

IN THE HIGH COURT OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

MISC. CIVIL APPLICATION NO. 117 OF 2021

*(Arising from HC. Civil Appeal No. 11 of 2020 originally from the
Resident Magistrate's Court in RM Civil Case No. 3 of 2019)*

EXAUD AUGUSTINO KWAYU.....APPLICANT

VERSUS

CRDB PLC.....RESPONDENT

RULING

Last Order Date: 27/10/2021

Ruling Date: 12/11/2021

M.MNYUKWA, J

This application was brought by way of chamber summons accompanied by affidavit of Lenin M. Njau an advocate of the applicant. The application was made under section 5(1)(c) of the Appellate Jurisdiction Act (Cap. 141 R.E 2019) and section 95 of the Civil Procedure Code (Cap 33 R.E 2019) seeking leave of this honourable court to appeal to the Court of Appeal of Tanzania against the decision of this court in HC. Civil Appeal No. 11 of 2020 before Tiganga J, which was delivered on 28th December 2020.



In his affidavit, the applicant's counsel has laid down the grounds and reasons for this application as stated in paragraph 9. The application was strongly opposed by respondent's counter affidavit sworn by Dr. George Mwaisondola, respondent's counsel.

This application was argued by way of written submission as preferred by parties, ordered and scheduled by the court. However, there was no any rejoinder submitted by the Applicant.

In his submission, Mr. Lenin Njau the applicant's advocate submitted by adopting his affidavit in its entirety. He then highlighted the principle governing determination of an application of this kind. He submitted that, leave is not automatic as it is granted within the discretion of the court after it has satisfied that, there are grounds of appeal that raise issues of general importance or a novel point of law as it was stated in the case of **British Broadcasting Corporation v Erick Sikujua Ng'maryo, Civil Application No. 138 of 2004**, Court of Appeal of Tanzania at Dar es Salaam(unreported).

The applicant's counsel added that, the Court of Appeal decision in the case of **British Broadcasting Corporation** (supra) quoted with approval the case of **(i) Harban Haji Mosi (ii) Shauri Haji Mosi vs (i) Omar Hilal Seif (ii) Seif Omar** Civil Reference No. 19 of 1997, CAT (Unreported) where it was stated that leave is to be granted where there



is a reasonable chance of success to the proposed appeal or where the proceeding as a whole reveal such disturbing features as to require the guidance of the Court of Appeal.

The counsel of the applicant argued that in support of their application they stand by the facts stated in the entire paragraph 9 of his affidavit. That the intended appeal is the second appeal as the case emanates from Resident Magistrate's Court of Mwanza and therefore the appeal is not limited to the points of law as it can be lodged in respect of matters of facts or points of law or both as per the Appellate Jurisdiction Act (Cap 141 R.E 2019) and the Tanzania Court of Appeal Rules, 2009. And that in this application they have pointed out both matters of facts and points of law.

The counsel submitted on their point of law regarding recovery procedure. That whether one is justified to interfere with property which was not kept as security considering that the procedure is governed by the law as stipulated under paragraph 9 of the affidavit.

The applicant's counsel also submitted on respondent's counter affidavit by opposing its contents on paragraphs 4, 5 and 6 by submitting that, matters that are complained of in applicant's affidavit are in regard of the appeal in the judgement of the High Court. That the basis of their intended appeal centers on paragraph 9 (a), (b), (c), (d), (e) and (f) of



applicant's affidavit which was also stipulated in the case of **British Broadcasting Corporation v Erick Sikujua Ng'maryo**, Civil Application No. 138 of 2004, Court of Appeal of Tanzania at Dar es Salaam (Supra).

The Applicant's counsel winded up his submission by pointing out that, the right to appeal is a fundamental Constitutional right stipulated under Article 13(6) (a) of the Constitution of United Republic of Tanzania and as that the respondent was afforded the same right, he prayed discretion of this court to do the same for the Applicant.

Responding, the counsel for the respondent prays to adopt his counter affidavit and acceded to the applicant's contention that the test for determination to grant leave or not were laid down in the case of **British Broadcasting Corporation v Erick Sikujua Ng'maryo** (supra). The respondent added that since this is a second appeal then only points of law and not points of facts can be taken to the CAT for determination.

