

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY**

AT MOSHI

MISC.CIVIL APPLICATION NO.24 OF 2021

(C/F Civil Appeal No. 6/2020 of the High Court; Originating from Civil
Case No 1/2019 of Siha District Court)

GODSON S. MUNUO..... APPLICANT

VERSUS

UMOJA SAVINGS AND CREDIT

COOPERATIVE SOCIETY LIMITED RESPONDENT

RULING

12/4/2022 & 11/5/2022

SIMFUKWE, J.

The applicant is seeking leave to appeal to the Court of Appeal of Tanzania against the decision of this court delivered by Hon. Mwenempazi, J on 3rd day of June 2021 in Civil Appeal No. 6 of 2021. The application was brought under **section 47(2) of the Land Disputes Courts Act Cap 216 R.E 2019; section 5(1) (c) of the Appellate Jurisdiction Act, Cap 141 RE 2019 and Rule 45(a) of the Tanzania Court of Appeal Rules, 2009** and any other enabling provisions of the Law.



The application is supported by the affidavit sworn by Elia Johnson Kiwia, the learned advocate which was opposed by the counter affidavit sworn by the respondent's Chairman Mr. Emanuel Lazaro Lukumay.

The application was argued by way of written submissions. The applicant was represented by Mr. Elia Kiwia, learned counsel while the respondent was unrepresented.

Briefly, the records reveal that the claim between the parties originated from Siha District Court where the court decided in favour of the respondent. The applicant unsuccessfully appealed to this court. Still aggrieved, the applicant intends to appeal to the Court of Appeal. He thus filed this application for leave to appeal to the Court of Appeal.

Supporting the application, Mr. Kiwia for the applicant on the outset prayed the Applicant's affidavit together with prayers in the chamber summons be adopted to form part of applicant's submission.

Mr. Kiwia started by acknowledging the principles governing granting leave to appeal to the Court of Appeal of Tanzania as stated at page 6 and 7 in the case of **British Broadcasting Corporation v. Eric Sikujua Ng'maryo, Civil Application No. 138 of 2004** (unreported) in which it was held that:

"As a matter of general principle, leave to appeal will be granted where the grounds of appeal raised issues of general importance or point of law or where the grounds show a prima facie or arguable appeal however, where the grounds of appeal are frivolous, vexatious or useless or hypothetical no leave will be granted."



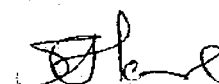
He further argued that in the cited case of **British Broadcasting Corporation** (supra) at page 7 the Court cited cases of (i) **Harban Haji Moshi** (ii) **Shauri Haji Mosi v. Omar Hilal Seif** (ii) **Seif Omar** (unreported) in which it was held that: -

"Leave is grantable where the proposed appeal stands chances of success or where, but not necessary, the proceeding as a whole reveal such disturbing features as require the guidance of the Court of Appeal..."

In the instant matter, the learned advocate referred the court to paragraph 6 of Applicant's affidavit where the applicant raised issues of pecuniary jurisdiction. He argued that through the proceedings and judgment of the trial Court and the High Court, it is apparent on the Court records that the amount claimed in the plaint filed in the District Court by the Respondent was Tshs 8,403,300/=.

He stated that after they had completed trial in the trial court and the High Court, that is when they discovered that, the trial Court had no jurisdiction to try the matter arising out of contract of Tshs 8,403,300/=, following the amendment of **section 18 of the Magistrate Court Act** through **section 20 of the Written Laws (Miscellaneous Amendments) Act No. 6 of 2016** which changed the Primary Court pecuniary jurisdiction arising out of contract from Tsh 3,000,000/= to Tshs 30,000,000/=.

Thus, the above-mentioned amendment of **section 18 of the MCA (Cap 11)**, was made in 2016 and this matter was filed three years later that is 2019. Therefore, the trial District Court had no jurisdiction.



Mr. Kiwia submitted that the issue of jurisdiction was not raised in the first appeal. However, he was of the view that if there is any contentious point of law in the pleading or proceedings which may raise legal implication, that issue can be raised at any time, even in the second appeal. To support his views, he referred to the case of **Barclays Bank of Tanzania Limited V. Tanzania Pharmaceutical industries and 3 others, Civil Application No. 62/16 of 2018** (CAT) (unreported) (supra), which held that: -

"... since it was not raise (sic) in the appeal that was struck out, it is important to understand that a matter of legal stance and which may raise legal implication or otherwise described as a point of law can be raised at any time."

