IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM SUB DISTRICT REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 558 OF 2021

(Arising from the judgment and Decree of the High Court in Civil Appeal No.259 of 2020 before **Hon.Y. Mlyambina, J** delivered on 15th day of September 2020)

WAUNGWANA AUCTION MART .....1ST APPLICANT

NELSON JUSTINE MBILINYI.....2ND APPLICANT

MOSES ZUBERI SHABANI.....3RD APPLICANT

VERSUS

EFC TANZANIA LIMITED.....RESPONDENT

RULING

Date of last order: 27th July, 2022

Date of ruling: 12th August, 2022

E.E.KAKOLAKI J.

In the District Court of Kinondoni vide Civil Case No. 181 of 2019, the respondent successfully sued the applicants for breach of contract for debt collection from her client who had taken loan from her. The applicants were on 01/07/2017 contracted to sell a motor vehicle with registration No.T.493 DKN, Make Mitsubishi Fighter not below Tshs. 43,000,000/-, being the security for loan advanced to the respondent's client in which he had failed to repay. It appears the appellants after seizing the said motor vehicle, took

it to their yard instead of auctioning it until sometime in 2019, when the same was noticed by the respondent to be not roadworthy as some spare parts were removed. When demanded to make good the omission by settling the amount which was to be realized from it, the applicants ignored the call as a result the respondent sued them for recovery of the said loss of Tshs. 43,000,000/-, general damages and costs of the suit. After full hearing of both parties' cases, the trial court entered judgment in favour of the respondent, ordering the applicants to pay the respondent Tshs. 43,000,000/- as specific damages, Tshs. 20,000,000/- as general damages and costs of the suit. Discontented the applicants by way of appeal unsuccessfully challenged the said judgment before this Court in Civil Appeal No. 259 of 2020, the appeal which was dismissed on 17/09/2021. Still irked with the decision of this Court, the applicants on 01/10/2021 lodged the notice of Appeal to the Court of Appeal, followed by the present application seeking leave of this Court to appeal to the Court of Appeal.

The application is preferred under section 5(1)(c) of the Appellate Jurisdiction Act [Cap. 141, R.E. 2019] (the AJA) and section 95 of the Civil Procedure code, supported by an affidavit duly sworn by one Rogers Edward Mbonimpa, the applicants' advocate. On the other side, the same was

vehemently challenged by the respondent vide a counter-affidavit deposed by Adam Kessy, the principal officer of the respondent.

When the application came up for hearing on 21st June, 2022, applicants were represented by Mr. Rogers E. Mbonimpa, learned advocate who was unable to proceed with hearing for not feeling well as a result he prayed for the matter to proceed by way of written submissions, the prayer which was cordially granted. The respondent was represented by Mr. Cleophace James, learned advocate.

This Court under section 5(1)(c) of AJA is seized with powers to entertain and grant the prayers sought by the applicant in this application. It is however the law that, leave to appeal to the Court of Appeal is not granted automatically as the applicant must provide the Court with sufficient materials to warranting exercise of its discretion whether to grant or not. The same is granted upon the Court establishing that, the materials placed before it discloses arguable issues or raise issues of general importance or a novel point of law or that, the procedure as a whole sought to be challenged reveal such disturbing features as to require guidance of the Court of Appeal. Leave will not be granted where the application is found to be vexatious, useless or frivolous. See the cases of **Harban Haji Mosi and Shauri Haji**

Mosi Vs. Omari Hilal Seif and Another, [2001] TLR 409, **British Broadcasting Corporation Vs. Eric Sikujua Ng'imaryo**, Civil Application No. 133 of 2004 (CAT-unreported) and **Rutagatina C.I Vs. The Advocate Committee and Clavery Mtindo Ngalapa**, Civil Application No. 98 of 2010 (CAT-unreported). In the case of **British Broadcasting Corporation** (supra) the Court of Appeal stated thus:

> *"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 raise issues of general importance or a novel point of law or where the grounds have a prima facie of arguable appeal. However, where the grounds of appeal are frivolous. Vexatious or useless or hypothetical, no leave will be granted."*

Similarly the case of **Rutagatina C.I (supra)** summarised it all when stated thus:

> *"An application for leave is usually granted if there is good reason, normally on point of law or on a point of importance, that calls for this Court' intervention."*

In this application the applicant raised four grounds intended to be placed before the Court of Appeal for determination upon grant of leave by this Court. **One**, that, the learned Judge erred in fact and law to confirm the award of specific damage which was not justified or proved by the respondent. **Second**, the learned Judge erred in dismissing the appeal for not considering the fact that the award of Tshs. 20,000,000/- in the decree as compensation for breach of contract totally disagreed with the judgment. **Third**, the learned Judge erred in fact and law for not considering that, there was no evidence to proving the cost of the motor vehicle to be Tshs. 43,000,000/-. And **fourth**, that the learned Judge erred in law and fact for endorsing the trial magistrate's finding that, the 2nd and 3rd applicant were not in breach of contract.

