

**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. 226 OF 2022

DB SHAPRIYA & COMPANY LIMITED APPLICANT

VERSUS

AMARACHI INVESTMENT CO. LTD RESPONDENT

(Arising from Civil Appeal No. 94 of 2021)

RULING

11th and 29th July, 2022

KISANYA, J.:

DB Shapriya & Company Limited has filed an application for leave to appeal to the Court of Appeal against the judgment and decree of this Court (Masabo, J.) dated 29th April, 2022 in Civil Appeal No. 94 of 2021. The application is preferred under section 5 (1) (c) of the Appellate Jurisdiction Act [Cap. 11, R.E. 2019] and rule 45(a) of the Court Rules, 1979 and is supported by an affidavit of the applicant's counsel one, Mr. Roman S. L. Masumbuko. On the other side, the respondent contested the application vide the counter-affidavit sworn by their advocate, Julius Lazaro Manjeka.

The underlying dispute between the parties is the contract for supply of building materials. The respondent in this matter, sued the applicant before the Resident Magistrate's Court of Dar es Salaam at Kisutu for breach of supply of

building materials contract. The respondent's case was based on the fact that, at the request of the applicant, she (the respondent) supplied building materials at the site of Yara Tanzania and that the applicant refused to pay upon receipt of the order. The applicant disputed the respondent's claim on the reason that the person responsible for the payment of the purchase price was Yara Tanzania who owns the site. The trial court held the view that the applicant and respondent had no contractual relationship and thus, dismissed the respondent's suit with costs.

Irked by the said decision, the respondent appealed to this Court on the grounds to the effect that, the trial court erroneously found that there was no contractual relationship between the parties; the trial court erroneously raised a new issue on delivery notes; the trial magistrate erred in holding that the respondent did not prove her case; and the trial court failed to evaluate the evidence and it did not give reasons for its findings.

After hearing both parties, this Court found merit in the appeal by the respondent. It went on reversing the decision of the trial court. The applicant was ordered, among other, to pay the respondent Tshs 48,167,494.8 being the outstanding price of the supplied materials.

The applicant was aggrieved by this Court's decision. Upon filing the notice of appeal to the Court, she lodged the present application for leave to appeal to

the Court of Appeal. The application is grounded on the following points deposed in paragraph 7 of the supporting affidavit:-

- a. That the High Court Judge erred in law by holding that it was the Applicant who was responsible to furnish consideration that there was no contractual relationship between the Appellant and Respondent.*
- b. That the High Court erred in law by holding that the contract had been proved after failing to point out the terms of contract. The parties never even agreed on the price of the goods.*
- c. That the High Court Judge erred in law by omitting to properly interpret issues before her determination as they relate to the law of evidence specifically on sufficient of proof on alleged fact.*
- d. That the High Court erred in law by holding that the burden of proof shifted to the Appellant while it was the duty of the Respondent to prove her case beyond the required standards of law.*
- e. That the High Court erred in law by wrongly applying the principles of the laws of contract on consideration and wrongly assumed that it was the Respondent (Applicant herein) who was responsible to furnish consideration despite the fact that all payments were executed by the Applicant's client (YARA Tanzania Limited) and the Respondent.*
- f. That the High Court Judge wrongly granted the specific damage and commercial interest without any proof as required by law.*

When the application was called on for hearing, the applicant was represented by Mr. Frateline Mnali, learned advocate while the respondent enjoyed the legal services of Mr. Julius Manjeka, learned advocate.

In his submission in chief, Mr. Mnali prayed to adopt the supporting affidavit to form part of his submission. He further submitted that the grounds deposed in paragraphs 7 of the supporting affidavit raise arguable issues worth of consideration. The learned counsel fortified his submission by making reference to the case of **Ms Airport Properties Ltd vs the Registrar of Titles and Another**, Civil Application No. 389/17 of 2020. He then prayed that the application be granted. It was his considered view that if the application is not granted the applicant will be deprived of her right to appeal enshrined under Article 13(6) of the Constitution.

In his rebuttal submission, Mr. Manjeka began by praying to adopt the counter-affidavit as part of his submission. The learned counsel submitted that leave to appeal is not automatic. It was his submission that leave to appeal is granted when the Court is satisfied that the proposed grounds raise issues of general importance or whether the grounds shows that there is an arguable issue of law to be determined by the Court. His submission was supported by the case of **Harban Haji Mosi and Another vs Omary Hilary and Another** [2001] TLR 409.

Mr. Manjeka further argued that the proposed ground must stand a reasonable chance of success. He went on to contend that the applicant admitted the respondent's claim and that her defence was to the effect that the payment would have been made by Yara Tanzania. That being the case, the learned counsel submitted that there is no good cause as to why the respondent was not paid. He was of the view that the applicant was using the court to delay the payment. Thus, Mr. Manjeka invited the Court to dismiss the application with costs. In alternative, he asked the Court to make an order to security.