Mr. Kiwia also argued that he was aware with the fact that parties filed the suit before the District Court on the reason that they intended to engage advocates. However, it was stated that it was not proper for the case to be transferred to the district court with agreement between parties only on the reason of engaging advocates while the Court had no jurisdiction to entertain the matter. It was Mr. Kiwia's argument that jurisdiction of court is creature of the statute and could not be conferred by parties' agreement. He cited the case of **Meneja Kiwanda cha Saruji Wazo v. Hermelida Joseph Bikongoro, High Court, Miscellaneous Land Case Appeal No. 10 of 2020** buying that principle of law from the case of **Shyam and others v. New Palace Hotel, East Africa Case No. 2 1972 1 EA 199 (CAD)** in which the Court held that:



"All the courts in Tanzania are created by statute and their jurisdiction is purely statutory. It is an elementary principle of law that parties cannot by consent give a court jurisdiction which it does not possess. "

Basing on the cited authority, it was submitted that although parties filed the case in agreement for the purpose of engaging advocates, it is apparent that, the trial District Court had no jurisdiction to determine the matter. Mr. Kiwia concluded that there is arguable point of law before the Court of Appeal in the intended appeal and that if the application will be granted, then the Applicant will have chances of success.

The learned counsel for the applicant went on to state that at the 7th paragraph of Applicant's Affidavit there is an issue of validity of the contract alleged to have been entered between the parties. It was stated that during the trial the applicant denied entering any agreement with the respondent and he challenged the competence and authenticity of the Agreement tendered by the Respondent. That, the document which was written by a pencil, admitted by the Respondent to be rubbed when he likes in absence of the Applicant. Mr. Kiwia argued that the contested agreement which was written by a pencil is an arguable issue before the Court of Appeal.

The learned counsel submitted further that the Savings and Credit Co-operative Societies (SACCOSS) are established in terms of **section 2 of the Co-operative Societies Act, No.6 of 2013** together with its regulations (**Co-operative Societies Regulations**) **G.N No. 272 of**



2015. Regulation 76 (1) of the said Regulations strictly prohibits a Co-operative society to enter into a contract in respect of loan or credit service, or disposal of society property which exceeds five million shillings without prior approval of the general meeting and thereafter with consultation in writing with the registrar of the society. Also, **Regulation 76(3)** provides that any person who contravenes this regulation commits an offence. **Regulation 65(1)** provides that, an employee or officer of a cooperative society shall not on credit basis transact without prior approval in writing of the Board.

It was Mr. Kiwia's opinion that in the 1st appeal, the applicant submitted how the respondent's Chairman violated the above-mentioned regulation as the Respondent entered the alleged contract with the Applicant without prior authority of the SACCOS board. While the respondent failed to provide the minutes of the SACCOS Board allowing his chairman to transact the business and institute the case before the court of law without consent of the board resolution. Thus, the Chairman lacked locus standi to file the case, which made the suit filed before the trial court to be incompetent. It was commented that the High Court failed to observe that shortcoming together with the above-mentioned provisions of the law and delivered the decision in favour of the Respondent. If the High Court had properly observed those provisions of the law, it would have ruled out to the contrary. Mr. Kiwia, was of the view that the same was a contentious legal issue which required consideration of the Court of Appeal.

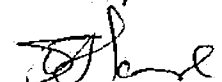


The applicant's counsel was of the opinion that the two intended grounds of appeal are sufficient in granting leave for the Appellant to appeal to the Court of Appeal. That, if leave will be granted, the applicant intends to appeal against all grounds of appeal raised in the first appeal. He added that the grounds raised in the 1st appeal are of judicial consideration that qualifies the general principle provided in a case of **British Broadcasting Corporation v. Eric Sikujua Ng'maryo** (supra) which is a prominent case used by courts as a guidance in granting leave to appeal to the Court of Appeal of Tanzania. In conclusion, he prayed their prayers to be granted.

In reply, the respondent stated that the applicant submission is frivolous, vexatious, bad in law and have no legal legs to stand. He adopted his counter affidavit to form part of his submission.

