

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM SUB DISTRICT REGISTRY)**

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 120 OF 2022

*(Originating from the Judgment of the High Court in
Civil Appeal No. 135 of 2020, dated 23rd February, 2022)*

LAKE CEMENT LIMITED..... APPLICANT

VERSUS

WAMILUMA ENTERPRISES LIMITED.....RESPONDENT

RULING

Date of Last Order: 12/07/2022

Date of Ruling: 12/08/2022

E.E. KAKOLAKI, J.

By way of Chamber Summons made under *section 5(1) (c)* of the *Appellate, Jurisdiction Act Cap 141 R.E 2019* (the AJA), the Applicant is seeking for leave to appeal to the Court of Appeal against the decision of the High Court of Tanzania Dar es Salaam District Sub Registry in Civil Appeal No 235 of 2020. Further to that he prays for costs of this application and any other reliefs this Court deems fit to grant.

The Chamber Summons has been taken at the instance of the applicant supported by an affidavit of George Vedasto, applicant counsel. Gathered from the affidavit, the applicant was the appellant in Civil Appeal No. 235 of

2020, decided by this Court on 23rd February, 2022 in favour of the respondent. Being aggrieved, the applicant through her advocate lodged the Notice of Appeal and prepared a draft of memorandum of appeal carrying grounds intended to be placed before the apex Court for final examination and determination of his grievances against this Court's decision. Responding to the application the respondent filed her counter affidavit duly sworn by one Tazan Keneth Mwaiteleke, respondent's advocate contesting its merit.

On 12/07/2022 when the application was placed for hearing orally, both parties were represented. Mr. Detric Mwesigwa appeared for the applicant, while respondent hired the services of Tazan K Mwaiteleke, learned counsel.

Submitting in support of the application Mr. Mwesigwa prefaced his submission with a prayer to adopt the affidavit and its annexed documents and argued that, section 5 (1) (c) of AJA in which this application is preferred does not provide what matters should the court consider to grant or withhold the leave as the guidelines are well elaborated in the case laws. He cited to the Court the case of **Harban Haji Moshi and Another Vs. Omary Hillary Seif** (2001) TLR 409 at 414, in which the Court of Appeal stated that, leave is granted where the proposed appeal stands reasonable chances of success

or where but not necessary, the proceedings as whole reveals such disturbing features as to require the guidance of the Court of Appeal.

He submitted that, at paragraph 4 of the affidavit, the applicant states his intention to appeal to the court of appeal by annexing the draft of memorandum of appeal, which shows the possible grounds of appeal being one of the factors to be considered for granting leave to appeal to the apex court as it was held in the case of **Ngerengere Estate Company Ltd Vs. Edna William Sitta**, Land Application No. 98 of 2014 (HC-unreported). He argued that, the draft memorandum of appeal reveals chances of success of the appeal and disturbing features as discussed in the case of **Harban Haji Mosi** (supra). He further submitted that, in the first ground, the applicant is complaining that the High Court erred in law for not determining the issue as to whether Exhibit D2 exists or not. According to Mr. Mwesigwa, this issue was not determined as observed at page 9 of the High Court Judgment, thus applicant wants to ask the Court of Appeal to revisit the evidence and determine existence of exhibit D2 which contained several delivery notices as the high court did not decide on that as a real issue.

Mr. Mwesigwa went on submitting on the second ground by faulting the High Court's decision to the effect that, the appellant did not prove forgery without

considering all the appellant evidence including exhibit D2 and D4. In view of Mr. Mwesigwa, had the court considered all this evidence, it would have come up with different or contrary conclusion. He referred the Court to the case of **Deemay Dhat & Others Vs. R** (2005) TLR 132 (CAT), where the Court of Appeal gave guidance on how to treat and consider the evidence tendered in court. He rested his submission by requesting the Court to grant the prayer in the application.

