IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM SUB DISTRICT REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 253 OF 2022

PAUL ALPHONCE MUNISI.....APPLICANT

VERSUS

ELISANTE WILBARD KIRITA.....RESPONDENT

RULING

Date of last Order 13th Dec, 2022

Date of Ruling 17th February, 2023

E. E. KAKOLAKI J

"Whether the application for leave to appeal to the Court of Appeal should be accompanied with the decision sought to be impugned" is the centre of controversy this ruling seeks to address. The issue was suo motu raised by the Court following the application by the applicant for leave to appeal to the Court of Appeal against the judgment and decree of this Court in Civil Appeal No. 237 of 2020 between the parties, preferred under section 5(1)(c) of the of the Appellate Jurisdiction Act, [Cap. 141 R.E 2019] (the AJA). The application is supported by the affidavit dully sworn by applicant annexed with several documents. As the judgment of this Court sought to be impugned was omitted to be annexed in the affidavit both parties were

invited to address the Court on the propriety or competency of the applicant's application.

During the address of the Court by the parties on the above cited issue which was done orally, the applicant appeared represented by Mr. Dickson Sanga, learned advocate whereas the respondent hired the services of Ms. Wivina Rwebangila, learned advocate. In his submission Mr. Sanga informed the Court that, the application is competent as the provision of section 5(1)(a) of AJA in which this application is premised does not provide for the requirement of attaching the decision sought to be impugned nor is Rule 45 of the Court of Appeal Rule, 2009 (the Rules). According to him that requirement is made mandatory only when the application for leave to appeal to the Court of Appeal is lies before the Court of Appeal as a second bite under Rule 49(3) of the Rules. To reinforce his argument the learned counsel relied on the decision on this Court in **Tumaini Nikodemu Vs. Olam Tanzania Limited**, Civil Application No. 32 of 2021 (HC-unreported) and **The Attorney General and Another Vs. Fatma Amani Karume**, Misc. Civil Application No. 8 of 2021 (HC-unreported), where it was held in application for leave to appeal to the Court of Appeal before this Court annexing the decision sought to be challenged is not mandatory. He

therefore invited this Court to find the application is competent and order the same to be heard on merit.

In the alternative Mr. Sanga argued, in the event this Court finds the attachment of the decision sought to be impugned is mandatory then be pleased to allow and order the applicant to amend the affidavit by attaching the intended to be impugned judgment as amendment of affidavit is allowable as it was held in the case of **Sanyou Service Station Ltd Vs. BP Tanzania Limited (Now PUMA Energy (T) Ltd)**, Civil Application No. 185/17 of 2018 (CAT-unreported).

Submitting against the applicant's arguments Ms. Rwebangila contended that, the application is incompetent for failure of the applicant to file the judgment and decree sought to be impugned in the Court of Appeal as that contravenes the provisions of Rule 49(3) of the Rules, that requires attachment of the decision sought to be challenged in application for leave to the Court of Appeal. She cited to the Court the cases of **Janet D. Mmari Vs. International School of Tanganyika and Another**, Civil Application No. 103 of 2001 (CAT-unreported) and **TANESCO Vs. Ibrahim Ford**, Civil Appeal No. 99 of 1999, which were interpreting the provisions of Rule 46(3) of Court of Appeal Rules, 1979, that commanded that every application for

leave to appeal to the Court of Appeal, shall be accompanied by a copy of the decision, against which is desired to appeal. She said the object is to enable the Court to establish if there is arguable appeal, hence the argument by Mr. Sanga that annexing of the sought to be impugned judgment is not mandatory is misplaced and should be disregarded. As in this application the sought to be impugned judgment is not annexed as required by the law then the application is incompetent and the only remedy is to strike it out with costs, the order in which she invited this Court to issue against the appellant as the cases cited in support of the applicant's submission are distinguishable. With regard to the prayer for amendment of the affidavit by the applicant, Ms. Rwebangila was not in agreement with as according to her once the applicant is incompetent the same cannot be amended. She said in the case of **Sanyou Service Station Ltd** (supra) relied on by Mr. Sanga amendment of the affidavit was ordered because it was affidavit which was defective unlike in this matter where the application is incompetent. She therefore pressed for the striking out of the application with costs as alluded to above.

