

**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. 303 OF 2022

BANDIN ELIAS MUSHI t/a NASULA

GENERAL SUPPLIES APPLICANT

VERSUS

LODHIA STEEL INDUSTRIES LIMITED RESPONDENT

**(Arising from decision of this Court (Kakolaki, J) dated
17th June, 2022 in Civil Appeal No 375 of 2021)**

RULING

27th and 28th September, 2022

KISANYA, J.:

This application is made under section 5(1)(c) of the Appellate Jurisdiction Act, Cap. 141, R.E. 2019 (the AJA) and rule 45(a) of the Court of Appeal Rules, 2009 as amended (now R.E. 2019). It is supported by an affidavit sworn by Mr. Mahfudhu Ahmada Mbagwa, advocate of the applicant. Pursuant to the chamber summons, the applicant is seeking for leave to appeal to the Court of Appeal and certificate on point of law in the intended appeal to the Court of Appeal.

In terms of the supporting affidavit, the applicant unsuccessfully sued the respondent in the District Court of Mkuranga. His main claim was for payment of TZS 33, 237,300 arising from breach of contract of sale of goods to wit, industrial

assortments. Aggrieved, the applicant appealed to this Court in Civil Appeal No. 375 of 2021. In its decision dated 17th day of June, 2022, this Court (Hon. Kakolaki, J) dismissed the said appeal for want of merit. Still dissatisfied, the applicant lodged a notice of appeal to the Court of Appeal. He then filed the present application for the foresaid orders. The points worth of consideration by the Court of Appeal were deposed in paragraph 5 of the supporting affidavit as follows: -

(a) Whether the High Court Judge was justified in arriving at his finding/judgment declining the applicant's invitation to discard the defendant's (respondent's) sole witness testimony which was absolutely based on hearsay and completely departing from respondent's pleadings.

(b) Whether the High Court Judge was justified in not stepping into the shoes of the trial court to analyze, assess and come to his own conclusion having seated to determine the appeal as the first appellate court.

(c) Whether or not the High Court Judged (sic) properly addressed himself in law on the principles governing performance of contract sale of goods as against matter herein.

(d) Whether or not High Court was not bound to rule in favour of the applicant having regard to the principles of evidence, pleadings and in all other respect.

At the hearing of this application, the applicant was represented by Mr. Mahfudhu Mbagwa, learned advocate, while the respondent enjoyed the legal services of Ms. Josepha Tewa, also learned advocate.

Before the hearing could commence, Mr. Mbagwa prayed to abandon the second relief in respect of certificate on a point of law. With regard to the application for leave to appeal, the learned counsel started by adopting the supporting affidavit to form part of his submission. It was his argument that, at this stage, the Court is enjoined to satisfy itself on whether the proposed grounds are arguable in the intended appeal. To cement his argument, Mr. Mbagwa cited the case of **Bulyankulu Gold Mine Ltd and 2 Others vs Petroleum (T) Ltd and Another**, Civil Application No. 364/16 of 2017 (unreported). In that regard, Mr. Mbagwa was of the view that, the grounds deposed in paragraph 5 of the supporting affidavit are arguable. He therefore invited this Court to grant the application for leave to appeal.

Ms. Tewa resisted the application. She also adopted the counter affidavit filed on behalf of the respondent to form part of her submission. It was her argument that the proposed grounds were not raised in the first appeal. Therefore, she was of the view that the leave to appeal cannot be granted because the Court of Appeal will not determine a ground which was not raised before the appellate court. To bolster her argument, Ms. Tewa referred me to the decision of this Court (Kalayemaha, J) in the case of **Safari Mwazembe vs Juma Fundisha**, Misc Civil Application No. 53 of 2021, HCT at Mbeya (unreported). In that regard, the learned counsel prayed that the application be dismissed with costs.

When Mr. Mbagwa rose to rejoin, he submitted that this Court has no mandate to determine the merits of the proposed grounds. He was of the firm view that the issue whether the applicant raised new grounds of appeal cannot be determined at the leave stage. He further urged me to consider that the case of **Safari Mwazembe** (supra) is not binding to this Court.

I have respectively considered the submissions by the counsel for the parties and the record of the application. Since the second prayer was abandoned, the sole issue for determination by this Court is whether the application for leave to appeal is meritorious or otherwise.

It is trite law that leave to appeal is granted if the court is satisfied that the intended appeal has issues of general principle or novel point of law or where the proposed grounds are arguable. The law is further settled that leave to appeal will not be granted when the intended grounds of appeal are frivolous, vexatious, useless or hypothetical. I am fortified by the case of **British Broadcasting Corporation vs Eric Sikujua Ng'maryo**, Civil Application No. 138 of 2004 (unreported) which was also cited with approval in the case **Bulyankulu Gold Mine Ltd and 2 Others** (supra) in which the Court of Appeal underscored that:-

"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 and 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 show a prima facie or arguable appeal (see: **Buckle v Holmes** (1926) ALL ER. 90 at page 91). However, where the grounds of appeal are frivolous, vexatious or useless or hypothetical, no leave will be granted."*

In view of the above position of law and reading from the chamber summons and affidavit, I hold the view that the issues to wit, whether the decision of this Court is based on hearsay and completely departing from pleadings, whether the court addressed the principles governing performance of contract sale of goods and whether the Court considered the principles of evidence and pleadings which were averred in paragraph 5 of the supporting affidavit raise points of law or arguable grounds. I find no cogent reason to hold that the said proposed grounds are frivolous, vexatious, useless or hypothetical.

I have further considered Ms. Tewa's argument the said grounds were not raised in the first appeal instituted in this Court. In terms of the settled law, this Court is not required to consider substantive issues that will be dealt by the appellate court. Its duty is to determine whether the proposed grounds of appeal raise points of law or issues of public importance without considering substantive issues that are to be dealt by the appellate court. In the case of **Hamisi Mdida and Another vs The Registered Trustees of Islamic Foundation**, Civil

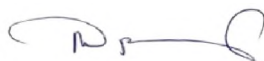
Appeal No. 232 of 2018 (unreported), this Court (Rumanyika, J, as he then was) examined the proposed ground and found it unmeritorious on the reason that it was a new point. When the matter reached the Court of Appeal, it was held as follows:-

"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 light of the above cited authority of the Court of Appeal, the respondent's contention that the proposed point are new grounds of appeal cannot be determined at this stage. It will be dealt at an appropriate time when the appeal is before the Court of Appeal.

For the reasons stated above, I find merit in the application for leave to appeal. The applicant is accordingly granted leave to appeal to the Court of Appeal. Costs shall follow the event in the intended appeal.

DATED at DAR ES SALAAM this 28st day of September, 2022.



S.E. Kisanya
JUDGE

COURT: Ruling delivered this 28st day of September, 2022 in the presence of Mahfudhu Mbagwa, learned advocate for the applicant, Ms. Josepha Tewa, learned advocate for the respondent and Ms. Zawadi, court clerk.



S.E. Kisanya
JUDGE
28/09/2022