On adverse response, Mr. Mwaiteleke who appeared for the respondent resisted the application. He started by seeking leave of the court to adopt the counter affidavit so as to form party of his submission. He then argued that, the submission is unmerited as it neither disclose part of law nor disturbing features worth consideration by the Court of Appeal. He argued that, the intended appeal being the second appeal ought to disclose point of law and not analysis of evidence as it is the first appellate court only which is entitled to evaluate evidence and come up with its conclusion as stated in the case of **Martha Michael Weja Vs. AG and 3 Others** (1982) TLR 35 at page 43. He said, looking at the intended grounds of appeal marked as exhibit AA3 in the affidavit in support of the application all of them intends to invite the Court of Appeal to re-evaluate the evidence. He was of the view

that, in the second appeal the appellate court cannot re-evaluate the evidence as that duty was well discharged by this court when re-evaluated the evidence and considered to have no merit. Mr.Mwaiteleke cited the case of **Said Ramadhani Mnyanga Vs. Abdallah Salehe** (1996) TLR 74, **Simon Kabaka Daniel Vs. Mwita Marwa Nyang'anyi and 11 others** (1989) TLR 64 , **Tahera Sumiji Vs. NHC**, Land case No. 59 of 2006 (HC) page 5, and **Registered Trustee of Shadhiluly Lyashurtiy Vs. Mahafudhi Salum Omarry Bin Tahar**, Misc. Civil Application No. 19 of 2022, where the court held that, the application must raise a contentious issue of law or disclose disturbing features worth consideration by the Court of Appeal. To him, the grounds of appeal stated in the draft is the replica of the grounds of appeal stated during the appeal in this court hence there is no point of law and there is neither novel point of law involved nor prima facie arguable appeal, warranting grant of leave for consideration by the apex court. In view of Mr. Mwaiteleke, ground No. 1 which refers to existence of exhibit D2 was dismissed by this court, after its consideration whether forgery was proved by the applicant before the trial court and satisfied hence ruled that it was unproved, thus dismissal of the appeal. As regard to exhibit D4 he argued the same was also discussed at length to page 7 of the

Judgment and that, as all four grounds intend to invite the Court of Appeal to re-evaluate the evidence, the practice which is barred by the law, the application is bound to fail as there is no contentious issue raised by the applicant worth consideration by the Court of Appeal. He prayed the Court to dismiss this application with cost.

In a short rejoinder, Mr. Mwesigwa submitted that; the application contains contentious arguable grounds of appeal since it is only the Court of Appeal which has powers to call and examine proceedings of the lower court and evaluate the correctness and legality of any findings of the court. He referred the case of **Ngerengere** at page 3 where the court held that, leave can be granted if it is shown that, the intended appeal has some merit whether factual or legal, and that is why the court is left with discretionary powers whether to grant or not. He thus pray the court to grant the application.

I have dispassionately considered rival arguments by both parties' counsel and thoroughly perused the affidavit, counter affidavit and the annexures as well as the law applicable under section 5 (1) (c) of AJA that requires appeals to the Court of Appeal from this Court against Decree, Order or Judgment of the High Court to be with the leave of High Court or the Court of Appeal itself. It is evident to me that, this Court is seized with necessary powers to

consider the application and grant the applicant with the sought prayer for leave to appeal to the Court of Appeal. The rationale behind such requirement for leave no doubt is to vest this Court with the duty to filter out frivolous and vexatious appeals and in so doing, spare the Court of Appeal from the phantom of unmerited matters and enable it to give adequate attention to cases of true Public nature and other serious matter. See the case of **Harban Haji Mosi Vs. Omari Hilal seif and Another** Civil Reference No. 19 of 1997 (Unreported). Ordinarily though discretionary, leave is not automatically granted as such discretion must be exercised judiciously depending on the materials put before the court by the applicant to enable it exercise its discretion not only judiciously but also with great circumspection. Further, an application like the one at hand can only be granted if there is good reason to do so, more often sufficient point(s) of law or such disturbing features as to call for attention of the higher court. It is therefore a settled principle and thus conditional precedent for the applicant to demonstrate that, there is arguable appeal or novel points of law or public importance or that, the grounds of appeal raise issues of general importance worth consideration by the apex court. This sound principle of the law was expounded in the case **British Broadcasting Corporation Vs. Erick**

Sikujua Ngamaryo, Civil Application No 133 of 2004 (Unreported) where it was stated”;

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 be judiciously exercised on the materials before the Court. As a matter of general principle leave to Appeal will be granted where the grounds of Appeal raised issue of general importance or novel point of law or where the grounds show a primacies or arguable Appeal. However, where the grounds of appeal are frivolous, vexation or useless or hypothetical no leave will be granted.