The respondent disputed the issue of jurisdiction raised under paragraph 6 of the applicant's affidavit. He averred that the trial court had jurisdiction to entertain the case since the same is self-explanatory. The Respondent called upon this court to consider the records of the first appellate court to satisfy itself that Siha District Court had jurisdiction to entertain the matter between the parties.

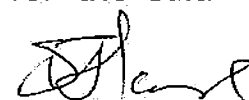
The respondent continued to argue that it is not disputable that the Applicant herein owe the Respondent herein the sum of Tanzanian shillings eight million four hundred and three thousand and three hundred shillings only (8,403,300/=). That, on the 11th day of July 2017, the Respondent wrote the demand letter demanding the applicant to pay such amount within 14 days from the date thereof. That, the



Applicant defaulted in paying the Respondent something which caused serious loses of income and thereby occasioning untold sufferings.

The respondent's representative insisted that the said matter was within the jurisdiction of Siha District Court as the Court of first instance. He stated that originally on 9/8/2017 the Respondent instituted Civil Case (Kesi ya Madai) No. 5 of 2017 before Sanya Juu Primary Court claiming among other things payment of the remaining balance at the tune of Tanzanian shillings eight million four hundred and three thousand and three hundred shillings only (8,403,300/=) from the Respondent herein. On 8/9/2017 the Respondent while engaging the legal services of the learned Advocate Elia Johnson Kiwia who is also the current applicant's advocate in this application; filed Misc. Civil Application No. 01 of 2017 in the District Court of Siha seeking among other things the Order of the Court that Civil Case No. 5/2017 pending in Sanya Juu Primary Court be transferred from Sanya Juu Primary Court to Siha District Court so that the applicant herein could get representation of an advocate before Siha District Court. He added that on 9/11/2017 Siha District Court ordered the transfer of Civil Case No. 05/2017 which was pending before Sanya Juu Primary Court to Siha District Court. Hence the case was instituted in the District Court of Siha. He referred to the court of first instance's proceedings in Civil Case No. 5/2017 of Sanya Juu Primary Court and the said Court Order.

The respondent distinguished the cited cases by the learned advocate on the reason that the same are irrelevant at this stage since it was the applicant himself and his advocate who prayed to transfer the said



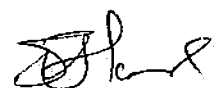
original civil case to Siha District Court.

The respondent thus contended that Siha District Court had jurisdiction to entertain Civil Case No. 1 of 2019 between the parties. In addition to that, it was stated that the advocate's mistakes (negligence) and ignorance of the law is not a ground of appeal. He blamed Advocate Kiwia for knowing what he was doing but kept on wasting the Court's time seeking sympathy of the Court to be allowed to appeal to the Court of Appeal of Tanzania without genuine reasons.

Contesting the contents of paragraph 7 of the applicant's affidavit on the issues of validity of contract as the point worth determination by the Court of Appeal, it was the respondent's argument that the trial Magistrate delivered her judgment and reached the decision in favour of the Respondent herein correctly after being satisfied that the contract entered on 22/11/2013 between the parties was breached by the Applicant herein and that the said contract was correctly entered between the said parties.

He stated further that the said Agreement/Contract was tendered before the trial Court and it was conceded by the Respondent. **Exhibit P2** in the said Court's records is a Counter Book within which the Respondent and the Applicant herein entered into an agreement on 22nd November, 2013 for selling Soya beans from SACCOS members about 16,998 kgs worth Tshs. 22,947,300/-. The Agreement was for the Appellant to sale and deposit the balance in the SACCOS Account after he had deducted his commission.

The respondent also submitted in respect of the competence and



authenticity of the agreement tendered by the Respondent. He submitted that it was the Applicant's duty to disapprove before the trial Court that the signature inserted in the said agreement was not his signature and that it was forged.

Further to that, the Respondent stressed that the said Mr. Emmanuel Lazaro Lukumay, the respondent's Chairman was allowed by the Respondent and their leaders at that time to enter into the said contract which was signed on 22/11/2013. He added that, that was the reason that no member or leader of UMOJA SAVINGS AND CREDIT COOPERATIVE SOCIETY LIMITED, appeared before the trial Magistrate to oppose the tendered contract (**Exhibit P2**).

Lastly, the respondent called upon this court to ignore the cited cases and legal provisions in the Applicant's submission due to the fact that the Respondent strongly proved his claims against the Applicant in the original case before the trial Court as seen in the proceedings and judgment. The respondent prayed for the dismissal of this application in its entirety with costs for being devoid of merit. He also prayed for any other relief this court deems fit and just to grant.