Now the issue is whether the raised grounds of appeal by the appellant meet the conditions set out in the case of **British Broadcasting Corporation** (supra). Before I venture into determination of the said grounds of appeal, I find it worth to note that, it is not the duty of this court to determine the merits or demerits of the grounds of appeal raised by the applicant when seeking leave, rather to see whether they raised arguable appeal or not or they raise issues of general importance or a novel point of law. See the case

of **Bulyankulu Gold Mine Limited and 2 Others Vs. Petrolube** (T) Limited, Civil Application No. 364/16 of 2017 (CAT-unreported) and **Jireyes Nestory Mutalemwa Vs. Ngorongoro Conservation Area Authority**, Application No.154 Of 2016 (Unreported). In the case of **Jireyes Nestory Mutalemwa** the Court of Appeal held that:

> *The duty of the court at this stage is to confine itself to the determination of whether the proposed grounds raise an arguable issue(s) before the court in the event leave is granted. It is for this reason the court brushed away the requirement to show the appeal stands better chances of success a factor to be considered for the grant of leave to appeal. It is logical that holding so at this stage amounts to prejudging the merits of the appeal.*

Having thoroughly perused and considered the submission by both parties as well as the pleadings, I wish to address first the 1st and 3rd grounds jointly as they relate and the 2nd and 4th separately. To start with the 1st and 3rd grounds it is the applicants' complaint in which Mr. Mbonimpa submits that, the award of Tshs. 43,000,000/- as specific damages was neither justified nor proved by the respondent as mere tendering of the contract between the parties was not a proof of loss incurred by the respondent. Mr. James is of the contrary view for submitting that, the same was proved through

evidence of PW3 and exhibit PE2 as the said evidence was never challenged by the applicants. I find arguable issue in these two grounds. It is the requirement of the law that specific damage must be pleaded and strictly proved (See the case **of Anthony Ngoo and Another v.Kitinda Kimaro**,Civil Appeal No.25 of 2014 (CAT-unreported).What was the cause of action in the trial court was the allegations on the breach of contract where the respondent alleged that applicants removed the spare parts from the vehicle which was seized by them under her instructions. The applicants were instructed to sale the same for Tshs.43,000,000/=but they did not sell it rather they abandon it. That being the case the issue therefore is whether the mere instructions to sell it for TSZ 43,000,000/= is enough evidence to justify the award of TZS 43,000,000/=as specific damages as required by the law? I therefore approve the same as one of the grounds of appeal.

As to the second ground, it is Mr. Mbonimpa's submission that the award of compensation of Tshs. 20,000,000/- to the respondent as shown in the decree contravenes the provisions of Order XX Rule 6(1) of the Civil Procedure Code, [Cap. 33 R.E 2019] (the CPC) as the decree does not agree with the judgment which awarded the same amount as general damages. Mr. James in his response argues that the same is a clerical error which can

be rectified by the trial court upon request of either party as held by this Court when dismissing the complaint on the same ground. I agree with James that that the complained disagreement between the decree and judgement can be rectified by the trial court upon request of either party in this matter. However the issue here is whether such disagreement of the decree with the judgment on the award of Tshs. 20,000,000 to the respondent raises a point of law or arguable appeal. In my humble opinion it does not as there is always arguable appeal. And leave is not granted because there is arguable appeal as the applicant has to demonstrate that there is prima facie ground meriting the appeal to the higher court. See 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."* (Emphasis added)

Applying the above cited principle to the facts in the present ground, I find the complaint of disagreement between the decree and judgment by the applicants does not raise a prima facie ground meriting the appeal before the Court of Appeal. I so hold for one good uncontroverted reason that, the

complained disagreement being a clerical error can be rectified by the trial court upon being move by either party including the appellants themselves, but they did not find it important so do even before filing their appeal to this Court. In other words the ground is self-defeating. It is for that reason I find the same to be wanting too.

Lastly is the fourth ground where Mr. Mbonimpa is contending that, the learned Judge erred in law and fact for not faulting the trial court's finding that the 2nd and 3rd applicant were in breach of the contract too while they were not parties to the contract. The learned trial judge disregarded this ground as the same was not canvassed by the applicants and decided on by the trial court, hence could not be raised at the appellate stage. Mr. James had no response to this ground instead he prayed this court to dismiss the application with costs for want of merit. In rejoinder Mr. Mbonimpa had nothing material to add on this ground apart from reiterating his submission in chief and the prayers.

Having considered the submission made by both parties on this ground, I think the same need not detain this Court much as I don't find any arguable issue. I say so as it is the well-established principle of the law that appellate court cannot deal with the issue not raised or pleaded and canvassed at the

trial or lower court. It was held by the Court of Appeal in the case of **Farida and Another v. Domina Kagaruki**, Civil Appeal No. 136 of 2006 (CAT Unreported), that:-

> *"It is the general principle that the appellate court cannot consider or deal with issues that were not canvassed, pleaded and not raised at the lower court."*

In this matter Mr. Mbonimpa apart from insisting that it is an arguable ground of appeal, he does not dispute that the complained ground was not raised or canvassed by parties and decided on by the trial court. It will therefore be absurd to invite the appellate court to deal which the ground contravening the principle of the law governing appeals at the appellate level. I therefore discount the same.

In the upshot, having endorsed one ground of appeal out of the 1st and 3rd grounds raised by the applicants, I find merit in this application and grant leave to the applicants to appeal to the Court of Appeal as sought. The applications is therefore allowed.

I order each party to bear its own costs.

It is so ordered.

DATED at DAR ES SALAAM this 12th day of August 2022.

E. E. KAKOLAKI

JUDGE

12/08/2022.

The Ruling has been delivered at Dar es Salaam today 12th day of August, 2022 in the presence of Mr. Rogers E. Mbonimpa, advocate for the applicants and Mr. Asha Livanga, Court clerk and in the absence of the Respondent.

Right of Appeal explained.

E. E. KAKOLAKI
JUDGE
12/08/2022.