Similarly in the case of **Rutagatina C. L Vs. The Advocate Committee and Another**, Civil Application No.98 of 2010 (unreported), the Court of Appeal stated that:

*An application for leave is usually granted if there is good reason, normally on a point of law or point of public importance that calls for this Court's intervention. Indeed, on the aspect of leave to appeal, the underlying principle was well stated by this Court in **Harban Haji Mosi and Another v Omar Hilal Seif and Another**, Civil Ref.No.19 of 1997 (unreported) thus: Leave is grantable where the proposed appeal stands reasonable chances of success or where, but not necessarily, the proceedings as a whole, reveal such disturbing features as*

to require the guidance of the Court of Appeal. The purpose of the provision is, therefore, to spare the Court the spectre of unmeriting matters and to enable it to give adequate attention to cases of true public importance.

Guided by the above principles of law, the issue which this court is called to determine *is whether, the applicant has advanced novel points of law or arguable appeal or issues of sufficient importance worth determination by the Court of appeal.*

A glance of an eye to the applicant's affidavit has unearthed nothing material and therefore prove to this court's satisfaction that, the same does not contain even a single paragraph seeking to explain or advance any legal issue or novel points of law calling for determination by the Court of Appeal apart from merely annexing the memorandum of appeal carrying four (4) grounds of appeal which again do not contain the said requisite grounds or factors for the grant of the leave to appeal. Mr. Mwesigwa tried to convince this Court that, he had prepared the draft of the memorandum of appeal in which the grounds therein disclose arguable appeal, however upon thorough scrutiny of the same, I was unable to come across any ground by the applicant raising arguable appeal or issue of sufficient importance or disturbing features worth determination by the apex court. Leave is not

granted on mere contention that there is arguable appeal as always there would be arguable appeal. This Court is therefore duty bound to examine whether the same exist or not as it was held in the case of **Gaudensia Mazungu Vs. The IDM Mzumbe**, Civil Application No. 94 of 1999 (CAT-unreported) where the Court of Appeal observed that:

“Again, leave is not granted because there is an arguable appeal. There is always an arguable appeal. What is crucially important is whether there are prima facie grounds meriting an appeal to this court.”

In discharging the above insisted Court duty, I have thoroughly perused the judgment sought to be challenged by the applicant visa vie the grounds advanced in her draft of memorandum of appeal and convinced that, no prima facie grounds meriting an appeal to this court have been established by the applicant as insisted in **Gaudensia Mazungu** (supra). In arriving to such conclusion, I am alive to the principle that, this court’s duty while entertaining applications of this nature is not to determine the merit or demerits of the appeal but rather *consider whether the proposed issues are embraced in conditions set in the case of **British Broadcasting Corporation** (supra)*. See the case of **Bulyankulu Gold Mine Limited**

and 2 Others Vs. Petrolube (T) Limited, Civil Application No. 364/16 of 2017 (CAT-unreported).

In light of the above principle I do not, with due respect, agree with Mr. Mwesigwa's submission as submitted above that, the issue as to whether exhibit D2 exists or not was not addressed by this court hence an arguable issue before the apex court. I therefore shoulder up with Mr. Mwaiteleke's proposition that, the applicant failed to advance any novel point of law or arguable issues, worth consideration by the Court of Appeal nor did she stage any disturbing features to require intervention of the Court of Appeal as stated in various cases, one of which is the case of **National Bank of Commerce Vs. Maisha Musa Uledi** (*Life Business Centre*), Civil Application No. 410/7 of 2019, where the Court of Appeal when deliberating on similar issue to the one at hand, had this to say:

In application for Leave to Appeal, what is required of the Court hearing such an application is to determine whether or not the decision sought to be appealed against raises legal points which are worth consideration by the Court of Appeal.

In the upshot since the applicant has failed to meet the established principle for the grant of the sought prayer, I dismiss this application for want of merit with costs.

It is so ordered.

DATED at Dar es Salaam this 12th day of August, 2022



E. E. KAKOLAKI

JUDGE

12/08/2022.

This Ruling has been delivered at Dar es Salaam today 12th day of August, 2022 in the presence of Mr. Dertick Mwesigwa, advocate for the Applicant, Mr. Tazan Mwaiteleke, advocate for the Respondent and Ms. Asha Livanga, Court clerk.

Right of Appeal explained.



E. E. KAKOLAKI

JUDGE

12/08/2022.