

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY)**

AT MWANZA

CIVIL APPLICATION NO. 112 OF 2021

(Arising from Civil Appeal No. 06 of 2021)

NUI MILLS CO. LIMITED ----- APPLICANT

VERSUS

KASEKANDIS CONSTRUCTION &

TRANSPORT LIMITED----- RESPONDENT

RULING

Last Order: 23.03.2022

Ruling Date: 14.04.2022

M. MNYUKWA, J

Under section 5(1)(c) of the Appellate Jurisdiction Act, Cap 141 [RE: 2019] and Rule 45(a) of the court of Appeal Rules of 2009, the application is preferred before this court by way of chamber summons supported by an affidavit deposed by Innocent Michael, the applicant's learned advocate. Applicant's learned counsel, moved this court for leave to appeal to the Court of Appeal against the decision in Civil Appeal No. 06 of 2021 before Hon. Mazengo, PRM (with extended Jurisdiction) dated 11



August 2021 which was dismissed. Aggrieved, the applicant resolved to prefer an appeal to the Court of Appeal, thus he had to obtain leave to appeal in terms of rule 45(a) of the Court of Appeal Rules and section 5(1) (c) of the Appellate Jurisdiction Act, Cap 141 [RE: 2019] The respondent filed the counter affidavit in objection of the application. The application was argued orally by Mr. Innocent Michael servicing the applicant and the respondent employed the service of Mr. Wilberd Kilenzi learned advocate.

It was the applicant who was the first to submit where he prays this court to adopt the chamber application and the affidavit to form part of his submissions. He avers that, this court has to consider the disturbing features that require the attention of the Court of Appeal. Insisting, he cited the case of **Harbar Haji Mesi & Another vs Omari Hilal Seif & Another** [2001] TLR 409. He claims that there are disturbing issues as stated on paragraphs 6 (i) to (vi) of his affidavit.

The 1st disturbing feature is whether the PRM with extended jurisdiction was justified to hold that there was misinterpretation while the respondent inspected and was satisfied with the fitness of the excavator before the same was transported to Mwanza. Referring to page 5 of the judgment, he insisted that there was a fact that was not seen by the PRM with extended jurisdiction.



He went on pointing out that, another disturbing feature was for the PRM with extended jurisdiction to hold that Tsh 22,300,000/= was the advance payment while the evidence on record shows that it was Tsh. 20,000,000/=. And that Tshs. 2,300,000/= was not proved as reflected on page 9 of the judgment and he avers that the same needs the attention of the Court of Appeal.

Again, he claims that the holding of the PRM with extended jurisdiction that the 2nd issue of the counter claim was not resolved while it depends on the 1st issue which was affirmatively resolved needs intervention by the Court of Appeal. He again insisted that the Court of Appeal needs to look at the findings of the first appellate court as to whether the PRM with extended jurisdiction properly hold that there was no breach of contract.

He went on that, another disturbing feature is the holding of the PRM with extended jurisdiction that there was communication between parties concerning the subject matter without proof on records. He also avers that the holding of PRM with extended jurisdiction that the trial court erred in awarding general damages for want of sufficient reasons needs intervention for the reasons can be traced on page 10 of the trial court's records.



He insisted that, the features need the intervention of the Court of Appeal citing the case of **Vumi Mgunila vs Mayunga Njile**, Misc. Civil Application No. 59 of 2021 HC Mwanza cited with approval in the case of **Hamis Ngida and Another vs the Registered Trustee of Islamic Foundation**, Civil appeal No. 323 of 2018.

Responding to the applicant's averments, Mr. Wilberd Kilenzi learned advocate for the respondent objected to the application. He avers that, the matters raised by the applicant in paragraph 6 (i-vi) are matters of fact and not law. He went on that, since the intended appeal will be the second appeal, the court will require as a matter of law to deal with legal matters only and not the matter of facts. Insisting, he cited the case of **Atlass Gapco Tanzania Ltd vs Commissioner General, Tanzania Revenue Authority** Civil Appeal No. 167 of 2019 CAT at Dodoma (unreported) and the case of **Paschal Bandiho vs Arusha Urban Supply & Sewage Authority (AUWSA)** Civil Appeal No. 04 of 2020 CAT at Arusha (unreported) that the court defined what amounts to the matter of law.

