

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(MBEYA REGISTRY)
AT MBEYA

MISCELLANEOUS CIVIL APPLICATION NO. 2 OF 2021

(Arising from High Court Civil Appeal No. 16 of 2019 in the High Court
of Tanzania at Mbeya)

Mohamed Omary Magavu ----- APPLICANT

VERSUS

Nadir Kawogo

Hosiana Frank Kionzo

r----- RESPONDENTS

RULING

Date of last order: 03.08.2021

Date of Ruling: 17.09.2021

Ebrahim, J.:

The Applicant, Mohamed Omary Magayu has filed an application before this court praying to be granted leave to appeal to the Court of Appeal following his dissatisfaction with the decision of this Court on Civil Appeal No.16 of 2019.

The application has been preferred under **Section 5(1)(c) of the Appellate Jurisdiction Act, Cap 141 RE 2019** and it is supported by the affidavit sworn by Chapa Alfredy Counsel for the Applicant.

In this case the Applicant was represented by advocate Chapa and the Respondents preferred the services of advocate Kamru Habibu and advocate Felix Kapinga.

At the hearing of the application, advocate Chapa adopted the contents of the affidavit to form part of his submission. He invited the court to para 5 (i)(ii)(iii) and (iv) and referred to pg 32 of the typed proceedings saying that the applicant tendered exhibit P3 which showed how the respondents were paying the loan. Basing on that assertion and demonstration, he averred that there are serious contentious issues of law and facts for consideration by the Court of Appeal which he extracted from the case of **Said Ramadhani Mnyanga Vs Abdallah Salehe**, [1996] TLR pg 74. He further referred to the case of **Sango-Bay Estate Ltd & Others Vs Dresdneir Bank**, [1971] EA pg 17 where it was held that leave to appeal will be granted where there is prima facie grounds of appeal which need serious judicial consideration. He pointed out that the counter affidavit noted the contents of para 5 of the affidavit on the averment that there are serious issues to be determined by the Court of Appeal. He prayed for the application to be allowed.

Responding to the arguments by the Counsel for the applicant, advocate Habibu fending for the respondent also adopted the contents of their counter affidavit to form part and parcel of their submission. In opposing the application, he contended that there are no points of law exhibited by the applicant to warrant the leave. In cementing his argument, he cited the case of **the Registered Trustees of Biafra Secondary School and Another Vs Enock Daniel Makenge**, Misc Civil Application No. 575 of 2019 (HC-Unreported) pg 4 which cited the case of **Harban Haji and Another Vs. Omar Hilal Seif and Another, Civil Reference No. 19 of 1997** (CAT-unreported). Counsel for the respondent further referred to para 5(i) (ii)(iii) and (iv) of the affidavit and challenged that they are the issues answered by the facts on the record. He responded on their response in noting the contents of para 5 of the affidavit that it was not a concession and even if the court find that it is, still the court has a duty to determine as to whether the application raises serious issues to be determined by the Court of Appeal.

In rejoinder, Counsel for the applicant reiterated his earlier submission in chief.

An application for leave to appeal is granted on discretion of the court judiciously exercised upon showing that grounds of appeal raise issues of general importance; or a novel point of law; or where the grounds show a prima facie; or arguable appeal; or that the proceedings as a whole reveal such disturbing features that call for intervention of the Court of Appeal. The underlying principle was stated by the Court of Appeal in the case of **Rutagatina C.L V The Advocates Committee & Another**, Civil Application No 98/2010 (Unreported) which quoted with authority the case of **British Broadcasting Corporation v Eric Sikuja Ng'maryo**, Civil Application No. 133 of 2004 (unreported) where it was stated as follows: -

*"Needless to say, leave to appeal is not automatic. It is within the discretion of the Court to grant or refuse leave. The discretion must, however be judiciously exercised on the materials before the court. **As a matter of general principle, leave to appeal will be granted where the grounds of appeal raise issues of general importance or a novel point of law or where the grounds show a prima facie or arguable appeal (see: Buckle v Holmes (1926) ALL E.R. Rep. 90 at page 91).** However, where the grounds of appeal are frivolous, vexatious or useless or hypothetical, no leave will be granted"*

The essence of leave is to ensure that the Court of Appeal is saved from the mirage of unmeritorious matters and wisely concentrate on

matters of public importance, law, and or contentious issues that need guidance of the Court of Appeal.

I have thoroughly gone through the affidavit filed by the Counsel for the Applicant and his submission. From the affidavit, the Applicant's counsel has averred at para 5(i) to (iv) that the issues that need further consideration of the court of appeal is whether the respondents were not entitled to pay the applicant Tshs. 70,000,000/- as unpaid balance for the loan while the evidence on record at the trial court is clear that the respondents did not dispute on the amount obtained from the applicant. What could be gathered from the averments of the counsel for the applicant is that the appellate court did not thoroughly consider and evaluate evidence on record in reaching its decision.

Conspicuously, both the respondents have noted the contents of para 5(i) (ii) (iii) and (iv). It is a rule of practice that the use of the word "noted" in an affidavit or pleadings generally means acknowledging the fact which is not disputed. As correctly stated by the counsel for the applicant, the respondents acknowledged the contents of para 5 (i) (ii) (iii) and (iv) of the affidavit. More – so counsel for the respondents adopted the contents of the counter-affidavit to form part and parcel

of the submission. Thus, it is clear that they conceded to the issues for determination by the Court of Appeal.

The above notwithstanding, I have considered the fact that being the first appellate court, the High Court still had an avenue to re-evaluate and re-consider the evidence on record. Thus, since there are issues pertaining to the existence of contract and admission of facts pertaining to the payment of the loan that the applicant claims that they have not been considered and they are the basis of the claim in the original case; I am of the firm stance that justice would be served if the Court of Appeal is also invited to look into the matter.

It is from the above background I find that the Applicant has managed to establish sufficient prima facie grounds that call for the attention of the Court of Appeal to warrant this court to exercise its judicial discretion to grant leave. Accordingly, I grant leave to the applicant to appeal to the Court of Appeal. Costs shall follow the main event.



Mbeya

17.09.2021

R.A. Ebrahim

Judge

Date: 17.09.2021.

Coram: Hon. P. D. Ntumo – PRM, Ag-DR.

Applicant:

For the Applicant:

1st Respondent: Absent.

2nd Respondent:

For the Respondents: Mr. Felix Kapinga, Advocate.

B/C: P. Nundwe.

Court: Ruling delivered in open chambers in the presence of Mr. Felix Kapinga, learned Counsel for the respondents this 17th day of September 2021.



P.D. Ntumo - PRM

Ag- Deputy Registrar

17/09/2021