

IN THE HIGH COURT OF TANZANIA

(MAIN REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 08 OF 2021

THE ATTORNEY GENERAL.....1ST APPLICANT

THE ADVOCATES COMMITTEE2ND APPLICANT

VERSUS

FATUMA AMANI KARUME.....RESPONDENT

Date of Last Order: 23.11.2021

Date of Ruling: 17.12.2021

RULING

MAGOIGA, J.

The applicants, THE ATTORNEY GENERAL AND THE ADVOCATES COMMITTEE filed this application against the above named respondent by way of chamber summons made under section 5(1) (c) of the Appellate Jurisdiction Act [Cap 141 R.E.2019] read together with Rules 45 (a) of the Tanzania Court of Appeal Rules, 2009 as amended from time to time and section 95 of the Civil Procedure Code [Cap 33 R.E.2019] praying that, this court be pleased to grant the following orders, namely:

- a. Leave to the applicants to appeal to the Court of Appeal of Tanzania against the judgement and decree of the High Court of Tanzania at Dar es Salaam by Honourable Maige, Nangela and kakolaki J.J.J.

dated 17th June 2021 delivered on 21 June, 2021 in Civil Appeal No. 02 of 2020 arising from the decision of the Advocates Committee dated 23rd September, 2020 in application No.29 of 2019; and

- b. Costs of this application be provided for;
- c. Any other relief(s) this court may deem just and fit to grant.

As usual the chamber summons was accompanied by the supportive affidavit deposed by Mr. George Nathaniel Mwandepo, learned Principal State Attorney stating the reasons why this application should be granted.

Upon being served by the chamber summons and accompanied affidavit, the respondent, through Mr. Peter Kibatala, learned advocate filed a counter affidavit stating the reasons why this application should not be granted.

The brief facts of this application are that, the respondent hereinabove was before 20th September 2019 practicing advocate with Roll Number 848 in the Roll of Advocates and was representing the applicant in Application No. 29 of 2019 before Hon. Dr. Feleshi, Principal Judge. It is alleged that in course of the representation of her client, she committed misconduct and was suspended from practicing and the court, among others, ordered the

Registrar High Court to transmit the complaint to the second respondent. Contrary to the court's directives, the matter was referred to Advocates Committee by the Attorney General which after hearing the parties delivered its verdict and found the respondent to have committed misconduct and ordered her removal from the Roll of advocates.

Aggrieved with the decisions of the Advocates Committee, the respondent appealed to the full bench of High Court (composed of panel of three judges). After hearing the appeal, the full bench of the High Court set aside the decision of the Advocates Committee and quashed proceedings of the Advocates Committee. Consequently, the High Court ordered the Registrar, High Court to transmit the complaint to the second applicant in the manner directed by the court when suspending the respondent.

Aggrieved with the High Court decision and directives, the applicants preferred this application for leave to go to the Court of Appeal Tanzania, hence, this ruling.

When this application was called on for hearing, the applicants were enjoying the legal services of Messrs. Deodatus Nyoni and Musa Mbura, learned Principal State Attorneys and Ayoub Sanga, learned State Attorney;

whereas the respondent was enjoying the legal services of Dr. Rugemeleza Nshalla, learned advocate.

Mr. Nyoni took the floor by reiterating the provisions under which the application was pegged and prayed to adopt the contents of the affidavit in support of this application. The learned Principal State Attorney went on to argue that, they have complied with formal procedures for grant of the leave by filing notice of appeal, letter requesting copies of the proceedings and have preferred this application within time prescribed by law praying for leave which is prerequisite condition to appeal to the Court of Appeal of Tanzania against the decision of the full bench of the High Court.

Mr. Nyoni pointed out that, in the intended appeal, if leave is granted, they intend to parade 5 grounds of appeal before the Court of Appeal as contained in paragraph 13 of the affidavit in support of the application.

In support of the application, the learned Attorneys cited the case of BULYANKULU GOLD MINE LIMITED AND 2 OTHERS vs. PETROLUBE (T) LIMITED AND ANOTHER, CIVIL APPLICATION NO. 364/16 OF 2017 CAT (DSM) (UNREPORTED) in which, among others, the Court of Appeal of Tanzania insisted and guided the High Court not to determine the merits of

the issues raised for grant of the leave but leave that to the domain of the Court of Appeal to determine.

