

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

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 303 OF 2021

(Originating from the Judgment of the High Court in Civil Appeal No. 234 of 2019, Mlyambina, J,
dated 28/05/2021)

USANGU LOGISTICS TANZANIA LIMITED..... APPLICANT

VERSUS

BAHDELA COMPANY LIMITED..... RESPONDENT

RULING

Date of last Order: 08/12/2021.

Date of Ruling: 18/02/2022.

E.E. KAKOLAKI, J

In this application preferred under sections 5(1)(c) of the Appellate Jurisdiction Act, [Cap. 141 R.E 2019] referred to as AJA and Rule 45(a) of the Court of Appeal Rules as amended, supported by affidavit of one Erick Erison Kamala, applicant's advocate, the applicant has moved this court for grant of leave to appeal to the Court of Appeal in respect of the decision of this court, Mlyambina, J in Civil Appeal No. 234 of 2019 dated 28/05/2021.

The application has been vigorously resisted by the respondent who

instructed her advocate one Godwin Musa Mwapongo to swear and file the counter affidavit to that effect. As both parties were represented by their respective advocates, the application was heard viva voce.

The facts that gave rise to this application can be simply narrated as hereunder. Before the District Court of Ilala in Civil Case No. 171 of 2018, the Respondent unsuccessfully sued the Applicant claiming from her the sum of Tshs. 59,714,884/- before she preferred a successful appeal to this court vide Civil Appeal No. 234 of 2019, in the judgment handed down on 28/05/2021. Before the appeal could come for hearing, the respondent successfully applied for additional evidence through Misc. Application No. 123 of 2020 before the same appellate court vide the ruling of the court dated 25/09/2020, the evidence which was considered later on during hearing and determination of the appeal. Discontented with the decision of this court in Civil Appeal No. 234 of 2019, the applicant filed a Notice of Appeal to the Court of Appeal against the whole decision before he lodged the present application for leave, as per the requirement of the law so as to be allowed to file his appeal to the Court of Appeal.

Submitting in support of the application Mr. Kamala informed the court that, the applicant raised three triable issues for determination by the Court of

Appeal as deposed in paragraph 9 of the affidavit in support of the chamber summons. The said issues are:

- (a) Whether the appellant Court has power of admitting additional evidence before hearing of the appeal.
- (b) Whether the evidence discovered outside the Court can be admitted as fresh evidence in appeal.
- (c) Whether the additional evidence was not available during the trial.

It was Mr. Kamala's contention that, in admitting the said evidence the three conditions for admitting additional evidence as regulated under Order XXIX Rules 27,28 and 29 of the Civil Procedure Code, [Cap. 33 R.E 2019] and set out in the case of **Ismail Rashid Vs. Mariam Msati**, Civil Appeal No. 75 of 2005 (CAT-unreported) when quoted with approval the case of **S.T Paryani Vs. Choitram and Other** (1963) EA 462, must be met. According to him, in that case the Court said additional evidence could be justifiably obtained where the following conditions are fulfilled:

- 1. It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;*
- 2. The evidence must be such that, if given would probably have an important influence on the result of a case, although it need not be decisive;*

3. The evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible...”

Mr. Kamala went on submitting that, contrary to what is provided in the three conditions above cited, the evidence which was admitted in addition by this court during the appeal was available during the trial of the case as the same was attached to the closing submission in October 2019, hence a blatant lie by the respondent that it was obtained during the appeal process. According to him the respondent’s act was in contravention of conditions under which fresh evidence can be admitted in court during the appeal as stated in the case of **A.S Sajan Vs. Co-operative and Rural Development Bank** (1991) T.L.R 44 at 46 as quoted in the case of **Idrisa R. Hayeshi Vs. Emmanuel Elinani Makundi**, Civil Application No. 113/08 of 2020 where the court held:

“Except on grounds of fraud or surprise the general rule is that an appellate Court will not admit fresh evidence, unless it was not available to the party seeking to use it at the trial, or that reasonable diligence would not have made it so available.”

