

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB- REGISTRY OF MWANZA
AT MWANZA**

MISCELLANEOUS CIVIL APPLICATION NO.69 OF 2022

(Arising from Civil Case No. 19 of 2021 of High Court of Tanzania Mwanza)

REV.ASUMWISYE MWAFONGO MWAISABILA.....1ST APPLICANT
REV. BOAZ KAZIBA.....2ND APPLICANT
REV. ROBERT NGAI 3RD APPLICANT
REV. JACOB THOMAS CHACHA 4TH APPLICANT

VERSUS

**THE REGISTERED TRUSTEES OF THE EVANGELISTIC
ASSEMBLIES OF GOD TANZANIA.....RESPONDENT**

RULING

3^d August, 2022

Kahyoza, J.:

This ruling is in respect of an application seeking leave to appeal to the Court of Tanzania. The applicants were aggrieved by the ruling of this Court dismissing the preliminary objection.

A brief background of this matter that, respondents sued the applicants vide Civil Case No. 19/2021 which is still pending. In the course of defending the suit, the applicants raised in the Written statement of defence a preliminary objection with four points that: -

- 1) Owing to paragraph 27 (the jurisdiction clause) and the reading of the entire plaint the court is not vested with jurisdiction to entertain this matter.
- 2) That, the suit contravenes the provisions of Article 19(2) of the constitution of the United Republic of Tanzania 1977 as amended from time to time which ousts the jurisdiction of the court to entertain the same.
- 3) The plaint defective and therefore, incompetent for being improperly verified without disclosing particulars as to what facts are based on deponents own knowledge and what are on belief and whose source of belief.
- 4) In the alternative to the above this suit is *res-subjudice* to Misc. Cause No. 21 of 2020 which is pending the appeal process and Civil Appeal No.17 of 2020

When this application came for hearing the respondents were absent and the applicants' advocate did not appear in person he requested Mr. Ishengoma advocate to hold his brief. After the Court made it clear that it was not going to adjourn the hearing to another date, Mr. Ishengoma prayed for a short adjournment to obtain permission to proceed and prepare for hearing. The Court granted the prayer and adjourned the hearing up to 02.30 pm the same day. The hearing resumed as fixed in the afternoon. The respondents did not appear, the third applicant

appeared and Mr. Ishengoma advocate held Mr. Robert's brief for all applicants with instructions to proceed.

The applicants' advocate prayed to adopt the affidavit in support of the application. He submitted that he was praying for leave to appeal against the decision of this Court which dismissed a preliminary objection. He submitted that the application was based on paragraph six of the affidavit.

Shortly after a brief submission from the applicants' advocate, I entertained doubts if the order was appealable. If the order is not appealable it would be ridiculous to hear an application for leave to appeal. Before we deep-dived in the determination of the application, I invited the applicants' advocate to address me on the issue whether the order dismissing a preliminary objection is appealable to the Court of Appeal.

Briefly, the facts from which the current application emanates, are that; this Court (*Itemba, J.*) found no merit on the preliminary objection the applicants had raised, overruled it and ordered the suit to proceed for hearing on merit. This Court's order did not amuse the applicants. The applicant wanted to appeal to the Court of Appeal of Tanzania, hence, they

instituted the application praying for leave to appeal to the Court of Tanzania.

Is the order dismissing a preliminary objection appealable to the Court of Appeal?

The applicants' advocate submitted that the order of this court dismissing the preliminary objection was appealable. He argued that on one of the points of law the applicants raised was the issue of that court tacks jurisdiction. He contended that without authority that, a decision which touches jurisdiction of the Court even if it arises from a preliminary or an interlocutory order is appealable. He emphasised that it was unsafe to proceed with the determination of the main suit before the issue of jurisdiction is determined. He argued that in his opinion, a court to proceed with the trial of the main suit before the issue of jurisdiction is determined is unlawful. The defects arising from such a procedural mishap was apparent on the face or record, which rendered the decision illegal.

To support his contention that the issue of jurisdiction was of paramount importance, the applicants advocate cited the case of **Tanzania China Friendship Textile v. Our Lady of Usambara Sisters** [2006] TLR. 70, where the Court of Appeal held that the issue of

jurisdiction was paramount it must be ascertained prior to determination of the main suit.

