

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF DAR ES SALAAM**

**AT DAR ES SALAAM**

**MISCELLANEOUS CIVIL APPLICATION NO. 679 OF 2020**

**NMB BANK PUBLIC LTD COMPANY.....APPLICANT**

**VERSUS**

**KAFURUKI MWINGIRA SHUBIS.....RESPONDENT**

*(Arising from Civil Appeal No 185 of 2020; Original Civil Case No. 16 of 2018 of the Resident Magistrates' Court of Kibaha H.I, Mwaitolo, Esq. Resident Magistrate)*

**RULING**

**MRUMA, J.**

This is an application for leave to appeal to the Court of Appeal against the ruling of this Court in Miscellaneous application No. 185 of 2020 brought under Section 5(1) (c) of the Appellate Jurisdiction Act and Rules 10, 45 (b) and 49 (3) of the Court of Appeal Rules.

The applicant was represented by Victor Kikwasi, learned advocate and the Respondent was represented by Mr. Mohammed Nyenye, learned advocate. In the interest of time court directed the counsel for both parties to file written submissions. Counsel for the Applicant complied but counsel for the Respondent did not.

The main ground for this application is that the applicant appealed against the decision of the Resident court of Kibaha in Civil Appeal No. 185 of 2020 which was decided in Respondent's favour. After the said decision, she wrote a letter to the Registrar of this court requesting to be supplied with copies of judgment and decree and also filed a Notice of Appeal. According to the learned counsel the impugned judgment and decree is only appealable to the Court of Appeal with leave of this court and hence this application.

The Respondent filed an affidavit in reply to this application conceding to most of assertions of the Applicant's counsel, but didn't file any submission in opposition to the submission filed by the counsel for the Applicant. In my view it would appear that the application is not opposed on the facts as presented by the applicant.

The law governing the application for leave to appeal to the Court of Appeal is set out in section 5(1) (c) of the Appellate Jurisdiction Act and it provides as follows:

*"In civil proceedings, except where any other written law for the time being in force*

*provides otherwise, an appeal shall lie to the Court of Appeal with leave of the High Court or of the Court of Appeal against every other decree, order, judgment decision or finding of the High Court”*

From the wordings of the law, it goes without saying that leave of the High court is prerequisite before one can lodge an appeal to the Court of Appeal against the decision of the High Court in exercise of its appellate jurisdiction. This is an application to grant leave to appeal against the ruling of this court given under Civil Appeal No 185 of 2019.

In the case of **Sango Bay Estate vs Dresdner Bank & Attorney General [1971] EA 17** *Spry V.P* stated the principle upon which an application for leave to appeal may be granted as follows:

*“As I understand it, leave to appeal from an order in civil proceedings will normally be granted where prima facie it appears that there are grounds of appeal which merit serious judicial consideration....”*

The Court further noted that;

*“At this stage of litigation we are satisfied that the grant of leave to appeal is necessary to protect the applicant’s right of appeal and for attaining the ends of justice in instant case.”*

The issue for determination is; ***Whether there are sufficient grounds to grant leave to appeal?***

The main consideration for the grant of leave is whether prima facie there are grounds of appeal which merit serious judicial consideration. In the present application the applicant contends that the intended appeal raises important issues of law and facts with regards to the amount of general damages awarded comparing to the initiatives the Applicant undertook to settle the matter. The Applicant also says that the intended appeal raises an important issue of law and fact, namely illegality of the decision being challenged.

From the submissions of the Applicant she is dissatisfied with the assessment of general damages in view of initiatives she took to mitigate damages and have the matter settled amicably. General damages are

assessed and awarded at the discretion of the court. Like any other court's discretion it has to be exercised judicially. It may only be set aside on the ground that the discretion was not exercised judicially. This is a serious ground that needs judicial consideration on appeal. The court should take into account the intending appellant's strong feelings of injustice when considering whether to grant permission, at least where those feelings are arguably objectively justified.

Leave to appeal will be given where: the court considers that the appeal would have prospect of success; or there is some compelling reason why the appeal should be heard. In the case of **Swain v Hillman [2001] 1 All ER 91** Lord Woolf, MR noted;

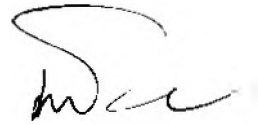
*"That a real prospect of success means that the prospect for the success must be realistic rather than fanciful. The court considering a prospect for permission is not required to analyse whether the grounds of the proposed appeal will succeed, but merely whether there is real prospect of success"*

This is the third consideration request premised on equity and fairness. It is a practice in our judicial hierarchy that a person has the right

to be heard by at least three different forums namely; court of first instance, high court (on appeal) and the Court of Appeal constituting three judges. Thus, in the present case I am satisfied that the grant of leave to appeal is necessary to protect the applicants' right of appeal and for attaining the ends of justice in the instant case.

In the result for the reasons stated herein above this application is allowed with no order as to costs.

It is so ordered.



**A. R. Mruma,**

**Judge,**

Dated at Dar Es Salaam this 30<sup>th</sup> Day of March 2022.