

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR-ES-SALAAM SUB REGISTRY)

AT PAR ES SALAAM

MISC. CIVIL APPLICATION NO. 368 OF 2021

BETWEEN

MULTICHOICE TANZANIA LIMITED.....APPLICANT

VERSUS

MAIMUNA K. KIGANZA.....RESPONDENT

RULING

S.M. MAGHIMBI, J:

The current application was lodged under the provisions of Section 5(1) of the Appellate Jurisdiction Act, Cap 141 R.E 2019 and Rule 45(a) of Tanzania Court of Appeal Rules, 2009 G.N. No. 368 OF 2009 as amended by G.N NO. 362 of 2017 and G.N NO. 344 of 2019. The applicant is seeking this honorable Court to grant her leave to appeal to the Court of Appeal of Tanzania against the decision of this court in Civil Appeal No. 166 of 2020 dated 2nd July 2021 (Honourable E.E Kakolaki, Judge) partly dismissing the Applicant's Appeal against the decision of the District Court of Kinondoni in Civil Case No. 195 of 2019. This Application has been taken at the instance

affidavit of Mr. Jovinson Kagirwa.

The gist of this application was that the Defendant was aggrieved by the decision of Kinondoni District Court in Civil Case No. 195 of 2019 which found the Defendant liable for airing the Plaintiff's movie titled "PENZI BIASHARA" via broadcasting television DSTV, Multichoice Tanzania Limited without Plaintiff's consent. She appealed to this court via Civil Appeal No. 166 of 2020 which was partly allowed. Hence the present appeal.

At the hearing of this application, the Applicant enjoyed the service of learned counsel Mr. Simon Borrow Lyimo while the Respondent was represented by Sijaona Revocatus, learned Counsel. The application was heard by way of written submissions.

In his submissions supporting his application, Mr. Lyimo established that it is the principle of the law that leave to appeal is not automatic, it is upon Court's discretion whether to grant it or not. He argued that however, this discretion ought to be exercised judiciously. To support his argument he cited the case of; **British Broadcasting Corporation Vs Eric Sikujua Ng'maryo** where the Court had this to say;

"Needless to say, leave to appeal is not automatic. It is within the discretion of the Court to grant or refuse leave. The discretionary must, however judiciously exercised and on the materials before Court"

Mr. Lyimo submitted further in an application for leave to appeal, the Applicant is only required to show that there is a point of law worth being determined by the Court of Appeal. He pointed out that his application reveals serious triable issues worth consideration of the Court of Appeal as listed under paragraphs 11(a) to (h) inclusive of the Applicant's affidavit in support of this application. He elaborated that on page 12 of the trial Court's judgment, it did explore the issue as to 'whether the Court having framed the issue of ownership of the infringement broadcasting channel, was correct to condemn the Applicant without making a finding on the issue of ownership of the same' but ultimately did not make a finding on the same. His argument was that this was a violation of the provision of order XX Rule 5 of the Civil Procedure Code, Cap 33 R.E 2019 and hence it requires the intervention of the highest Court of the land. In supporting the other grounds of his application, Mr. Lyimo alleged that the Respondent didn't prove that the Applicant is the owner of the broadcasting channel that allegedly aired his actress work and this was a serious error that needed the attention of the Court of Appeal.

In reply, the Respondent submitted that the Applicant's submission is

unfounded and not supported by the records of the trial Court and there is no serious fact or issue to be considered by the Court of Appeal. He hence prayed for the dismissal of this application. . To support his argument, he cited the case; **Erasto Daima Sanga Vs Peter Mwonga, Misc. Land. Application No. 66 of 2019**, H.C Mbeya (Unreported) whereby Utamwa J (as he then was) had this to say;

"...I do not detect any serious issues of law/facts fit to be considered by the CAT on appeal. Again, I see no chance of success of the intended appeal. I thus, answer the sub-issue passed above negatively that the application at hand did not meet any of the conditions highlighted above granting the leave. I accordingly answer the major issue passed above negatively that, this application for leave to appeal to the CAT is not meritorious"

On that note, the Respondent prayed for this Court to dismiss the application with costs.

In rejoinder, Mr. Lyimo reiterated that their submission in chief extensively demonstrated serious issues of law and fact worth being considered by the Court of Appeal. He went on submitting that all cited cases by Respondent are distinguishable and urge this Court to disregard them. He reiterated his prayer that the application be granted with costs.

Having gone through the respective submissions of the parties, I am in agreement with both the position of both parties that it is trite law that application for leave to the Court of Appeal is not automatically granted but is within the jurisdiction of the court to grant. The important issue for the court to consider is that the discretionary powers must be exercised judiciously. See the decision of the Court of Appeal in the case of **British Broadcasting Corporation vs. Eric Sikujua Ng'maryo** (Supra).

I have revisited the Court's records of both the Civil Appeal No. 166 of 2020 and the trial Court's record via Civil Case No. 195 of 2019. In the impugned judgment of the trial Court, at page 12, the trial Magistrate established an issue as to whether the broadcasting channel was owned by the Defendant and the applicant claimed that the issue of ownership was not determined. I find this issue as warranting the attention of the Court of Appeal. That being the case, this application is hereby allowed. Leave is hereby granted to the applicant to appeal the Court of Appeal against the decision of this court in Civil Appeal No. 166 of 2020.

Dated at Dar es Salaam this 28th day of February 2023.

A handwritten signature in blue ink, appearing to be 'S.M. Maghimbi', is written over a horizontal dotted line.

S.M. MAGHIMBI
JUDGE.