IN THE HIGH COURT OF TANZANIA

(MAIN REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO.16 OF 2021

HON. MINISTER FOR FINANCE AND

PLANNING.....1ST APPLICANT.

HON. MINISTER COMMUNICATION AND INFORMATION

TECHNOLOGY.....2ND APPLICANT

HON.THE ATTORNEY GENERAL.....3RD APPLICANT

VERSUS

LEGAL AND HUMAN RIGHTS CENTER.....RESPONDENT

RULING.

Date of last 30.11.2021

Date of Ruling 14.12.2021

MARUMA, J.

The application before this Court is for the following orders:

1. The honourable Court be pleased to grant leave to the Court of Appeal of Tanzania against the Ruling and Drawn Order of the High court of Tanzania (Main Registry) at Dar es salaam, by Honourable Mgetta J, delivered on 13th October 2021 in the Misc. Cause No. 11 of 2021
2. Costs of this application to be provided for
3. Any other relief(s) this court deems just and fit to grant.

At the hearing of the application, Mr. Erigh Rumisha, State Attorney assisted by Emmanuel Daniel and Mr. Ayoub Sanga, State Attorneys appeared for the applicant. The respondent had the services of Mr. Mpale Mpoki, assisted by Mr. Amani Melchzedeck Joachim, Advocate.

In supporting the application Mr. Erigh, the learned State Attorney started by a prayer for adoption of the applicant's affidavit sworn on 28th October 2021 and filed on 5th November 2021 to form part of their

submission. The essence of his prayer was to the effect that the gist of application is centered on para 8 (i) – (vi) of the applicant's affidavit, on why the applicant is applying to this Court to be granted leave to challenge the decision in Miscellaneous Cause No. 11 of 2021. He submitted that they are applying the leave because it is a mandatory requirement of the law under section 5 (1) of the Appellate Jurisdiction Act Cap 141 R.E 2019 read together with rule 45 (a) of the Tanzania Court of Appeal Rules R.E 2019. He submitted that it is settled by the law that, in an application of this nature the applicant always is required to show that there is a point of law or other way there is a prima facie ground. Looking at the contents of para 8, he submitted that, there is a point of law based on the fact that the trial Court failed to determine whether the respondent had a cause of action. His argument was that, there was no proof of evidence that, the respondents operate mobile telephone number collection number of TIGO, Vodacom and Airtel 275454 and wallet payment no. Tigo account 25564000347. There was also no proof that the registration number belonging to the applicant to give him the locus standing to challenge the regulation made by the Minister for Finance and Planning. He therefore, argued that the respondent has no legal authorization to institute such an application. Moreover, he argued that

the respondent did not demonstrate and proof any interest that have been affected to warrant a trial court to grant a leave for judicial review.

Lastly, he submitted that there is a point of law to be determined by the Court of Appeal as established under paragraph 8 of the affidavit in support of the application. He cited the case of **Rev. Sadock Yakobo Mlongecha Versus Registered Trustees of Pefa Kigoma**, Civil Application No. 12 of 2016 CA at DSM at page 7, whereby the Court was referred to the case of **Gaudencia Mzungu Versus The IDM Mzumbe**, Civil, Application No. 94 of 1999. Compared with the present application, he submitted that, the failure by the trial Court to consider that the respondent has no legal authorization to institute the application that warrant that, there is legal issue to be determined. Further to this, he submitted that, the respondent did not prove that they had registration number from TRCA. This also shows that the decision has illegality to be determined by the Court of Appeal. The fact that the respondent did not prove any interest which have affected them again that is illegality warranting leave to appeal to the Court of Appeal.

He also submitted that, it is the settled principle that section 5 (1) (c) of the Appellate Jurisdiction Act and rule 45 (a) of the Court of Appeal Rules

RE 2019 do not provide factors to be taken into consideration in granting the leave to appeal to the Court of Appeal. But he referred the Court the position laid in the case of **Jireys Nestory Mutalemwa Versus Ngorongoro Conservation Area Authority**, Civil Application No. 154 of 2016, the Court of Appeal sitting at Arusha, facing with the similar situation which is before this court. He said the Court in that case referred to the case of **Bulyanhulu Gold Mine Limited and Two Others Versus Petrollube (T) Limited and Another**, Civil Application no. 364/16 of 2017 (unreported) from page 5 -7. His main point from these authorities was to draw the reference that though section 5 (1) does not cover factors for consideration in granting a leave. This case guided on factors to be considered for the leave to appeal and preclude to prejudge the merit of appeal. He submitted that this Court should confined on the grounds for appeal and the decision itself. Relating to this case he pointed out that the reference on illegality of the decision in para 8 at page 7 is the ground of appeal which should be considered by the Court of Appeal and in those circumstances, he prayed for the leave to be granted because this will not prejudice the respondent in this application.