I totally agree with the applicants' advocate that the issue of jurisdiction is paramount and that it must be determined before a court sets to determine the main suit. The applicants raised the issue that this Court had no jurisdiction to determine the suit. This Court (*Itemba, J.*) heard the arguments and found that the court had jurisdiction. Thus, this Court did determine the issue of jurisdiction. The principle in the case of Tanzania **China Friendship Textile** did not imply that once the issue of a court lacking jurisdiction is raised it must be upheld, but it states that it must be determined. The Court considered the preliminary objection and found no merit. I find therefore, that the issue of jurisdiction was determined. Had the court not determined the issue of jurisdiction, the applicants would not have a cause of lodging an appeal. The Court dismissed the preliminary objection aggrieving the applicants.

I am alive of this Court's duty at this stage, which is to find out whether the applicants' intended appeal exhibits on prima facie, grounds of appeal, which merit serious judicial consideration. See the decision of the defunct East African Court of Appeal in **Sanga Bay Estates Ltd & Others**

Vs. Dresdner Bank (1971) EA 17. This Court is also required to find out if there is good reason, normally on a point of law or on point of public importance, that calls for Court of Appeal's intervention. See the decision in **Rutagatina CL v. the Advocates Committee and Clavery Mtindo Ngalapa** Civ. Application 98/2010 (CAT unreported).

It is beyond dispute that no appeal lies against any interlocutory order. This position is provided under section 5(2) of the Appellate Jurisdiction Act, [Cap. 141 R.E. 2019] (**AJA**). It states-

5.-(1) N/A

(2) *Notwithstanding the provisions of subsection (1)-*

(a) N/A

(b) N/A

(c) N/A

(d) no appeal or application for revision shall lie against or be made in respect of any preliminary or interlocutory decision or order of the High Court unless such decision or order has the effect of finally determining the suit. (emphasis added)

It is clear as daylight that if an order sought to be appealed against is a preliminary order that order is not appealable, thus, party cannot seek to be granted leave to appeal. I hold a position that once an order is not appealable it cannot raise grounds of appeal, which merit serious judicial

consideration. The issue is whether the order sought to be appealed against is a preliminary or an interlocutory order. An interlocutory order as defined by Halsbury's Laws of England (4th Ed.) vol. 26 para. 506 is-

*"an order which does not deal with the final rights of the parties, but either (1) is made before judgment, and **gives no final decision on the matters in dispute**, but is merely on a matter of procedure; or (2) is made after judgment, and merely directs how the declarations of right already given in the final judgment are to be worked out, is termed interlocutory."* (emphasis is added).

The catch words in that definition is that interlocutory order or decision **gives no final decision on the matters in dispute**. The decision or order subject of appeal did not determine the rights of the parties or close the doors to any of the parties. It is therefore, not final and conclusive. The Court of Appeal also considered what is meant by the term final and conclusive in **University of Dar es Salaam Vs Silvester Cyprian & 210 Others** [1998] TLR 175 where it cited with approval the definition by John B. Saunder in work titled "**Words and Phrases Legally Defined**", 2nd Ed. Vol. 3 at page 82 as follows-

*"These applications only are considered interlocutory which [do] **not decide the rights of parties**, but are made for the purpose*

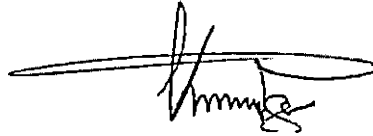
of keeping things in status quo till the rights can be decided,” (emphasis added)

The most common tests applied to determine whether an order is interlocutory or otherwise in Common Law Jurisdictions, from legal authorities are three namely, **nature of order test**, **application test** and **substantive matter test**. The Court of Appeal in the case of **Tanzania Motor Services Ltd and Another v. Mehar Sing t/a Thaker Singh**, Civil Appeal No. 115 of 2005 (CAT unreported) by quoting Lord Alverston in **Bozson v Altrinchman Urban District Council** [1903]1 KB 574 at 548, thus-

It seems to me that the real test for determining this question ought to be this: Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order”

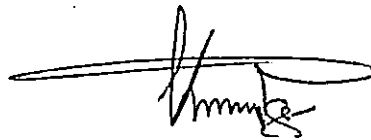
It is undisputable that the decision or order dismissing the preliminary objection did not determine parties’ rights conclusively. It is therefore, a ruling on interlocutory or preliminary order which is not appealable in terms of section 5 (2) of the **AJA**. Consequently, this Court cannot deploy its time to hear on merit an application for leave to appeal against unappealable order.

In the end, I find that the application is incompetent for being instituted in disregard to the clear provisions of section 5(2) of the **AJA**. Consequently, I strike out the application with costs.



J. R. Kahyoza
JUDGE
3/8/2022

Court: Ruling delivered in the presence of the third applicant and Mr. Ishengma advocate for all applicants. The respondents are absent. B/C Ms. Jackline (RMA) present.



J. R. Kahyoza
JUDGE
3/8/2022

