

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

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 125 OF 2022

(Arising from Civil Appeal No. 173 of 2020)

**TANZANIA CIGARETTE PUBLIC LIMITED
COMPANY APPLICANT**

VERSUS

OMARY MOHAMED IBRAHIM..... RESPONDENT

Date of Last Order: 01/07/2022

Date of Ruling: 08/07/2022

R U L I N G

MGONYA, J

This is an Application for Leave to Appeal to the Court of Appeal of Tanzania, as the Applicant **TANZANIA CIGARETTE PUBLIC LIMITED COMPANY** was aggrieved by the Judgment and Decree of the High Court of Tanzania (Dar es Salaam District Registry) at Dar es Salaam dated 25th August, 2021 issued in **Civil Appeal No. 173 of 2020.**

This application is made under **Section 5(1) (c) of the Appellate Jurisdiction Act, [Cap 141 R.E 2019]** and supported by the affidavit of **JACO ARNOLD LUOGA**, the Legal Affairs Associate of the Applicant.

With the leave of the Court, the application was disposed by way of written submissions.

In support of this Application **Ms. Kihampa** the Applicant's learned Counsel argued that there are legal issues that need to be determined by the Court of Appeal. She contended that the legal issues have been stated in paragraph 11 of the Affidavit which state that in the intended Appeal, the Applicant seeks the court of Appeal of Tanzania to determine and consider, among others, the following points:

- i) That the court erred in law in awarding the interest on the decretal sum at a rate of 12% in absence of an express agreement between the parties, contrary to the law.*
- ii) The court erred in law in exercise of its discretion in awarding to the respondent general damages amounting to TZS 50,000,000/-.*

Submitting to the issue whether the issues raised in the intended memorandum have contentious legal points worth the consideration of the Court of Appeal, the Applicant's Counsel is of the view that: On the first ground; that the court erred in law in awarding the interest on the decretal sum of a rate of 12% in absence of an express agreement in writing between the parties, contrary to the law.

On this point, the Counsel submitted that, the record is clear that no express agreement in writing was entered into by the parties before the Judgment of the trial Court was delivered or even after the delivery of the Judgment. Thus is the absence of an express agreement in writing it is legally correct for the applicant to challenge Judgment of the High Court which failed to reduce the interest rate to 7 percent.

Submitting further, it is the Applicant's Counsel view that, the High Court on Appeal was supposed to correct the error made by the trial Court but instead it made a further legal error by reducing the interest rate from **21 percent to 12 percent** in the absence of an express agreement in writing between the parties or a consent judgment.

From the above, it is the Applicant's Counsel that it is their concern this is a legal point worth the attention of the Court of Appeal.

Addressing on the second ground on the assessment of general damages, it is the Applicant's Counsel concern that the point is both a point of law and facts. It was stated that, as much as general damages are awarded on discretion, the assessment of the same and the quantum of general damages is a matter of law. Even the requirement that discretion must be exercised

judiciously is a point of law. As such they submit that the damages offered to the Respondent was in a high side considering the extent of the injury the Respondent incurred. Thus as the issue is a matter of law and facts, it is worth the adjudication by the Higher Court.

The Counsel therefore prayed for the Application to be granted as prayed.

In rebuttable, **Ms. Anna Amon**, the learned Counsel for the Respondent averred that, leave to appeal to the Court of Appeal is not automatic but rather it is subject to the principles and conditions set out by the law in granting or refusing to grant such Application. Submitting to the first point, the Respondent's Counsel contended that the question that the interest rate on the decretal sum is contrary to the law and that there is no express agreement on the 12% as awarded by the court, is an assertion which is misleading. It was submitted that this point was raised at the first appeal and it is reflected under page 3 of the judgment of appeal. Further, that the Court went further and considered the submission by the Respondent at page 4 of the Judgment of appeal where the same was absolutely not objected or contended by the Applicant. Moreover, at page 5 of the Judgment of the High Court, it is observed that the Respondent conceded to the

submission of the Applicant and prayed the interest to be lowered to **12%** as required by the law.

Submitting further, the Counsel said, the court addressed the said point at page 13 of the Judgment of appeal and dealt with the point considering the fact the Respondent conceded the submission of the Applicant and that his prayer to lower the interest to 12% where it was not objected or contended by the Applicant herein; and thus basing on the above fact, the court didn't labour much for the parties had agreed on the prayer by the applicant that the rate be 12%.

