

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
ARUSHA DISTRICT REGISTRY  
AT ARUSHA**

**MISC. CIVIL APPLICATION NO. 95 OF 2022**

*(C/F Civil Revision No. 1 of 2022 High Court of the United Republic of Tanzania at  
Arusha)*

**SIMON JOHN NGALESONI ..... APPLICANT**

**VERSUS**

**FATHER VELEMIR TOMIC (Suing as Legal Representative of  
the Registered Trustee of Catholic Archdiocese of Arusha..... RESPONDENT**

**RULING**

**10<sup>th</sup> March & 3<sup>rd</sup> May, 2023**

**GWAE, J.**

The applicant prays for leave to appeal to the Court of Appeal of Tanzania against the decision of this court (**Mwaseba, J**) in Civil Revision No. 1 of 2022 delivered on 12<sup>th</sup> July, 2022.

The application is made under section 5 (1) (c) of the Appellate Jurisdiction Act, Cap 141 Revised Edition, 2019 (herein AJA) and Rule 45 of the Court of Appeal Rules, 2009 (Court of Appeal Rules). It is supported by a sworn affidavit of Mr. Stephen D. Mushi, the applicant's learned counsel.

Brief history leading to this application is as follows; the applicant was successfully sued by the respondent in the Resident Magistrates' Court of Arusha (trial court) vide Civil Case No. 42 of 2018 following the accident caused by the applicant on 18<sup>th</sup> June, 2016. According to the records, the accident left the respondent with permanent disabilities as well as a damaged car, thus, he claimed for Tshs. 108,258,473/= as a liquidated damage which the trial court granted.

Following non-satisfaction of the decretal amount, the respondent successfully applied for execution of the decree against the applicant by way of arrest and detention as a civil prisoner. Aggrieved by such decision, the applicant filed an Application for revision to the court via Revision No. 1 of 2022 in this court (**Mwaseba, J.**) which was dismissed for want of merit. Hence, the present application.

According to the affidavit, the applicant prays for leave to appeal to the court of Appeal of Tanzania on the following grounds;

1. That, the High Court erred in law and fact in failing to consider that, the executing court erred in law in issuing an order that, the judgment debtor/applicant herein be committed as a civil prisoner without taking into account compulsory conditions and limitations specified under Order XXI Rule 39 (2) of the Civil Procedure Code, Cap 33 R.E. 2019.

2. That, the High Court erred in law and fact in establishing bad faith on the side of the judgment debtor/applicant herein while there was no evidence to establish bad faith on his side that would warrant the arrest and detention as a civil prisoner specified under Order XXI Rule 39 (2) of the Civil Procedure Code, Cap 33 R.E. 2019.
3. That, the High Court erred in law and fact in failing to consider that, the executing court misdirected itself by ordering the judgment debtor/applicant herein be committed as a civil prisoner on the ground that, he did not appear in court to show cause while in fact he was present during hearing of the application for execution.

The respondent through Mr. Said Musendo Chiguma, the learned counsel, filed a counter affidavit disputing the application resisting this application. During hearing, **Mr. Stephen Mushi**, the learned advocate represented the applicant whereas **Ms. Lulu Monyo** (adv) appeared representing the respondent.

Supporting the application, Mr. Mushi prayed for the court to adopt the contents of the affidavit and submitted that, the trial court failed to observe Order XXI Rule 39 (2) of the **Civil Procedure Code**, Cap 33, R.E. 2019 (CPC) instead, it issued a warrant committing the applicant to Civil Prison. He argued that, it was the duty of the trial court to ascertain whether there was compliance of Order XXI Rule 39 (2) of the CPC or not

as held in the case of **Safari Menzembe vs. Juma Fundisha**, Civil Application No. 503/06/2021 (unreported-, CAT). He averred that, there is arguable case to be considered by the Court of Appeal as it was held in the case of **Lightness Damiani and others vs. Said Kasim**, Civil Application No. 450/17 of 2020 (unreported). He prayed that, this application be granted.

Opposing the application, Ms. Monyo submitted that, this application is baseless in law and the same should be dismissed. She asserted that, according to section 5 (1) (b) (viii) of the AJA, arrest and detention order was in lieu of execution of the decree. She added that, it has been seven years for which the respondent has been striving to enjoy the fruits of his decree but the judgment debtor now the applicant has been deliberately applying delay tactics. She added that, the applicant has severally attempted to set aside the respondent's decree but all his efforts were inotiose.

It was Ms. Monyo's further submission that, since the Court of Appeal cannot entertain the matter involving arrest and detention of a decree debtor, the matter between the parties is not appealable before it. Thus, the application is aimed at delaying of justice deliberately. She prayed for the court to invoke the principle of overriding objective and

deal with real matter and not mere technicalities. She prayed that, this court be pleased to dismiss this application and supply the respondent with an account number of either court or the prison authority to proceed with the execution.