In a brief rejoinder Mr. Sanga observed that, the case of Janet D. Mmari (supra) and TANESCO (supra) relied on by the respondent should be

disregarded by this Court as the same were making interpretation of Rule 46(3) of the Rules of 1979 which are no longer in existence hence irrelevant to the circumstances of this case. As regarding to the duty of the applicant to annex the judgment as submitted by the respondent he argued such duty is limited to the parameters of the law and not outside it as the law does not provide for the same. With regard to the submission that applicant's prayer for amendment of the affidavit is misplaced hence untenable in law it was his response that, the learned counsel misinterpreted the decision as the Court of Appeal in that case refused to strike out the application on the defect of the application but rather ordered for amendment of the affidavit. Lastly on the prayer for costs by the respondent he submitted the same is untenable as the issue subject of this ruling was raised by the Court suo motu. In view of the above submission Mr. Sanga reiterated his earlier on prayer and rested his submission.

I have dispassionately considered the fighting submission by the parties as well as perused the law with view of answering the above raised issue. It is uncontroverted fact that in this application the applicant did not annex judgment and decree sought to be impugned in his affidavit in support of the application. I agree with Mr. Sanga's submision that there is no mention

of annexing the decisions sought to be impugned under the provisions of section 5(1)(c) of AJA and Rule 45(a) of the Rules which are providing for manner in which an application for leave to appeal to the Court of Appeal is to be made in this Court, save for Rule 49(3) of the Rules which is applicable to the application made before the Court of Appeal. See also the case of **Janet D. Mmari** (supra) at page 4 when the Court of Appeal was giving interpretation of the the provisions of Rule 4(3) of the Rules, 1979 which is a replica of Rule 49(3) of the Rules, 2009. To appreciate the above finding of this Court I find it imperative to quote the said provisions. Section 5(1)(c) of AJA reads:

> *5.-(1) 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-*
> *(c) with the leave of the High Court or of the Court of Appeal, against every other decree, order, judgment, decision or finding of the High Court.*

And Rule 45(a) of the Rules provides:

> *45. In civil matters:-*
> *(a) notwithstanding the provisions of rule 46(1), where an appeal lies with the leave of the High Court, application for leave may be made informally, when the decision against*

which it is desired to appeal is given, or by chamber summons according to the practice of the High Court, within thirty days of the decision; or

Further to that Rule 49(3) of the Rules reads:

> *(3) Every* ***application for leave to appeal shall be accompanied by a copy of the decision against which it is desired to appeal*** *and where application has been made to the High Court for leave to appeal by a copy of the order of the High Court.*

From the above exposition of the law governing the manner in which the application for leave to appeal to the Court of Appeal is to be preferred in the applications made before both the High Court and Court of Appeal as second bite, one would ask a question why is it mandatory to annex copy of the impugned decision to the application for leave to appeal preferred before the Court of Appeal under Rule 49(3) of the Rules and not the one before the High Court under Rule 45(a) of the Rules? To answer this pertinent question a purposive approach of statutory interpretation of statutes as it was in the case of **R Vs. Mwesige Geofrey and Another**, Criminal Appeal No. 355 of 2014 (CAT-unreported) where the provision of sections 361(1)(a) and 379(1)(a) of Criminal Procedure Act, [Cap. 20) (Now R.E 2022) providing for appeals generally and by the DPP respectively, were interpreted and

harmonise to resolve a controversy between parties, whether it was the requirement of the law for the appellant preferring his appeal under section 361(1)(a) of the CPA to file Notice of Appeal in the subordinate court, where it was held that requirement was an inadvertent omission and not deliberate on hence inserted it in the section.

In this matter though applicable to an application before the Court of Appeal, a thorough scrutiny and interpretation of the provision of Rule 49(3) of the Rules irresistibly read me to the conclusion that, the requirement of the attachment of the copy of the decision sought to be impugned was meant to provide the Court or the presiding judge over the application with clear facts of the decision sought to impugned, its parties, applicable law and the decision thereon so as to appreciate whether there is established prima facie grounds meriting the appeal before the Court or the grounds are vexatious and frivolous. See the cases of **Gaudensia Mazungu Vs. The IDM Mzumbe,** Civil Application No. 94 of 1999 and **British Broadcasting Corporation Vs. Eric Sikujua Ng'imaryo**, Civil Application No. 133 of 2004 (both CAT-unreported). The purpose of the provision is, therefore, to spare the Court the spectre of unmeriting matters and to enable it to give adequate attention to cases of true public importance. See the cases of

Harban Haji Mosi and Shauri Haji Mosi Vs. Omari Hilal Seif and Another, [2001] TLR 409 (CAT) and **TANESCO** (supra). This Court in the case of **TANESCO** (supra) when deliberating on the object of annexing to the application a copy of the decision sought to be impugned as provided under Rule 46(3) of Rules, 1979 which is the replica of Rule 49(3) of the Rules now under consideration, speaking through Katiti, J (as he then was) had this to say the observation which I subscribe to:

