

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

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 584 OF 2022

*(Application for leave to appeal to the Court of Appeal of Tanzania against the
Judgement of the High Court of Tanzania in Civil Appeal No. 266 of 2017)*

HERITAGE INSURANCE COMPANY LTD

(3RD PARTY)1st APPLICANT

JULIAN FEDRICK KIVUGO.....2nd APPLICANT

VERSUS

NURDIN IBRAHIM.....1st RESPONDENT

MIC TANZANIA LIMITED.....2nd RESPONDENT

RULING

13/3/2023 & 31/3/2023

POMO, J;

The above mentioned two applicants have filed this application under section 5 (1) (c) of the Appellate Jurisdiction Act, [Cap 141 R.E. 2019] and Rule 45 (a) of the Tanzania Court of Appeal Rules, 2009 seeking for leave to Appeal to the Court of Appeal of Tanzania against the decision of this Court in *Civil Appeal No. 266 of 2017*. The application is supported

by the affidavit deposed by the applicants' advocate, one Mwang'eza Mapembe.

The application is contested and in parallel to that, the 1st respondent herein one Nurudin Ibrahim has lodged a counter affidavit respectively.

From the content of this instantaneously application, the applicants wish for intervention of the Court of Appeal over the matter and under paragraph 11 (a) to (d) of the affidavit in support of this application, the applicants intends to challenge the decision of the High Court basing on the following grounds which I see it apt to reproduce hereinunder :-

- (a) That the first appellate Court erred in law and in fact in holding that the general damages awarded by the trial Court was on the lower side and awarded the 1st respondent Tanzania Shillings One Hundred and Fifty Million (Tshs. 150,000,000/=), the amount which put the 1st respondent to a far better financial position than he was immediately before the occurrence of the accident.*
- (b) That the first appellate Court erred in law and in fact in awarding excess quantum of general damages to the 1st respondent contrary to the principle of restitution in integrum.*
- (c) The first, appellate Court erred in law in granting general damages to the tune of Tanzanian Shillings One Hundred and fifty million (Tshs. 150,000,000/=) that has applied*

wrong principle of law by leaving out of account some relevant factors.

- (d) The first appellate Court erred in law and in awarding general damages the amount which are so inordinate high that it must be a wholly*
- (e) That the learned judge of the High Court erred in law in deliberating and quashing the proceedings in Misc. Civil Application No. 46 of 2018 which were uncontested by the parties nor were they before the Court for consideration, without giving opportunity to the parties or their counsel to be heard.*

In this matter the applicants were represented by the Mr. Mwangénza Mapembe, learned advocate whilst the first respondent enjoyed the services of Mr. Deogratius Lyimo Kiritta, learned advocate and the 2nd respondent was ably represented by Mr. Victor Kikwasi, learned advocate.

The application was agreed to be disposed by way of written submissions. The scheduling order of filing written submissions by the parties was made in the following order: Written submission by the Applicant was to be filed by or before 17/3/2023, Reply submission by the Respondents was to be filed by or before 22/3/2023 and rejoinder was to be filed by or before 27/3/2021. The record shows that the Applicants' advocate had filed his written submissions on 16/3/2023. The

Respondents' advocates have not filed any submission in reply. It means that the Respondents' defied the order of hearing set.

It is a trite law that failure to file written submission has been held time and again to be equivalent to failure to enter appearance in Court on the date the case is fixed for hearing. This was held by the Court of Appeal in the case of **Godfrey Kimbe Vs. Peter Ngonyani**, Civil Appeal No. 41 of 2014 which cited its previous decision in **National Insurance Corporation of (T) Ltd & Another Vs. Shengena Limited**, Civil Application No. 20 of 2007 (both unreported), where the Court made the following observations: -

*"In the circumstances, we are constrained to decide the preliminary objection without the advantage of the arguments of the Applicant. We are taking this course because **failure to lodge written submissions after being so ordered by the Court, is tantamount to failure to prosecute or defend one's case** "[Emphasis added]*

Guided by the above decision, I will now determine the application in reliance only to what has been submitted by the applicants' advocate, thus *ex parte* to the respondents.

In essence, Mr. Mapembe had submitted that, the invitation of the Court of Appeal, mainly is premised on determining the legality of the

award of general damages. And this can be exhibited from the intended grounds of appeal deponed under paragraph 11 (a) to (d) of the affidavit in support of application. Generally, it is the applicant's advocate submission that, the applicants are intending to challenge the award of general damages in a sense that, it violated the principles of law embodied in the decisions of the Court of Appeal of Tanzania and the High Court of Tanzania including the decision in **Tanzania Sanyi Corporation vs. African Marble Company Ltd** (2004) T.L.R 115, **Jonathan vs. Athuman Khalfab** [1980] T.L.R 190 and **Fastjet Airlines Limited vs. John Mnaku Mhozya**, High Court of Tanzania at Dar es Salaam, Civil Appeal No. 96 of 2016 (Unreported). It is the applicants' advocate contention that, upon such violation, the applicants were then distraught with the amount awarded.

The salient question for determination is whether the applicants have satisfied the conditions for the granting of the leave to appeal to the Court of Appeal of Tanzania. There are several decisions providing guidance on how High Court should invariably exercises its jurisdiction when considering applications for leave to appeal to the Court of Appeal of Tanzania.

For instance, in the case of **Simon Kabaka Daniel V Mwita Marwa Nyang'anyi And 11 Others** (1989) T.L.R 64 (HC) Mwalusanya J. (as he then was) provided a guidance to the effect that in an application for leave to the Court of Appeal the applicant must demonstrate that there is a point of law involved for the attention of the Court of Appeal. Besides, in **Saidi Ramadhani Mnyanga V Abdallah Salehe** (1996) T.L.R 74 (HC) Msumi, J. (as he then was) stated that where a matter raises contentious issues of law it becomes a fit case for further consideration by the Court of Appeal.

The same principles were restated, and in lucidity expounded by the Court of Appeal of Tanzania in **British Broadcasting Corporation vs. Eric Sikujua Ng'maryo**, Civil Application No. 138 of 2004 (Unreported) at page 6-7 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 judiciously exercised and on the materials before the court. As the matter of general Principe, 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 case or arguable appeal. (See: **Buckle vs. Holmes (1926) ALL E.R 90** at page 91). However, where the grounds of appeal are*

frivolous, vexatious or useless or hypothetical, no leave will be granted."

Guided by the above authorities, I am of the considered opinion that the question as to whether the assessment of general damages was just and fit, involves analysis of evidence in connection to the principles of law quantum in awarding the same to the winning party. It follows therefore that the intended grounds of appeal stated under paragraph 11(a)-(d) raise contentious grounds worth attention and consideration of the Court of Appeal of Tanzania.

In the event, the applicants are hereby granted leave to appeal to the Court of Appeal on grounds of appeal stated under paragraph 11(a)-(d) of the Applicants' affidavit against the decision of this Court in *Civil Appeal No. 266 of 2017*. Costs shall abide by the outcome of the intended appeal.

It is so ordered.

DATED at **DAR ES SALAAM** this 31st day of March, 2023.



MUSSA POMO

JUDGE

31.03.2023