Another case cited was the case of REV. SADOCK YAKOBO MLONGECHA vs. REGISTERED TRUSTEES OF PEFA KIGOMA, CIVIL APPLICATION NO. 12 OF 2016, CAT (DSM) (UNREPORTED) in which, among others, the court granted leave in order to correct the glaring defects in the proceedings.

The learned Attorneys equally cited article 13 of the constitution which allows an appeal as of right and pressed that the application be granted as prayed.

On the other hand for the respondent, Dr. Nshalla prayed to adopt the counter affidavit of Mr. Peter Kibatata and went on to argue that, leave is not automatic but must be exercised where there is arguable case that calls for Court of Appeal of Tanzania's intervention. According to Dr. Nshalla, looking at paragraph 13 which contained proposed 5 grounds of appeal as stated were not what the High Court determined. Dr. Nshalla insisted that proposed grounds 1, 2 and 5 are own creation of the deponent for applicants and do not as such qualify for grant of the leave. The learned advocate pointed out that proposed grounds numbers 3 and 4

as enumerated in paragraph 13 were proper guidance given by the High Court to Registrar to follow and comply with the order of the High Court in suspending the respondent and as such concluded that all the grounds as stated in paragraph 13 are intended to cause unmerited and are going to create unnecessary parking before the Court of Appeal. In support of his stance, the learned advocate told the court that, the purpose of leave is to censor all matters which are of no merits. In support of the above arguments, the learned advocate for the respondent cited the case of ROBERT RUGAMBIRWA vs. TANICA. LTD AND MERCHIORY ERNEST KAREGA, CIVIL APPLICATION NO. 53 OF 2019 (HC) BUKOBA (UNREPORTED) in which quoting the decisions of the Court of Appeal gave several factors for the court to grant or refuse leave which is basically a discretion and has to be judiciously exercised. Another case cited was the case of BRITISH BROADCASTING CORPORATION vs. ERIC SIKUJUA NG'MARYO, CIVIL APPLICATION NO. 138 OF 2004 (CAT) DSM (UNREPORTED) in which, among others, it was held that leave is not automatic and is granted where the applicant raises serious issues for the determination by the Court of Appeal.

Other cases cited are IBRAHIM DAUDI MJEMAS vs. ANNA GODFREY MJEMAS, LAND APPLICATION NO.33 OF 2021 HC DSM (UNREPORTED) and JEROME MICHAEL vs. JOSHUA OKANDA, CIVIL APPEAL NO 19 OF 2021, CAT DSM (UNREPORTED)

In the totality of the above reasons, the learned advocate for the respondent urged this court to dismiss this application for failure to meet set conditions for grant of leave or arguable prima facie case for the determination by the Court of Appeal.

In rejoinder, Mr.Nyoni, learned Principal State Attorney admitted that, indeed, grounds 1, 2 and 5 were not what the court decided expressly but was quick to point out and argue that, ground 1 by implication is what the court decided in the last page of the judgement. As to ground 2 it was decided at page 12 of the judgement, ground 3 was determined at page 12 of the judgement and paragraph 4 is page 13 and 5 is a point of that can be raised at any time.

In the foregoing, therefore, the learned Principal State Attorney reiterated his earlier prayers that this application be granted as prayed.

This marked the end of hearing of this application for leave.

Having carefully and dutifully considered the rivaling arguments for and against this application, the contents of the affidavit and counter affidavit and the cases cited; I noted that, **one**, grant of leave is not automatic, hence, apart from complying with the procedural requirements of filing notice of appeal, writing and serving letter requesting for proceedings and judgement and decree, nevertheless, the applicant is supposed to establish to the court that, there are triable issues or prima facie case for determination of by the Court of Appeal. **Two**, from rivaling arguments, I noted that two issues emerge for determination in this application; these are: **one**, whether an issue or point not determined by the High Court can be a basis for grant of leave to the court of appeal; and **two**, whether the applicants have made out a case to warrant the grant of leave to the Court of Appeal?