He went on that, the applicant claims that there are disturbing issues which are the foundation of the claim that the PRM with extended jurisdiction failed to evaluate the evidence on record and reached to a



wrong decision and not the matter of law. He again cited the case of **Mohamed Musero vs The Republic** [1993] TLR 290 and the case of **Simon Kabaka Daniel vs Mwita Marwa Nyanganyi & 11 Others** [1998] TLR 64, which emphasized that there should be matters of law only and not matters of facts.

He insisted that, in this present application the applicant raised only matters of fact that do not fall within the legal definition of the cited cases and he avers that the application fails for the want of criteria and prays this application to be dismissed with costs.

Rejoining, Mr. innocent Michael insisted that the applicant leave to appeal to the Court of Appeal is based on the criteria that the first appellate court failed to evaluate the evidence on record. He maintains that, paragraph 6 of the applicant's affidavit contains features and point of law which needs the intervention by the Court of Appeal. He, therefore, prays this application to be granted with costs.

After the parties' submissions, the issue before me is whether the applicant has managed to establish factual and legal points that require the attention of determination by the Court of Appeal.



It is worth to note that, the application before me is for leave to appeal to the Court of Appeal against the decision of the PRM with extended jurisdiction. It should also be known that the jurisdiction of this Court to grant leave to appeal under section 5(1) (c) of the Appellate Jurisdiction Act Cap. 141[RE:2019] is not predicated on any conditions contrary to the submissions by the applicant. To this effect, I am not called upon to determine the merits of the decision sought to be appealed against but only mandated to see if the intended appeal is arguable either on facts or on law for the determination of this application, this court lacks jurisdiction to go into merits or deficient of the judgment.

I had time to go through the cited cases of **Vumi Mgunila vs Mayanga Njile** Misc. Civil Application No. 59 of 2021 HC Mwanza, **Atlass Gapco Tanzania Ltd vs Commissioner General, Tanzania Revenue Authority** Civil Appeal No. 167 of 2019, **Paschal Bandiho vs Arusha Urban Supply & Sewage Authority(AUWSA)** Civil Appeal No. 04 of 2020 CAT, **Mohamed Musero vs The Republic** [1993] TLR 290 and the case of **Simon Kabaka Daniel vs Mwita Marwa Nyangányi & 11 Others** [1998] TLR 64 both of the court of appeal and of this court cited by the parties.



In above cited cases, two among them which were cited by the respondent's counsel, had the holding of the Court of Appeal that, one among the elements of the phrase "matters of laws" is the evidentiary element which also include failure to evaluate the evidence that is challenged by the applicant.

Furthermore, the law is now settled tracing its course from the decision of the Court of Appeal for Eastern Africa in **Sango Bay v Dresdner Bank A.G** [1971] EA 17, where it was held that: -

*"Leave to appeal will be granted where **prima facie** it appears that there are grounds which merit serious judicial attention and determination by a superior court."*

The same position was expressly stated by the Court of Appeal in the, case of **Hamis Mgida & Another vs The Registered Trustee of Islamic Foundation**, Civil Appeal No.323 of 2018, where it was pointed out that: -

*"..the application for leave must state succinctly the factual or legal issues arising from the matter and demonstrate to the court that the proposed ground of appeal merits an appeal. The court concerned should decide whether the said proposed grounds are **prima facie** worth of the consideration of the court of appeal."*



See also the case of **Gaudensia Mzungu vs IDM Mzumbe**, Civil Application No. 94 of 1994 CAT (unreported) and the case of **GRUP vs Jangwani Sea Breeze Lodge Ltd** Commercial Case No. 93 of 2002.

Revisiting the facts in the instant application specifically in paragraphs 6 (i) to (vi) of the applicant's affidavit, and without expressing any opinion, it is my view that the applicant has demonstrated sufficient grounds to invoke the appellate jurisdiction of the Court of Appeal.


In that circumstances, I do hereby exercise my discretion under section 5 (1) (c) of the Appellate Jurisdiction Act Cap. 141 [RE: 2019] to grant leave to the applicant to appeal to the Court of Appeal against the decision in Civil Appeal No. 06 of 2021 which was before PRM with extended jurisdiction.

In the upshot, the application for leave to appeal before the Court of Appeal of Tanzania is granted with no order as to cost. It is so ordered.




M.MNYUKWA
JUDGE
14/4/2022

Court: Ruling delivered on 14th April 2022 in the presence of the parties' counsel through audio teleconference.


M.MNYUKWA
JUDGE
14/4/2022