The respondent averred that through paragraphs 4, 5 and 6 of the counter affidavit, they opposed what was stated in paragraph 9(a), (b), (c) and (f) of the applicant's affidavit and they were not considered by the High Court and therefore they cannot be taken to the Court of Appeal. He



added that paragraph 9(d) and (e) are question of facts as to whether the procedures were followed or not.

The Respondent stressed that whether a notice or notices were issued or not cannot be a question of law as it is a question of facts and therefore there is nothing to be determined by the Court of Appeal on that issue. The Respondent prayed this court to dismiss the application with cost as it has no merit.

The applicant did not file Rejoinder and so, this marked the end of parties' submission. Now, this court remains with one issue to consider as to whether the application has merit.

In determining this issue, I am cautious that my duty is to determine whether the intended appeal is arguable before the Court of Appeal and that it is not frivolous, vexatious, or useless. However, before I venture into that, I would like to determine the issue raised by the Respondent counsel that, this being the second appeal then only points of law are to be determined and not matters of facts.

The respondent refers to the exception provided for under section 5(2)(c) of the Appellate Jurisdiction Act, cap 141 R.E 2019 which provides that:



"5 (2) (c) Notwithstanding the provisions of subsection (1) no appeal shall lie against any decision or order of the High Court in any proceedings under Head (c) of Part III of the Magistrate's Court Act unless the High Court certifies that a point of law is involved in the decision or order."

However, looking at part III of the Magistrate Court Act (Cap 11 R.E 2019) it stipulates on the appeals to the High Court that originates from Primary Court which is not the case here. It is true that the intended appeal will be the second appeal but it did not originate from the primary court and therefore the appeal can be on point of law as well as matters of facts.

Going back to the determination of the issue, paragraph 9 of the Applicant's affidavit laid down the reasons and grounds of this application which were as follows: -

- (a) Whether the court was justified by holding that it was lawful for the respondent to withdraw fund from FDR without the applicant's consent.*
- (b) Whether the court was justified in allowing the respondent to interfere with the applicant property which was not kept as security for loan.*
- (c) Whether the court was justified by holding that it was proper for the respondent to proceed with the recovery process against the applicant's personal property without notice thus not accorded right to be heard.*



- (d) *Whether the court was justified by deciding the appeal in favour of the respondent without considering the applicant's witness testimony to the effect that prior interference with the applicant property which was not kept as security due process was to be followed.*
- (e) *Whether the court was justified in not according weight of evidence on record.*
- (f) *Whether the court was justified in holding that the borrower has the right of claim another amount after selling of security at the throw away price (below market value).*

Looking at these grounds and reminding myself of the well-established principle of the law that in this instant application the court is not expected to determine the merits or otherwise the substantive issues before the appeal itself as it was stated in the case of **The Regional Manager-TANROADS Lindi v DB Shapriya and Company Ltd**, Civil Application No. 29 of 2012 CAT (Unreported) that: -

"It is now settled that a Court hearing an application should restrain from considering substantive issues that are to be dealt with by the appellate Court. This is so in order to avoid making decisions on substantive issues before the appeal itself is heard...."

I am to confine myself as to see whether the applicant has raised grounds that raise arguable issues in the Court of Appeal of Tanzania. It is my considered view that the reasons stated by the applicant are sufficient to move the Court of Appeal to determine the intended appeal

as there is a question as to whether the proper procedures were followed as to the withdrawing of FDR and disposing of property which was not subject of security.

Therefore, I am of the view that paragraph 9 of the applicant's affidavit contains arguable issues worth to be determined by the Court of Appeal. That being said, this application for leave to appeal to the Court of Appeal is hereby granted without costs.

Order accordingly.



M.MNYUKWA

JUDGE

12/11/2021

Ruling delivered on 12/11/2021 through Audio Teleconference in the presence of the respondent and in the absence of the applicant.



M.MNYUKWA

JUDGE

12/11/2021