Mr. Mpoki for the respondent arguing against the application, submitted that the principle of an appeal is that an appeal is a creature of a

statute. Right of appeal is not automatic. It is guided by statute. He highlighted that, thus, why there is a quotation that the right to appeal is a creature of statute unless a right of appeal is clearly and expressly given by statute it does not exist. According to him is that, if no such right, no appeal. He further submitted that, the right of an appeal cannot be inferred and the Court cannot confer itself that right. He argued that, the applicants are seeking leave to challenge the decision on Misc. Civil Cause No. 11 of 2021 which was brought under provision of section 18 (1) and 19 (3) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, Cap.310 R.E of 2019 together with section 2 (3) of the Judicature and Application of Laws Act, Cap 358. According to him, those are enabling provisions for the said application which all of them do not confer the right of the appeal. He argued that definitely the applicants in this application cannot apply for leave of appeal as the decision thereof is not appealable. He further argued that, someone cannot exercise the right to appeal on something which is not appealable. To support this argument, he referred the Court to the case of **Harnam Singh Bhogal, trading as Harma Singh & Co Versus Jadva Karsan**, Civil Appeal No. 22 of 1952, EAC. At page 18 where it was stated that, "*it is well settled that a right to appeal can only be founded on a statute*

and that any party who seek to avail himself on the tight must strictly comply with the conditions prescribed by the statute". Also, the case of **Attorney General Versus Sha**, Civil Appeal No. 42 of 1970 EAC. At page 50 in the 2nd paragraph that "*there is no such thing as inherent appellate jurisdiction. He submitted that for an appeal to lie should come from the statute and also at the Court of Appeal there is no inherent Jurisdiction".* He also referred the decision of the Court of Appeal sitting at Dar es Salaam in the case of **Augustino Lyatonga Mrema Versus Republic**, Criminal Appeal No. 61 of 1999. Whereby at page 7, it was held that "*the Court of Appeal has no jurisdiction to entertain an appeal by accused person from interlocutory orders; the Court, being a creature of statute, can only exercise powers conferred upon it by statute and has no inherent powers to assume jurisdiction".* He argued therefore, that since there is no right of appeal, the Court of Appeal has no inherent Jurisdiction to such right. He also pointed out that, section 17(5) of the Law Reforms (Fatal Accidents and Miscellaneous Provisions) Act, Cap.310 RE of 2019 provide a right of appeal against substantive application and not otherwise. He submitted that, the Legislature did it purposely because the leave does not determine the right. He also submitted that even if there is right of appeal not every right of

appeal is absolute. He made reference to section 5 (1) (c) and pointed out the applicants forgot section 5 (1) (d) of the Appellate Jurisdiction Act, that no appeal on preliminary or interlocutory decision is available unless such decision finally determines the suit. He also referred to the case of Court of Appeal of **Tanzania Motors Services LTD & Another Versus Mehar Singh t/a Thaker Singh**, Civil Appeal No. 115 of 2005. Whereby at page 9 the Court referred the case of **Bozson Versus Artrincham Urban District Council** (1903) IKB 547, which discussed the tests for determining interlocutory decision. He submitted that, the case gives definition of an interlocutory order by guided by the fact that the real test to determine the decision whether it is an interlocutory order or not. He also referred to the decision of the Court of Appeal in the case of **Agness Simba Gabba Versus. David Samson Gabba**, Civil Appeal 26 of 2008 whereby at page 5 the Court referred to the case of **Israel Solomon Kivuyo Versus Wayani Langoyi and Naishooki Wayani** (1989) TLR.140 where the Court quoted from JOWITT'S DICITIONARY OF ENGLISH LAW,2nd Edition at page 999 stated that, "An interlocutory proceeding is an incidental to the principal object of the action, namely, the judgment. Thus, an interlocutory application in an action includes all steps taken for the purpose of assisting

either party in the prosecution of their cases, whether before or after the judgment; or if protecting or otherwise dealing with the subject matter of the action before the rights of the parties are finally determined; or of executing the judgment when obtained. Such are applications for time to take a step, e.g to deliver a pleading, for discovery, for an interim injunction, for appointment of a receiver, for garnishee order, etc. It goes without saying therefore, that an application for a temporary injunction as was a case in the District Court could only be maintained if it related to a legal action or step pending in court. He also made a reference to a case of **Junaco (T) Ltd and Another Versus Harel Mallac Tanzania Limited**, Civil Application No. 473/16 of 2016 at Page 11-12. Moreover, the case of **Yusuf Hamisi Mushi & Another Versus Abubakari Khalid Hajj & Two Others,** Civil Application No. 55 of 2020 at page 7-8. Both discussed the test of an interlocutory order. He submitted that, there is no doubt that the decision to be challenged is an interlocutory order as insisted in all authorities. He pointed out that the decision in hand did not determine the rights of the parties as is a merely interlocutory order which does not fall under section 5(1) of the Appellate Jurisdiction Act.

