court of Appeal.

Thirdly, whether the Hon. High Court Judge legally justified to rely on delivery notes, Exhibit DO1 on assumption that they were issued by the applicant while there was no proof to that effect. He claims that the trial court admitted that there was no proof that the delivery notes were issued by the applicant but he went on relying on exhibit DO1 to give his judgment holding that it was issued by the applicant as against section 110(1) of the Law of Evidence Act Cap. 6 [RE: 2019].

He retires praying this court to evaluate the disturbing features and grant the application for the Court of Appeal to determine the same.

Responding to the applicant's submissions, Mr, Innocent Michael learned advocate, prays this court to adopt his affidavit and form part of his submissions. He denied the applicant's assertion that the High Court



trial judge's judgment was tainted with disturbing features which raised the seriousness of law and facts worth guidance by the Court of Appeal.

On the first issue, he claims that the trial high court judge was right to rule out that exhibit DO1 was pursuant to clause 2 of the contract entered by parties. He insisted that the learned counsel failed to understand the wording of the trial judge's reasoning.

On the second issue, he denied the applicant's assertion and argued that the trial high court judge was right as the same was pursuant to clause 2 of the agreement. He insisted that there are no disturbing features to warrant the attention of the Court of Appeal.

On the third issue, he avers that the trial court judge as the first appellate court evaluated the evidence on record and was satisfied that exhibit DO1 was that referred to in clause 2 of the contract. He therefore, wind up insisting that there are no disturbing features whether in law or in fact that require the attention of the Court of Appeal. Therefore, prays this court to dismiss the application.

Rejoining, the applicant added that the respondent learned counsel's submission focused on discussing the merit of the grounds of appeal rather than looking at disturbing features that will require the attention of the Court of Appeal. He insisted that the learned counsel should have confined himself to the determination of whether the



proposed grounds of appeal are arguable issues before the Court of Appeal. He insisted by cited the case of **Bulyanhulu Gold Mine Ltd & Others vs Petrolube T Ltd & Another** Civil appeal No.364/16 of 2007 and **Regional Manager Tanroads Lindi vs Dt Shapriya and Co. Limited** Civil Application No. 29 of 2002 (All unreported). He ended prays this court to allow the application and have their appeal be heard before the Court of Appeal of Tanzania.

In the determination of this application, I have considered the submissions for and against the application and the raised issues by the applicant as to whether they are issues worth the attention of determination by the Court of Appeal. Before I venture to determine the merits of the application, I find it wanting to make a few remarks, which I think will be sufficient to dispose some of the arguments raised during the hearing.

Having in mind that what is preferred by the applicant is a leave to appeal to the Court of Appeal against the decision of this Court, it should be known that the jurisdiction of this Court to grant leave to appeal under section 5(1) (c) of the Appellate Jurisdiction Act Cap. 141,[RE: 2019] is not predicated on any conditions contrary to the submissions by the applicant.



I am mindful that I am not called upon to determine the merits of the decision sought to be appealed against but to see if the intended appeal is arguable either on facts or law and this is because, in the determination of this application, I have no jurisdiction to go into merits or deficient of the judgment. I agree with the cited case of **Hamis Mgida & Another vs The Registered trustee of Islamic Foundation**, Civil Appeal No.323 of 2018, the court pointed out that

*"..the application for leave must state succinctly the factual or legal issues arising from the matter and demonstrate to the court that the proposed ground of appeal merits an appeal. The court concerned should decide whether the said proposed grounds are prima facie worth of the consideration of the court of appeal."*

*See also the case of **Gaudensia Mzungu vs IDM Mzumbe**, Civil Application No. 94 of 1994 CAT(unreported)*

Revisiting the facts in the instant application and without expressing any opinion, it is my view that the applicant has demonstrated sufficient grounds to invoke the appellate jurisdiction of the Court of Appeal.

In my view, once an appeal is eventually lodged, the Court of Appeal will have to determine issues such as

- (i) whether the Hon. High Court Judge was legally justified to assume that the delivery notes were issued in the year 2016 without being any proof to that effect,



(ii) whether the Hon. High Court Judge was legally justified to rely on delivery notes which had no names and signature of the parties.

It is my view that the third issue will be captured by the Court of Appeal when adjudicating the above two issues.

Therefore, I do not think if the above issues that have been also raised in paragraph 6 (i) and (ii) of the applicant's affidavit are not serious enough to be determined by the Court of Appeal. In that circumstances, I do hereby exercise my discretion under section 5 (1) (c) of Cap. 141 [RE: 2019] to grant leave to the applicant to appeal to the Court of Appeal.

In the upshot, the application for leave to appeal before the Court of Appeal of Tanzania is granted with no order as to cost. It is so ordered.

  
  
**M. MNYUKWA**  
**JUDGE**  
**27/08/2021**

Ruling delivered on 27/08/2021 via Audio Teleconference whereby all parties were remotely present.

  
**M. MNYUKWA**  
**JUDGE**  
**27/08/2021**