I will start with the first issue whether an issue or point not determined by the High Court can be raised during application for leave and be a basis for grant of the leave to go to the Court of Appeal. In order to determine this point, I find it apposite to leave the provisions of section 5(1) (c) to guide me. The said provision for easy of reference provide as follows:-

"Section 5 (1) In civil proceedings, except where any other written law provides otherwise, an appeal shall lie to the Court of Appeal-

(a)

(b)

(c) with leave of the High court or Court of Appeal, against every other decree, order, judgement, decision or findings of the High Court." (Emphasis mine)

Going by the wording and literal meaning of the above section, it is my considered opinion that, for an issue to be considered it must have been in the decree, order, judgement, decision or finding of the High Court and as such anything or issue not considered and determined by the High Court, it cannot be a basis for grant of leave to the Court of Appeal being it a point of law or fact. I take the above stance because leave is a restrictive application and must be confined to the High Court decision, order, ruling, judgement, decree, or finding and not otherwise.

This issue necessitated this court to go through the entire judgement of the High Court subject of this application for leave, and, I found out that

no doubt that, issues numbers 1, 2, and 5 as set out in paragraph 13 of the affidavit are novel to that judgement. The argument that issue number 5 on time limit is a point of law that can be raised at anytime, I must admit it disturbed my mind a great deal, but in my view, this point, however, logical it sounds but to my considered opinion, it cannot be entertained in a restrictive application for leave because leave should be limited to the order, decree, judgement and finding of the High Court otherwise the Court of Appeal may be turned into a court of first instance.

On the same token I find ground number 1 pegged under section 13(1) (a) (b) (c) of the Advocates Act [Cap 341 R.E. 2019] and rule 4(1)(a) (e) of the Advocates (Disciplinary and Other Proceedings) Rules, 2018 was brought outside what the High Court decided and cannot be a basis for grant of the leave in the circumstances of this application.

Equally ground number 2 on whether the High Court of Tanzania acted correctly in setting aside the decision by Advocates Committee and ordering for a fresh trial. By and large, the first part of this ground cannot be an issue nor do raise any arguable case for the determination by the Court of Appeal. The full bench of High Court (three Judges) is empowered under the provisions of section 24A (2) of the Advocates Act, [Cap341

R.E.2019] to affirm, reverse, or vary the decision or order appealed against. For easy of reference section 24A (2) provides as follows:

Section 24A (1) NA

"(2) On any appeal under this section the High Court may affirm, reverse, or vary the decision or order appealed against and may in addition thereto exercise the powers conferred upon the High Court by Civil Procedure Code, in relation to an appeal from civil suits."

So by clear and literal wording of section 24A the high Court had powers to do what it did in the circumstances.

On the second part of the issue whether the High Court order a fresh retrial, without much ado I agree with Dr. Nshalla that this was not what was decided by the High Court but rather the High Court upon setting aside the decision of the Advocate Committee ordered and directed the Registrar of the High Court to comply with the directives of the Hon. Dr. Feleshi, Principal Judge as ordered when the suspended the respondent.

In the circumstances, I find no arguable issue on this point and indeed is not what the High Court decided. The learned Principal State Attorney

needed to read between and along the lines of the decision of the High Court clearly before venturing into issues that were not decided by High Court.

In the totality of the above reasons, I find ground 1, 2 and 5 do not qualify to be issue that needed Court of Appeal intervention and are hereby rejected.

This takes me to the second issue whether the applicants have made out a case to warrant the grant of leave to the Court of Appeal? This issue will not detain this court much. Having considered the remaining issues and without going into their merits, but I find them devoid of raising any arguable issue worthy for consideration by the Court of Appeal. As correctly argued by Dr. Nshalla and rightly so in my own opinion, what the High Court decided in respect of these two remaining issues was proper guidance on handling advocates misconduct and one procedure cannot be mixed up by the other.

In the fine and for the reasons given above, this court hereby decline to grant leave to the applicants to appeal to the Court of Appeal of Tanzania as prayed in the chamber summons for failure of the applicants to establish

arguable case or issues for the Court of Appeal to consider. The instant application is, thus, dismissed with no order as to costs given the nature of the dispute and parties still have long way to go back to square one before Advocates Committee.

It is so ordered.

Dated at Dar es Salaam this 17th day of December, 2021.



A handwritten signature in black ink, consisting of a series of vertical lines followed by a horizontal stroke and a small flourish at the end.

S. M. MAGOIGA

JUDGE

17/12/2021