In rejoinder the applicant's advocate submitted that the respondent failed totally to adhere to the principles which govern granting leave to appeal to the Court of Appeal since he was arguing Applicant's submission in chief like he was contesting an appeal. He opined that the Applicant was required to address the court on the issues as to whether the intended appeal raised issues of general importance or point of law or whether the grounds show a prima facie or arguable appeal as it was held in the case



of **British Broadcasting Corporation v. Eric Sikujua Ng'maryo** (supra) cited by the Applicant in his submission in chief.

Furthermore, the learned counsel for the applicant argued that the reason for transferring the case to the district court was due to the agreement of parties for the purpose of engaging advocates. The case was later transferred from the Primary Court to the District by way of chamber summons under **section 47(1)(a) of the Magistrate Court Act** (supra). He referred the court to the case of **Abubakari Mohamed Mlenda v. Juma Mfaume, High Court of Tanzania [1989] TLR 145** where it was held that:

"Wish and ability to engage an advocate alone does not amount to good and sufficient cause to grant an application to transfer a case from primary court to any other court."

Mr. Kiwia also argued that under section 47(1) (a) for the case to be transferred from the Primary Court to the District Court, the District Court should have jurisdiction to determine the matter.

He reiterated the case of **Meneja, Kiwanda cha Saruji Wazo** (supra) and argued that it is elementary principle of law that, jurisdiction is conferred by the statute and it cannot be conferred by agreement by the parties.

He added the case of **Ashura M. Masoud v. Salma Ahmad, High Court of Tanzania at DSM, PC. Civil Appeal No 213 of 2004** at page 7 (unreported) to cement his point. He insisted that the point of jurisdiction raised by the Applicant in this Application is arguable point of law worth to be considered by the Court of Appeal.



The learned advocate insisted the existence of contentious arguable point of law of general importance moving the court to grant leave to appeal to the Court of Appeal as submitted in chief.

After going through the affidavits of the parties and their submissions, the issue for determination is whether this application deserves to be granted on the raised grounds. Leave to appeal to the Court of appeal is granted if there is a point of law or on point of public importance worth consideration by the Court of Appeal. See the case of **British Broadcasting Corporation** (supra). Also, the East African Court of Appeal in the case of **SANGO BAY ESTATES LTD & OTHERS VS DRESDNER BANK [1971] EA 17 (2)** it stated that:

"Leave to appeal from an order in civil proceedings will normally be granted where prima facie, it appears that there are grounds of appeal which merit serious judicial consideration."

I have carefully considered the argument put forward by the learned counsel for the applicant. Starting with paragraph 6 of the applicant's affidavit where the issue of jurisdiction was raised. I am of considered view that the issue of jurisdiction though it is the point of law cannot be referred to the Court of appeal simply because it is the applicant's advocate who was representing the applicant herein in the lower court and he is the one who applied for the case to be transferred to the District Court on the reason of engaging an advocate. That being the case, he cannot raise such concern at this stage claiming that the same warrants determination of the Court of Appeal.

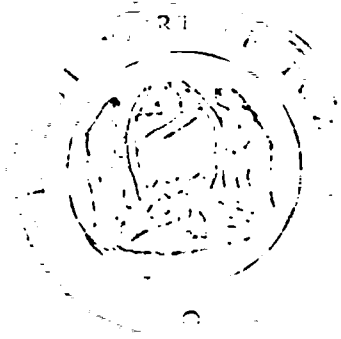


The only reason for granting this application is found under paragraph 7 of the applicant's affidavit that is validity of the contract. The learned counsel for the applicant referred to **Regulation 76(1) of the Cooperative Society Regulations** (supra) and argued that the same prohibit the cooperative Society to enter into a contract in respect of loan or credit service, or disposal of society's property which exceed five million shillings without prior approval of the general meeting and thereafter with consultation in writing with the registrar of the society. I am of considered view that there is on a issue of validity of contract a prima facie point of law worth Court of Appeal intervention.

In the event, the application is granted to that extent with no order as to costs.

It is so ordered.

Dated and delivered at Moshi this 11th day of May, 2022.



S. H. SIMFUKWE

JUDGE

11/5/2022