Mr. Amani, also for the respondent made a distinction between the application in hand and the case of **Rev Sadock Yakob (**Supra) that, the case was concerning an appeal from the Housing Tribunal to the High Court and then to the Court of Appeal. He said that was not an interlocutory order rather than it was from a substantive appeal. He also differentiated the **Ngorongoro's case** (Supra) to this application that, it talked on principles which do not apply to this application as no appeal created by either the statute or inherent jurisdiction. He said, the purpose of this application before this Court is to minimize congestion of cases at the Court of Appeal. Granting this application is to defeat the purpose of leave. He submitted therefore, that since leave is expressly provided by the statutes and granting it will only be for academic purposes, he prayed for the application to be dismissed with costs.

Mr. Erigh in his rejoinder, insisted that, this Court is to determine the factors to be taken into consideration in granting leave and not on whether the appeal is competent or not, or the order is appealable or not appealable but, it is on whether there are substantive issues for the Court of Appeal to decide. He submitted that in the case of Ngorongoro (Supra) at page 6 when referring to the case of **Reginal Manager – TANROADS Lindi Versus DB**

Shapriya and Company Ltd, Civil Application No.29 of 2021(Unreported). It was held that," *it is now settled that a Court hearing an application should restrain from considering substantive issues that are to be dealt with by an appellate Court. This is so in order to avoid making decisions on substantive issues before the appeal itself heard."* He submitted that, since they have already lodged a notice of appeal at the Court of Appeal so, there is an appeal. He also, referred the Court at page 9 of the decision, that the test was on an appeal itself and that was why in the case of **Murtaza Mohamed Viran Versus Mehboob Hassanali Versi**, Civil Application No. 168 of 2014 cited therein, it was said it was step further to the appeal and not the High Court. He further submitted that, there are other factors and not confined only on the issue to be determined by the Court of Appeal and since there was a decision based on illegality there is a need to be determined by the Court of Appeal. He concluded his rejoinder by referring this Court to the case of **Yusuph** (Supra) which was for an application to strike out the appeal. That at page 7 discussion was on interlocutory order by the Court of Appeal. The case of **Senate of University of Dar Salaam Versus. Edmund Amin Mwasage & 4 Other**, Civil Appeal 83 of 1999. Also, the

case of **Tanzania Post Cooperation Versus Jeremiah Mwandi**, Civil Appeal No.474 of 2020.

Mr. Ayub, State Attorney for the applicants, also made an additional submission on the issue of interlocutory order to support the application. He pointed out that in the case of **Ngorongoro** (Supra) at pg 7, the Court clearly indicated the grounds/reasons to be determined in an application for leave to appeal. He insisted that, is whether the appeal lies from an appealable order or not. He requested this Court to be confined to paragraph 2 from 1st – 6th lines at the Ngorongor's case. The issue of appealable not appealed or interlocutory is at the stage of Court of Appeal. He also argued that, the issue whether this comes from provisions not appealable, there is a notice of appeal in the Court of Appeal under rule 83 of the CA Rules GN 344. So, whether the appeal is competent or not is also an issue to be determined by the Court of Appeal of Tanzania. He wound up by saying that the cited case by the respondents that of **SHA** and **Hanam Singh (supra)** are distinguishable as they cannot apply to this application. All are persuasive coming from Uganda and Kenya.

I would like to appreciate submissions made by both counsel to the applicants and the respondent for the vast authorities in legal principles in

support of and in opposition to this application. Basing on those submissions the issue to be determined by this Court is on whether a leave to appeal against the ruling dated 13th October 2021 in Misc. Cause No. 11 of 2021 granted leave for judicial review based on arguable issues/factors outside the parameters of section 5 (1) (c) of the Appellate Jurisdiction Act, Cap 141 R.E 2019 can be granted or not.

