

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB- REGISTRY OF DAR ES SALAAM**

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 287 OF 2021

KAGERA TEA COMPANY 1ST APPLICANT
MUTWIRI IKIAO 2ND APPLICANT
JOSEPH KIRUGI MUKINDIA 3RD APPLICANT
DR. PETER MGIMBA 4TH APPLICANT

VERSUS

ARTHUR KIRIMI RIMBELIA 1ST RESPONDENT
JULIUS KIANGI MATHIU 2ND RESPONDENT

(Arising from Civil Case No. 85 of 2009)

RULING

30th May & 10th June, 2022

KISANYA, J.:

The above named applicants intend to challenge a default judgment of this Court (Mwarija, J. as he then was) in Civil Case No. 85 of 2009 dated 5th March, 2013 which was decided in favour of the respondents herein. They are seeking leave to appeal to the Court of Appeal, they were granted extension of time to file the same by this Court (Hon. Dr. Masabo, J) on 8th June, 2021 in Misc. Civil Application No. 85 of 2009.

Although this Court is not seized with the proceedings and judgment of Civil Case No. 58 of 2009, it is undisputed facts, from the ruling of Hon. Dr. Masabo, Judge, in Misc. Civil Application No. 282 of 2019, that the respondents sued the applicants. In reply, the applicants filed the written statement of defence. They also raised a preliminary objection on a point of law that, the trial the court had no jurisdiction to determine the matter. The appellants' written statement of defence was also challenged for being filed out of time. It turned out that the objection raised by the respondents was determined first and upheld thereby leading to *ex-parte* hearing and judgment. Therefore, the applicants filed the present application for the orders afore.

The application is preferred under section 5(1) (c) of the Appellate Jurisdiction Act Cap. 141, R.E. 2019 and rules 45A (1) (b) and 47 of the Court of Appeal Rules, R.E. 2019. It is supported by the affidavit of Ms. Crescencia Rwechungura, the applicants' counsel. The ground deposed in paragraph 9 of the supporting affidavit is to the effect that the impugned order dated 5th March 2013 is tainted with illegality. It is also worth noting here that, in its ruling in Misc. Civil Application No. 282 of 2019, this Court extended the time within which to apply for leave to appeal on the ground of illegality.

Nevertheless, this application is challenged by the respondents through the counter- affidavit of Mr. Kiondo Mtumwa Rajab, the respondent's counsel.

When the application was placed before me for hearing, the applicants were represented by Ms. Crescencia Rwechungura, learned advocate whereas Mr. Hassan Rasali, learned advocate appeared for the respondents.

Submitting in support of the application, Ms. Rwechungura contended that the provisions cited in the chambers summons empowers this Court to determine the application. She went on to submit that the order subject to the intended appeal to the Court of Appeal is illegal. Her submission was based on the contention that this Court expunged the applicant's written statement of defence after hearing of the preliminary objection raised by the respondents without determining first the objection as to its jurisdiction, which was raised by the applicant. She fortified her argument by citing the case of **Alimasi Idd Mwinyi vs National Bank of Commerce and Another**, Civil Application No. 88 of 1988 (unreported).

Expounding further and making reference to section 18(b) of the Civil Procedure Code, Cap. 33, R.E. 2019, the learned counsel argued that this

Court lacked jurisdiction to entertain the matter. Her argument was premised on the reason that the 1st applicant was residing in Kagera, while other applicants were residing in Kenya and that the applicants were carrying business in Kagera.

In conclusion, Ms. Rwechungura urged this Court to grant leave to appeal to the Court of Appeal on the submission that there are arguable grounds to be considered by the Court of Appeal.

Responding, Mr. Hassan was brief that the application lacks merits. He prayed to adopt the counter-affidavit to form part of his submission and urged me not to grant leave to appeal.

When Ms. Rwechungura rose to rejoin, she reiterated her prayer that the leave be granted because the impugned order is tainted with illegality.

I have carefully considered the submissions made by the learned counsel for both parties. I find it apt to state in earnest that, this being an application for leave to appeal, my role is restricted to considering whether the intended ground (s) raises an arguable issue(s) for determination by the Court of Appeal and not to consider the merits of the intended appeal. See for instance, the case of **Victoria Real Estate Development Limited vs**

Tanzania Investment Bank and Three Others, Civil Application No. 225 of 2014 (unreported), where similar position was stated. I am also alive to the fact that the law does not expressly state the factors to be considered for the grant of leave to appeal to the Court of Appeal. However, it is generally settled position that the grant of leave is discretionary but, not automatic. The application for leave is granted when the court is satisfied that the proposed grounds raise arguable issues in the intended appeal. In the case of **British Broadcasting Corporation vs Eric Sikujua Ng'maryo**, Civil Application No. 138 of 2004 (unreported), the Court of Appeal cited with approval its decision in **Rutagatina C. L. vs The Advocates Committee and Another**, Civil Application No. 98 of 2010 (unreported), where it was held that: -

"Needless to say, leave to appeal is not automatic. It is within the discretion of the court to grant or refuse leave. The discretion must, however judiciously exercised and on the materials before the court. As a matter of general principle, leave to appeal will be granted where the grounds of appeal raise issues of general importance or a novel point of law or where the grounds show a prima facie or arguable appeal (see: Buckle v Holmes (1926) ALL ER. 90 at page 91). However, where the grounds of

appeal are frivolous, vexatious or useless or hypothetical, no leave will be granted."

In view of the foregoing position of law, the main issue for this Court's consideration is whether the applicants have raised grounds which pass the threshold for the grant of leave to appeal. As alluded earlier, the supporting affidavit and submission made by the applicants' counsel suggest the intended grounds to the Court of Appeal are based on illegalities which give rise the following issues: *one*, whether this Court erred in determining the respondents' preliminary objection against the applicants written statement of defence before considering the preliminary objection raised by the applicants; and *two*, whether this Court had jurisdiction to entertain the matter. As stated earlier, at this stage, this Court is not expected to consider whether the complaints are genuine or otherwise. That duty will be exercised by the Court of Appeal at opportune time.

Having scrutinized the above facts deposed in the supporting affidavit, I find that the applicant's complaints raise important points for consideration in the intended appeal before the Court of Appeal. This is when it is considered that this Court extended the time within which to apply for leave to appeal after being convinced that the applicants had demonstrated an

illegality in the impugned order. It follows therefore, the application has passed the threshold for the grant of leave to appeal.

In the final analysis, I hereby allow the application and grant the applicants, leave to appeal to the Court of Appeal. Costs shall follow the event.

DATED at DAR ES SALAAM this 10th day June, 2022.



A handwritten signature in black ink, appearing to be "S.E. Kisanya".

S.E. Kisanya
JUDGE