Guided with the above cited case, Mr. Kamala argued, in this matter the respondent applied for additional evidence with intent to fill in the gap after

his failure to use or tender the admitted documents during the trial despite the fact that she had it in her possession. As the additional evidence did not meet the conditions set out by the law, the three issues raised by the applicant establish that there is arguable issues worth determination by the Court of Appeal, thus the applicant has proved the application has merit and deserves to be granted as prayed.

In rebuttal Mr. Mwapongo resisted the submission by Mr. Kamala terming it to be misplaced as the applicant has failed to advance substantive reasons warranting this court grant her this application. He argued the appeal sought to be impugned is concerned with Misc. Civil Application No. 123 of 2020 in which additional evidence was sought and granted on 15/09/2020, but the applicant has demonstrated nothing to show which law was contravened when the application for additional evidence was granted nor did she include it in her Notice of Appeal as part of the decision intended to be challenged. He contended, the applicant's act contravenes the established principle in the case of **Simon Kabaka Daniel Vs. Mwita Marwa Nyang'anyi and Others** (1989,) T.L.R 64 where the court stated the applicant must demonstrate that there is a point of law involved for the attention of the Court of Appeal. It was his submission that, in this case since the applicant

has not laboured to establish the law which was contravened nor is he stating that he is challenging the grant of the application for additional evidence, the applicant has failed to demonstrate sufficient ground to warrant this court grant her the prayers sought. He prayed the court to dismiss the application with costs. In brief rejoinder submission Mr. Kamala reiterated what he stated in his earlier submission in-chief while countering Mr. Mwapongo's submission that, the ruling in Misc. Application No. 123 of 2020 could not be appealed against as it was originating from the appeal which was before this court in which the court admitted the additional evidence before hearing of the appeal. According to him, the appeal was against the procedure used by the court to admit fresh evidence contrary to the provisions of the law which was relied on to determine the whole appeal. He insisted the application was meritorious and prayed the court to allow the appeal.

I have taken time to chew and digest the conflicting submission by both parties as well as perusing the pleadings filed before the court. The crux of the matter before the court is whether the applicant has demonstrated the grounds warranting this court exercise its discretion in granting the prayers sought in the chamber summons. It is Mr. Mwapongo's contention that, she

has failed to so do as neither the ruling in Misc. Civil Application No. 123 of 2020 which granted additional evidence is subject of this appeal nor has she demonstrated that there are provisions of the law which were contravened during the admission of the said additional evidence. I disagree with Mr. Mwapongo that the ruling in Misc. Civil Application No. 123 of 2020 ought to be subject of this appeal by being so stated in the Notice of Appeal, instead I embrace Mr. Kamala's submission that, since the same was originating from the present appeal, it was not appealable on the good reason that it was an interlocutory decision. As to whether the applicant disclosed the infringed provisions of the law, I find that she so did as during his submission Mr. Kamala told this court that, the additional evidence was obtained in contravention of the provisions of Order XXIX Rule 27,28 and 29 of the CPC, and the conditions for admission of additional evidence as adumbrated in the cases of **S.T Paryani** (supra) and **A.S Sajan** (supra), since this court admitted that fresh evidence which was discovered outside the court before hearing of the appeal. Now the issue as to whether the appellate Court has power of admitting additional evidence before hearing of the appeal and whether the evidence discovered outside the Court can be admitted as fresh

evidence in appeal, I am satisfied and therefore find are arguable issues worth consideration of the Court of Appeal.

In the upshot and for the fore stated reasons, I am inclined to hold that this application is meritorious. Leave to appeal to the Court of Appeal is hereby granted as prayed.

As regard to the costs, I order each party to bear its own costs.

It is so ordered.

DATED at DAR ES SALAAM this 18th day of February, 2022.



E. E. KAKOLAKI

JUDGE

18/02/2022.

The Ruling has been delivered at Dar es Salaam today on 18th day of February, 2022 in the presence of the Mr. Erick Kamala advocate for the applicant, Mr. Godwin Mussa, advocate for the Respondent and Ms. Asha Livanga, Court clerk.

Right of Appeal explained.



E. E. KAKOLAKI
JUDGE
18/02/2022