As pointed out earlier that the application before this court to seek leave to appeal at the Court of Appeal is brought under the provisions of section 5 (1) (c) of the Appellate Jurisdiction Act, Cap 141 R.E 2019 (AJA) and Rules 45(a) of the Tanzania Court of Appeal Rules R.E 2019 and section 95 of the Civil Procedure Code, Cap 33 R.E of 2019 (CPC). I would like to produce the said provisions as follows;

"Section 5 (1) (c) of AJA,

In civil proceedings, except where any other written law for the time being in force provides otherwise, an appeal shall lie to the Court of Appeal-

(a) Not applicable

(b) Not applicable

(c) *with the leave of the High Court or of the Court of Appeal, against every other decree, order, judgment, decision or finding of the High Court."*

" *Rules 45(a) of the Court of Appeal Rules,*

In civil matters-

(a) where an appeal lies with the leave of the High Court, application for leave may be made informally, when the decision against which it is desired to appeal is given, or by chamber summons according to the practice of the High Court, within fourteen days of the decision;"

"*Section 95 of the CPC,*

Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court"

Reading the above quoted provisions, the first one provides pre-conditions for an appeal to be instituted at the Court of Appeal that, there must be leave of the High Court or of the Court of Appeal. The second one provides the mode to apply for the leave to the High Court and the last

provision is to appreciate powers of the Court when determining the ends of justice or to prevent abuse of the process of the court. All these provisions were not disputed by either party in this application.

The only issue in dispute in regard to these provisions is on whether the ground/s in this application though not fall under the parameters to section 5 (1) of the Appellate Jurisdiction Act, can be entertained to warrant leave to appeal to the Court of appeal.

The applicant's argument on this is that, they are applying for the leave because it is a mandatory requirement of the law under section 5 (1) of the Appellate Jurisdiction Act, Cap 141 R.E 2019 which should be read together with rule 45 (a) of the Tanzania Court of Appeal Rules R.E 2019. The purpose was to fulfil the mandatory requirement of an application of this nature to show that there is a point of law or on the other way there is a prima facie ground. According to Mr. Erigh is that, this application demonstrates a point of law under paragraph 8 of the applicant's affidavit based on the fact that the trial Court failed to determine whether the respondent had a cause of action to warrant a grant of leave for judicial review.

Determining this argument, I agree with the respondent's argument on the principles of an appeal that, an appeal is not automatic rather than guided by the statute as referred to the cited cases such as of **Harnam Singh and Attorney General Versus Sha (Supra)**. It should also be noted that, the applicants are also aware that interlocutory orders are not appealable. Therefore, this Court should not labour much on this issue.

Moreover, looking at the application as argued by the respondent, there is no doubt that the applicants are seeking leave to challenge the decision in Misc. Civil Cause No. 11 of 2021 which was brought under provisions of section 18 (1) and 19 (3) of the Law Reforms (Fatal Accidents and Miscellaneous Provisions) Act, Cap.310 RE of 2019 together with section 2 (3) of the Judicature and Application of Laws Act, Cap 358.The provisions which do not confirm the right of the appeal. Based on this fact, I concur with the position of law and respondent's arguments that, the applicants in this application cannot apply for leave to appeal.

However, before concluding this finding, I have to look at the applicant's argument that the factors laid down in section 5(1) (c) of the Appellate Jurisdiction Act, should not limit the power of the Court to determine where there is an arguable legal issue which was not determined

by the trial Court. According to him, the avenue to challenge the legality in this application is by a way of an appeal to the Court of Appeal.

Supporting this argument, the applicant argued that section 5 (1) (c) of the Appellate Jurisdiction Act and rule 45 (a) of the Court of Appeal Rules RE 2019, do not provide the factors to be taken into consideration in granting the leave to appeal to the Court of Appeal. Thus, he referred to this Court to the case of **Jireys Nestory Mutalemwa Versus Ngorongoro Conservation Area Authority** (supra), in which the Court was faced with a similar situation as in the application before this Court. The applicants wanted this Court to be guided by this case in determining other factors out of those in section 5 (1) (c) to grant leave to appeal to the Court of Appeal. In this case, the Court being aware of parameters under section 5 (1) (c) of the AJA, recognized that, the law does not expressly state the factors to be considered to grant leave to appeal to the Court. To determine other factors to be considered, the Court referred to the case of **British Broadcasting Corporation Versus Eric Sikujua Ng'maryo**, Civil Application No.138 of 2004 (unreported) which also cited a case of **Rutagatina C.L. Versus The Advocates Committee and Another**, Civil Application No. 98 of 2010 (unreported). In this decision the Court stated that "... *leave to appeal is not*

