

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

**MISC. CIVIL APPLICATION NO. 155 OF 2020**

**GODFREY MICHAEL ..... APPLICANT**

**VERSUS**

**FG FLINT GRAPHS LIMITED ..... RESPONDENT**

**RULING**

15<sup>th</sup> September & 3<sup>rd</sup> November, 2020

**ISMAIL, J.**

This is ruling in respect of an application for leave to appeal to the Court of Appeal. It has been taken at the instance of the applicant, a losing party in which he featured as the respondent. The proceedings that bred the decision sought to be impugned were an appeal against the decision of the Resident Magistrates' Court of Mwanza at Mwanza. It all began with the respondent applying to set aside an *ex-parte* decree which was passed by the trial court on 27<sup>th</sup> February, 2020. This application fell through, necessitating the filing of an appeal to this Court (Civil Appeal No. 48 of 2020). The Court (Hon. Mgeyekwa, J) was convinced that the appeal was meritorious. In consequence, the appeal was allowed as a result of which

the *ex-parte* decision passed by the trial court was quashed and set aside to the applicant's bemusement.

The application is intended to unlock the door and pave the way for institution of an appeal to the Court of Appeal. Supporting the application is the affidavit sworn by Andrew Innocent Luhigo, the applicant's counsel, in which grounds for the prayers sought are stated.

This matter came up for orders on 15<sup>th</sup> September, 2021, the date on which the Court ordered that hearing of the application be by way of written submissions. These submissions were filed in conformity with the filing schedule.

In his brief submission, Mr. Linus Munishi, learned counsel for the applicant restated the principle that guides grant of leave, as accentuated in a number of decisions. These included ***Bulyanhulu Gold Mine Ltd & 2 Others v. Petrolube (T) & Another***, CAT-Civil Application No. 364/16 of 2017; and ***Rutagatina C.L. v. The Advocates Committee & Another***, CAT-Civil Application No. 98 of 2010; and ***British Broadcasting Corporation v. Eric Sikujua Ng'maryo***, CAT-Civil Application No. 138 of 2004 (all unreported).

Mr. Munishi submitted that reasons that justify granting of leave are as averred in paragraph 8 of the supporting affidavit. He contended that such reasons constitute an arguable case which distils the following issue:

*"Whether the appellant (respondent herein) provided sufficient reason(s) for his non-appearance to warrant the High Court allow the appeal."*

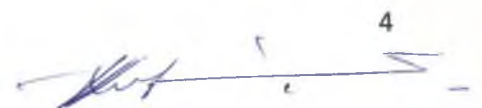
It was counsel's contention that the quoted ground raises a serious judicial consideration sufficient to constitute the basis for granting leave to appeal to the Court of Appeal.

Submitting in rebuttal, Ms. Hawa Tursia, counsel for the respondent, argued that, while it is generally agreed that leave to appeal is grantable under section 5 (1) (c), of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019, an application for such leave must conform to criteria set out in various court decisions. These include ***Kadili Zahoro (Administrator of the estate of the late Bahati Ramadhani Mponda) & Another v. Mwanahawa Selemani***, CAT-Civil Application No. 137/01 of 2019, in which the superior Court's other decision in ***Harban Haji Mosi & Another v. Omar Hilal Seif & Another***, CAT-Civil Reference No. 19 of 1999 (unreported) was quoted with approval. Commenting on paragraph 8 of the affidavit, the learned

counsel argued that the applicant has not proved that the same constitutes sufficient cause for granting leave to appeal to the Court of Appeal. Ms. Tursia castigated the applicant for being economical with explanation on how the proposed issue reflected a question worth of determination by the Court of Appeal, or which, among the reasons for non-appearance were improperly or illegally considered by this Court (Hon. Mgeyekwa, J), thus warranting determination by the Court of Appeal. She contended that the Court was convinced that there was sufficient evidence to justify non-appearance of the respondent, hence the decision to set aside the decision of the trial court.

On the chances of success, the contention by Ms. Tursia is that the affidavit is barren on whether the appeal stands any chances of success. She took the view that the impending appeal stands no chance of success since the decision of this Court addressed all issues that the applicant intends to take on appeal, thereby narrowing any chances of success. She urged the Court to hold that the application is barren of fruits and dismiss it.

From the parties' rival submissions, the pertinent question is whether the application has what it takes to allow for its grant.

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Both counsel are unanimous that the law, as it obtains, requires that a party who seeks leave to appeal to the Court of Appeal must demonstrate that the appeal he intends to take carries with it an arguable case, strong enough to draw the attention and engross the mind of the Court of Appeal. It implies, therefore, that grant of leave is not automatic or a mere public relations exercise. Rather, it is a rigorous process, and the applicant of such leave carries an onerous duty of demonstrating the points of contention are premised on serious points of law or law and fact. See ***Rutagatina C.L. v. The Advocates Committee & Another***, (supra) and ***Abubakari Ally Himid v. Edward Nyalusye***, CAT-Civil Application No. 51 of 2007; and ***Junaco (T) Ltd and Justin Lambert v. Harel Mallac Tanzania Limited***, CAT-Civil Application No. 473/16 of 2016 (all unreported); and ***British Broadcasting Corporation (BBC) v. Eric Sikujua Ng'maryo*** (supra)

The common message in all of the cited decisions and, as was propounded in the earlier decision ***Harban Haji Mosi & Another v. Omar Hilal Seif & Another*** (supra), is that leave is only grantable where the intended appeal raises issues of general importance or a novel point of law or where there is a prima facie or arguable appeal. The upper Bench held in the latter case it was held:

*"Leave is grantable where the proposed appeal stands reasonable chances of success or where, but not 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 unmeriting matters and to enable it to give adequate attention to cases of true public importance."*

As submitted by counsel, the sole ground relied upon by the applicant intends to ask the upper Bench to determine is contained in paragraph 8 of the affidavit. Essentially, it intends to enquire about whether the reason given by the respondent for non-appearance was sufficient enough to convince this Court to allow the appeal. Can this be said to constitute a disturbing feature in respect of which guidance of the Court of Appeal would be required? As contended by Ms. Tursia, my unflustered answer to this question is in the negative. I find nothing novel or significant in the question whether reasons adduced by the respondent were sufficient enough to convince the Court to allow the appeal.

My view is fortified by the fact that it is in the absolute discretion of the court to agree to set aside a dismissal or *ex-parte* order. Sufficient cause would vary from one case to another depending on the circumstance of each

case. Allowing the Court of Appeal to impeach exercise of the Court's discretion in this respect is to let the superior Court stoop too low and let it do what I would consider to be a micro-management of how courts exercise their discretion. If this is allowed, the whole purpose of vidding or sparing the upper Bench of the spectre of unmerited litigation will remain mirage.

Consequently, I take the view that the application is deficient and falling below the threshold for which leave may be granted. Accordingly, the application is dismissed with costs.

It is ordered accordingly.

DATED at **MWANZA** this 3<sup>rd</sup> day of November, 2020.



A handwritten signature in blue ink, appearing to read "M.K. ISMAIL", is written over a horizontal line.

**M.K. ISMAIL**

**JUDGE**