Rejoining, Mr. Mnali reiterated that in application for leave to appeal the Court is duty bound to consider whether there are arguable grounds of appeal. He was of the considered view that there is a danger of discussing the merits of the intended appeal in the event the court decides to consider whether the intended appeal stands chances of success. As regards the prayer for an order as to security, the learned counsel argued that this is not application for stay of execution.

Basing on the chamber summons, supporting affidavit, counter affidavit and the submissions made for and against the application, the issue for my determination is simply whether the application is meritorious.

Before I venture into answering the above posed issue, I find it appropriate to restate the position of law on the matter at hand. It is note worth that the decision subject to this application was given by this Court in the exercise of its

appellate jurisdiction against the decision of the Resident Magistrate Court. Therefore, in terms of section 5(1)(c) of AJA, an appeal against the said decision to the Court of Appeal with the leave of the High Court or of the Court of Appeal.

As rightly submitted by the counsel for the parties, the law is settled that leave to appeal is granted upon the court being satisfied that the proposed grounds of appeal raise issues of general importance or a novel point of law or where the grounds exhibit a prima facie case or arguable appeal. This position was stated in the case of **Ms Airport Properties Ltd** (supra) in which the Court of Appeal held:-

"It is trite law that in an application for leave the applicant must demonstrate that there are some arguable points of law or matters of general importance emanating from the impugned decision to convince the Court exercise its judicious discretion to grant it."

The Court of Appeal went holding that:

*Therefore, though the law does not provide for explicit factors which should be taken into account in deciding whether to grant leave to appeal (see **Wambele Mtamwa Shamte v. Asha Juma**, Civil Application No. 45 of 1999 (unreported), what is crucially important is a determination whether there are prima facie grounds meriting an appeal to this Court or whether based on the material put forward by the applicant in the notice of motion and the supporting*

affidavit there exist a legal point that deserve consideration by the Court."

Being guided by the above stated position, the question is whether the applicant has demonstrated prima facie grounds to be considered by the Court or whether the supporting affidavit shows legal point worth of determination by the Court of Appeal.

Reading from the grounds deposed in the supporting affidavit, I agree with Mr. Mnali that the same raises arguable issues or legal points which deserved consideration by the Court of Appeal. This is also when it is considered that all points stem from the decision of this Court and the trial court. In that regard, the grounds advanced in the supporting affidavit cannot be held to be frivolous or useless.

I have also considered Mr. Manjeka's argument that the applicant was required to demonstrate how the appeal stands chances of success. As indicated earlier, he relied on the case of **Harban Haji Mosi and Another** when the Court of Appeal stated that:

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

Flowing from the above provision, it is clear that the issue whether the intended appeal stands chances of success is not the sole ground for determination of the application for leave to appeal. Further to this, I agree with the applicant's counsel that such argument requires this Court to consider the evidence and the merits of the intended ground of appeal. The law is now settled that at leave stage, the court is not required to rehear the appeal or consider substantive issues to be dealt with by the Court of Appeal. See the case of **Ms Airport Properties Ltd** (supra) -where it was that:-

"We unreservedly hold this opinion cognizant of the fact that at this stage, the Court should concern itself with the determination as to whether the proposed grounds of appeal raises points of law or issues of public importance without considering substantive issues that are to be dealt by the appellate court."

In another case of **Hamisi Mdida and Another vs The Registered Trustees of Islamic Foundation**, Civil Appeal No. 232 of 2018 (unreported) this Court considered one of the proposed ground of appeal and found it unmerited for the consideration of the Court of Appeal. When the matter reached the Court of Appeal, it was underscored that:-

"It is our firm view that the reasoning and conclusion above are evidently faulty. First and foremost, we agree with Mr. Kassim that the learned Judge appears to have gone too far to adjudicate the first proposed issue on its merits as if he

was rehearing the appeal which Mallaba, J. had decided. He did not have to revisit the evidence on the trial record and express his impression on the matter.”

In the light of the decided cases, it is clear that this Court has no mandate to determine on the merits of the intended grounds of appeal. As indicated earlier, I am satisfied that on the face of the record that the proposed grounds are arguable. They are centered on the grounds that there was no contract between the applicant and respondent and thus, worthy of consideration by the Court of Appeal.

In the upshot of the above, this application is found meritorious and granted. Accordingly, leave to appeal to the Court of Appeal is hereby granted. It is further ordered that costs shall follow the event.

DATED at DAR ES SALAAM this 29th day July, 2022.



S.E. Kisanya
JUDGE