automatic. It is within the discretion of the Court to grant or to refuse leave. The discretion must however judiciously exercised and on the materials before the court. As a matter of general principle, the leave will be granted where the grounds of an appeal raise issues of general importance or a novel point of law or where the grounds show a prima facie or arguable appeal..." . Relating to the present application before this Court, the pertinent question to be asked is whether this position applied to any factor that is outside the parameters of section 5(1) (c) of AJA. Based on the nature of the present application and considered the applicants' argument that there is arguable issue to grant leave to appeal, the answer is no. This is said so based on the view that, to apply this, the Court should base on the materials at hand or before the Court as it was stated in the above decisions that "*leave is not automatic*". Looking at this case, the applicant was seeking leave to appeal as the second bite at the Court of Appeal. It should be noted that in this case the Court did not sit as an appellate Court. So, to compare with the situation in the present case is to mislead the Court. Moreover, the matter before the Court determined the substantive right of the party where there was no other avenue to exercise such right. In the present application, a prayer is for leave to challenge a decision which granted a leave to apply for judicial review,

the decision which did not determine substantive rights of either party. In lieu of the above authority and materials before this Court, without going into the depth of ground of appeal, I find that the ground given is premature and the applicants still can challenge this in the main application for judicial review. To go to the Court of Appeal at this stage will be a misuse of the Court process.

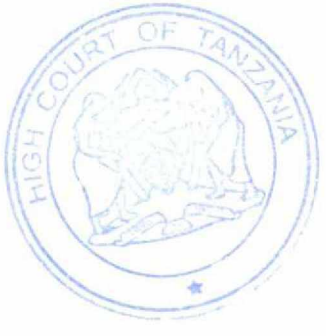
Coming to the case of **Senate of University of Dar Salaam Versus. Edmund Amin Mwasage & 4 Other**, Civil Appeal 83 of 1999. The applicant's argument is that the Court should not confined on the parameters of section 17(5) of the Law Reforms (Fatal Accidents and Miscellaneous Provisions) Act, Cap.310 RE of 2019 which provide a right to appeal against substantive application and not otherwise. I agree with the position in this case, where the Court directed that, "*If the applicant was dissatisfied with the order granting leave ex parte an appeal should have been filed to this Court (Court of Appeal) when, at the hearing of the appeal, the issue of not joining the Attorney General would be raised.*" However, the Court did not ends there, it went on to determine whether such an order did not finally determine for substantive rights of the parties. Therefore, I failed to distinguish this case with this application as the fact that the ground given

did not determine the matter in its finality though it is alleged that there is arguable issue to be determined at the Court of Appeal subject to the leave of appeal from this Court. As said in that decision that, the Court did not agree with step taken by the applicant by challenging the application granting a leave for judicial review by way of preliminary objection for failure to join the Attorney General as a party while the substantive issue was yet to be determined. This is also the same as to the case of **Tanzania Post Cooperation Versus Jeremiah Mwandi**, Civil Appeal No.474 of 2020 the leave was based on substantive decision not otherwise. This is the same as to this application, the decision to be challenged by way of an appeal is still premature as nothing substantive has been determined.

Moreover, this Court is in an agreement with the applicant's argument that a notice of appeal is a preparatory step to institute an appeal at the Court Appeal. However, it is not in an agreement with the argument that, since there is a notice of an appeal to the Court of Appeal, the appeal has been instituted. It should be noted that, in civil cases, an appeal is instituted by the record of appeal and memorandum of an appeal as required by rule 90 of the Court of Appeal Rules of 2019. For the purpose of a civil appeal, a leave to appeal from the High Court should form part of the record of an

appeal. Therefore, the applicant should distinguish the status of notice of appeal under rule 83 on civil appeal and rule 68 (1) of the Rules, on criminal appeal whereby a notice of appeal institutes an appeal at the Court of Appeal.

Hence, as argued by the respondent's counsel that, the purpose of this application before this Court is to minimize congestion of cases at the Court of Appeal. Granting this application is to defeat the purpose of leave. Since the decision to be challenged was just a step taken for the purpose of assisting the parties to pursue the rights in dispute and did not determine the substantive rights of the parties, I find this application is premature before this Court and the applicants are advised to apply their rights at the appropriate time for consideration on merit by the Court. I therefore, dismiss the application with no order as to costs.



Z.A.Maruma, J

14/12/2021.

Ruling delivered in Chambers this 14th December,2021 in the presence of Mr. Erigh Rumisha, State Attorney, for the Appellants and Mr. Mr. Faustine Moshi holding brief for Mr. Amani Melchzedeck Joachim, Advocate for the respondent.

Z.A.Maruma, J

14/12/2021