> *"… It is the copy of the decision, which can help the Court to see how the process of mind over the facts, and law of the adjudicating judge or magistrate, reached the decision. In my confident mind it is not too much of a job, to see why the rule requires a copy. The reason is not too far to seek.* ***The application for leave, is purposely put in place as mechanism, of sieving and eliminating unmeritorious cases from flooding the Court of Appeal, it is meant to act as an interceptor of mischief makers, and loose body-bodies, and a copy of the ruling or judgment, showing the flow of minds in the application of the law on the facts, can easily enable the judge hearing the application to determine how meritorious the application is****. (Emphasis supplied)*

While having in mind the object of Rule 49(3) of the Rules as discussed in the above cited case when discussing the application of Rule 46(3) of the

Rules 1979, the replica of Rule 49(3) of the Rules 2009, and while aware of the position of the law that the duty of this Court when entertaining an application for leave is not to determine the merit of the application but rather to consider whether the proposed grounds by the applicant are raising arguable issues as rightly stated in the case of **Bulyankulu Gold Mine Limited and 2 Others Vs. Petrolube** (T) Limited, Civil Application No. 364/16 of 2017 (CAT-unreported), I do not see as to how the Court can arrive to such findings that there is arguable appeal or not, without being first availed with copy of the intended to be impugned decision. Since the purpose of mandatorily annexing the copy of the impugned decision in the application for leave before the Court of Appeal under Rule 49(3) of the Rules is to enable it see and appreciate how the Judge or magistrate processed his minds over the facts and applied the law before reaching the decision, I do not see the reason as to why such requirement is inapplicable to the similar application before this Court. It is obvious and so is my confident findings that, there is a lacuna resulting from the omission by the drafter to impose that mandatory requirement in the provisions of Rule 45(a) of the Rules or any other suitable Rule, which to me undoubtedly is inadvertent and not deliberately done. I arrive to that finding while alive to the fact that, it is the

duty of this Court to make findings and fill in gaps or clear any ambiguity of the law whenever raised as it was held by the Court of Appeal in the case of **Mwesige Geofrey** (supra) where the Court had the following observation to make:

> ***"Where there is an obvious lacuna or omission and/or ambiguity the courts have a duty to fill in the gaps or clear the ambiguity.*** *In doing so they are not embarking on "a naked usurpation of the legislative function under their disguise of interpretation" ad feared by Lord Simonds in* ***Magor and St. Mellons Rural District Council Vs. Newport Corp*** *[1952] A.C 189, 191.* ***It is because often, Parliament enacts provisions with general or vagus wording with a view to courts filling gaps. This may occur deliberately or inadvertently****." (Emphasis supplied)*

In light of the above deliberation I shoulder up with Ms. Rwebangila that, it is mandatory for the party seeking for leave to appeal to the Court of Appeal before this Court to annex a copy of the decision sought to challenged and so find. I so hold as the cases of **Tumaini Nikodemu** (supra) and **Fatma Amani Karume** (supra), are distinguishable from the facts of this Court since in Fatuma Amani Karume case (supra) the judgment in dipute was annexed and in Tumaini Nikodemu, the object of annexing the copy of decision was not under discussion. As annexation of a copy of the impugned

decision to the application before this Court is mandatory as found above, in this application since the applicant did not attach the same, the omission I hold renders the application incompetent as rightly submitted by Mr. Rwebangila. The issue is therefore answered in affirmative in that, any application for leave to appeal to the Court of Appeal has to be accompanied with the copy of the decision sought to be impugned.

Having found the application incompetent the next issue for consideration is the prayer by Mr. Sanga for the applicant that, he be allowed to amend the affidavit by annexing the said impugned judgment. In other words he is seeking to comply with the law which he has persistently been submitting that is not mandatory. With due respect to Mr. Sanga, I am not prepared to heed to the prayer. The reason is not far-fetched, as it needs no any citation of authority to hold that an incompetent matter cannot be amend.

The application is therefore struck out for being incompetent.

I order each party to bear its own costs.

It is so ordered.

Dated at Dar es salaam this 17th day of February, 2023.

E. E. KAKOLAKI

JUDGE

17/02/2023.

The Ruling has been delivered at Dar es Salaam today 17th day of February, 2023 in the presence of Mr. Noel Sanag, advocate for the applicant, Ms. Ester Mlimandago holding brief for advocate Wivina Rwebangira for the Respondent and Ms. Asha Livanga, Court clerk.

Right of Appeal explained.

E. E. KAKOLAKI
JUDGE
17/02/2023.