

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(MBEYA REGISTRY)
AT MBEYA

MISCELLANEOUS CIVIL APPLICATION NO. 27 OF 2020

*(Arising from the judgement and decree of the High Court of Tanzania
at Mbeya in Civil Appeal No. 21 of 2019; originating from Civil Case
No. 44 of 2019 at Mbeya Resident Magistrate Court)*

KISHORE KOMALDAS PABARI T/A HIGHLAND MOTORS-----APPLICANT

VERSUS

MBOZI DISTRICT COUNCIL -----RESPONDENT

RULING

Date of last order: 17.02.2022

Date of Ruling: 28.03.2022

Ebrahim, J.:

The Applicant herein, having had lost at the District Court and at the High Court, he has filed an application before this court praying to be granted leave to appeal to the Court of Appeal.

The application has been preferred under **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 GN No. 368 of 2009** as

amended. The application is supported by an affidavit sworn by Dr. Ashery Fred Utamwa, Counsel for the Applicant.

In this application the Applicant was represented by advocate Dr. Utamwa. The Respondent was represented by advocate Mwakimenya where it was recorded by the court on 17.03.2021 that advocate Maria Kalusye held brief of advocate Mwakimenya who was sick. After that, there followed a number of adjournments until 25.08.2021 where there was recorded representation of Counsels from both sides. The case was adjourned again until 02.12.2021 before hon. Mbagwa, J in the absence of the Counsel for the Respondent where it was ordered that the application be disposed of by way of written submission.

Nevertheless, apart from the submissions by the Counsel for the Applicant, Counsel for the Respondent did not file their reply. The Respondent only filed a counter affidavit which in essence they mainly disputed the contents of the affidavit and demanded proof thereof.

In the circumstances, I shall only consider the submissions made by the Applicant's side.

In his submission, Counsel for the Applicant in submitting as to whether the instant application fulfils the conditions to warrant the court to exercise its judicial discretion to grant leave, cited the case of **Rutagatina C.L. Vs The Advocates Committee and Another**, Civil Application No. 98 of 2010. He argued that the preliminary objection raised and sustained at the District Court on time limitation and upheld by the High Court was not on a pure point of law as envisaged in the case of **Mukisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Ltd**, [1969] EA and the Court of Appeal case of **Mount Meru Flowers Tanzania Limited Vs Box Board Tanzania Limited**, Civil Appeal No. 260 of 2018. He said there was a dispute regarding the date of breach of contract which required ascertaining of some facts on when exactly the cause of action arose.

In essence, the Applicant seeks leave to appeal to the apex Court so as to intervene on whether the preliminary objection was on a pure point of law; hence whether the suit was time barred or not.

An application for leave to appeal is granted on discretion of the court judiciously exercised upon showing that grounds of appeal raise issues of general importance; or a novel point of law; or where the

grounds show prima facie; or arguable appeal; or that the proceedings as a whole reveal such disturbing features that call for intervention of the Court of Appeal. The underlying principle was stated by the Court of Appeal in the case of **Rutagatina C.L V The Advocates Committee & Another (supra)**.

The essence of leave is to ensure that the Court of Appeal is saved from the mirage of unmeritorious matters and wisely concentrate on matters of public importance, law, and or contentious issues that need guidance of the Court of Appeal.

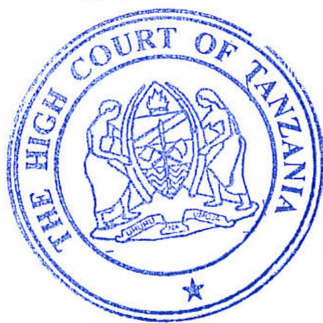
I have thoroughly gone through the affidavit filed by the Counsel for the Applicant and his submission. From the affidavit, the Applicant's counsel has averred at para 5 referring to para 1 (a) to (d) of the Chamber Summons where he argued that the decision of the trial court and the 1st appellate court contravened **section 27(3) of the Law of Limitation Act, Cap 89 RE 2019** which provides among other things that the cause of action accrues where the person liable or accountable acknowledges the claim.

What I could glean from the affidavit and submission by the Counsel for the Applicant, there is an issue pertaining to the question as to

when did the right of action accrued in respect of the respective breach of contract. Each party is in-fact pleading existence of certain facts in proving or disapproving the argued lapse of prescribed time by law to bring an action. That being the position therefore, I am of the firm stance that justice would be served if the Court of Appeal is also invited to look into the matter and confirm the correct time on the accrual of right of action.

It is from the above background I find that the Applicant has managed to establish sufficient prima facie grounds and arguable appeal that call for the attention of the Court of Appeal to warrant this court to exercise its judicial discretion to grant leave. Accordingly, I grant leave to the applicant to appeal to the Court of Appeal. Costs shall follow the main event.

Accordingly ordered.




R.A. Ebrahim
Judge

Mbeya

28.03.2022

Date: 28.03.2022.

Coram: Hon. A.E. Temu -DR.

Applicant: Absent

For the Applicant: Nuru Stanley

Respondent:

For the Respondent: } Absent.

B/C: P. Nundwe.

Nuru Stanley:

This application is coming for ruling today and I am ready.

Court: Ruling delivered in open chamber court in the presence of Nuru Stanley (Advocate) for the Applicant.



A.E. Temu

Deputy Registrar

28/03/2022