It has further been observed that, during the hearing the Applicant was well represented by an Advocate whom knows the procedure where the Counsel for the Appellant did not object to the prayer by the Respondent. Thus under the circumstances, the Applicant cannot at this stage say that there was no express agreement. In cementing her point, the learned Counsel referred this court to the provisions of **Order XX, Rule 21 of the Civil Procedure Code, Cap. 33 [R. E. 2019]** which states: -

"..... all such other rate not exceeding 12 per centum per annum, as the parties may expressly agree in writing before or after the delivery of the judgment or as may be adjudged by consent".

Submitting to the second point that the Court erred in law in exercise of its discretion in awarding to the Respondent general damages amounting to **Tshs. 50,000,000/-** the Respondent's Counsel submitted that the said point does not qualify as the point of law.

On this point the Counsel is of the view that the Court enjoys discretionary powers in granting general damages whereby it depend on the circumstances of each case. The case of ***TANZANIA - CHINA FRIENDSHIP TEXTILE CO, LTD V/S OUR LADY OF USAMBARA SISTERS, [2006] T.L.R 76*** was cited to support the Respondent's concern.

Further, it was submitted that, at page 15 and 16 of the Judgment of Appeal, Hon Judge elaborated well the circumstances of the case before upholding the amount awarded by the trial Court as general damages, whereby he rightly noted that the award of the general damages is a province of the trial court and appellate courts are discouraged into interfering it and that, the Appellate court may only interfere upon being satisfied that the trial court in assessing the damages applied a wrong principle of law.

It is the Respondent's Counsel concern that at page 16 and 17 of the Judgment of appeal that the court expressed the

circumstances of the instant case considered the permanent incapacitation which the Respondent has to suffer for the rest of his life and successfully justified the award of **50,000,000/-** as general damages.

Concluding the Respondent's submission the Counsel is of the view that the Applicant herein has failed to demonstrate any principle of the law which has been infringed in awarding the damages. Moreover, that the Applicant has failed to exemplify any point of law to warranting the intervention of the Court of appeal, hence the prayer that the application be dismissed.

In determining this application, the Court is to be guided by the principles set by the law regarding granting or refusing to grant leave to Appeal to the Court of Appeal as it was held in the case of ***SIMON KABAK DANIEL vs. MWITA MARWA NYANGANYI & 11 OTHERS***, Mwalusanya, J. (as he then was) that:

"In Application for leave to the Court of Appeal the Applicant must demonstrate that there is a point of law involved for the attention of the Court of Appeal."

It is further obvious therefore that leave to Appeal is not automatic, it is **discretionary**, and there has to be a point of law or point of public importance as was held in the case of ***RUTAGATINA C.L.VS THE ADVOCATES COMMITTEE AND CLAVERY MTINDO NGALAPA, Civil Application No. 98 of 2010*** where His Lordship Justice Msoffe (as he then was) stated that:

"An application for leave is usually granted when there is a good reason, normally on point of law or on point of public importance that calls for the Court of Appeal intervention".

From the above principles and from the facts and decisions of the trial court and this court, I am convinced that as from the Applicant's Affidavit to the submission in this respect, the same do not disclose any triable issues which need the guidance of the Court of Appeal as alleged by the learned Counsel for the Applicant.

Starting with the second point, it is my considered view that, as from the Applicant's Counsel submission, the point is **highly misconceived**. I say so since the principle as to the court's discretion on the general damages is well known by both Counsel. The word itself depicts that the amount was reached upon

discretion of the court. I understand that the same is to be exercised judiciously. However, we have to understand that before the grant of this nature, there are some facts which have been well observed by the court to reach to the said decision. It has been well said that due to the Respondent's incapacity, then it was seen wise for the court to grant such amount. It can impossible for someone to challenge court's discretion under those circumstances; especially when the situation is justifiable and speaks by itself.

On this, I have to say that, if at all the reasoning of this nature is challenged, then what is the use of having court's discretion? On this point I join hands that the amount was reached judiciously, hence there is no point to forward the matter to the higher court as there was no fault on this, hence this Court desist to grant leave sought through this point.

More so, on the first point on percentage, it is my similar concern that the 12%, it was particularly consented hence there is no need for the same to be forwarded as a point of law for determination before the highest Court of the Land.

In conclusion, thus, the Applicant has failed to established and demonstrate that there is a point of law or contentious issues to be considered by the Court of Appeal.

In the event therefore, the Application is accordingly **dismissed with costs for want of merits.**

It is so ordered.



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L. E. MGONYA

JUDGE

08/07/2022

Court:

Ruling delivered before Honourable **J. Luambano Deputy Registrar** in the presence of Mr. Stephen Byabato Advocate for the Applicant, Mr. Elinihaki Kabura Advocate for the Respondent and Mr. Richard RMA on this 8th day of July, 2022.



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L. E. MGONYA

JUDGE

08/07/2022