In his brief rejoinder, Mr. Mushi argued that, the respondent's counsel submitted on matter of facts namely; allegedly caused delay and unsuccessful cases filed by the applicant. According to him, these facts ought to have been pleaded since submission is not part of the evidence as held in the case of **Registered Trustees of Archdiocese of DSM vs. The Chairperson Bunju Village Government and 12 others**. He also disputed the fact that, the Court of Appeal of Tanzania has no jurisdiction to entertain an appeal relating to arrest and detention meanwhile section 5 (1) (c) requires an aggrieved party by the High Court decision to apply for leave. He submitted that, the impugned decision was on revision by this Court and not execution by the trial court and that, the principle of overriding objective is not applicable in the circumstances of the case since there is right of appeal.

Having gone through the parties' affidavits, submissions and the courts' records, I would first like to address the issue raised by respondent's counsel that, according to section 5 (1) (b) (viii) of the AJA,

arrest and detention order in lieu of executing the decree is not appealable by the Court of Appeal. Disputing the same, applicant's counsel submitted that, the same is appealable under section 5 (1) (c) AJA which requires only one condition that, an aggrieved party by the High Court decision has to apply for leave.

It is trite law in our jurisdiction that, save for appeals from matters set out under section 5 (a) and (b) of AJA, all civil appeals to the Court of Appeal require a leave from this court as per section 5 (c) of AJA including decisions made out of application for execution of decrees. However, in this application it is highly questionable if, the order of this court in revision challenging legality of the order of the RM's court is appealable. The RM's order directing arrest and detention of the applicant as a civil prisoner is not appealable simply because, even an order of this court exercising its original jurisdiction relating to arrest and detention is not appealable as per Section 5 (1) (b) (viii) of CPC which reads;

*"An order under any of the provisions of the Civil procedure Code, imposing a fine or directing the arrest or detention, in civil prison, of any person, **except where the arrest or detention is in execution of a decree**"*  
*Emphasis added).*

According to the above quoted provision of the law, the order of this court when exercising its original jurisdiction under provisions of CPC, imposing a fine or directing the arrest and detention is appealable save where the order is in respect of arrest or and detention in an application for execution of a decree. Thus, an order of the court directing arrest and detention of judgment debtor as a civil prisoner is not appealable. Equally, an order of a subordinate court directing arrest and detention of judgment debtor is not appealable. The arguments by the respondent's counsel is meritorious

An application for leave to appeal to the Court of Appeal of Tanzania is granted at the discretion of the court. Much as the law is silent on how this discretion should be exercised, the conditions for granting leave have been given in a number of Court of Appeal decisions including that, of **Jireys Nestory Mutalemwa vs. Ngorongoro Conservation Area Authority**, Civil Application No. 154 of 2016, (unreported). In this case, the Court Appeal while affirming the position elucidated in its previous decisions it held that:

*"We acknowledge that the law does not expressly state the factors to be considered for the grant of leave to appeal to the Court. However, it is now accepted that the conditions were, lucidly, expounded by the Court in the case of **British Broadcasting Corporation vs Eric***

**Sikujua Ng'maryo**, Civil Application No. 138 of 2004 (unreported). In that case, as cited in the case of **Rutagatina C. L. vs The Advocates Committee and Another**, Civil Application No. 98 of 2010 (unreported), the Court stated 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 a matter of general principle, 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 or arguable appeal (see: **Buckle vs. Holmes** (1926) ALL ER. 90 at page 91). However, where the grounds of appeal are frivolous, vexatious or useless or hypothetical, no leave will be granted."

On the foregoing authority, much as the grant of leave is discretionary, yet it is not automatic. The court adjudicating on such application is not left free to do so. It can grant leave to appeal only where the grounds of the intended appeal raise arguable issues for the attention of the Court. In other words, the grounds raised should merit a serious judicial consideration by the Court. This is intended to spare the Court from dealing and wasting its precious time on unmerited matters (See the Court's decisions in the case of **(i) Harban Haji Mosi (ii) shauri Haji Mosi vs (i) Omar Hilal Seif (ii) Seif Omar**, Civil Reference No. 19 of 1997 cited in the case of



***British Broadcasting Corporation vs Eric Sikuja  
Ng'maryo (supra).***

Subscribing fully to the case law above, therefore, leave to appeal to the Court of Appeal of Tanzania cannot automatically be granted until and unless the court is satisfied that, the conditions expounded above exist. Applying the conditions in the above precedent and this present application for leave, the court has to be satisfied that, the anticipated grounds of appeal as set out under Para. 5 of the applicant's affidavit raised issues arguable by the Court of Appeal. I have further looked at the decision of this court subject of an intended appeal to the Court of Appeal, I have not found any arguable issue or any issue of general importance or point of law worth for consideration by the Court of Appeal. I also further considered the fact that, the applicant is not desirous to challenge the decisions dismissing his application to set aside ex-parte judgment. Therefore, the intended appeal is aimed at delaying tactics. The refusal or neglect found by the court on the part of the judgment debtor to pay the decretal amount is constituted by his unnecessary and untimely applications filed in the subordinate court and absence of any justifiable reasons as to why the decree in favour of the respondent is not satisfied.

However, I am of the firm view that, the applicant was to start being imprisoned as a civil prisoner immediately after the order of the RM's court especially when the fees payable by the decree holder are known. Doing otherwise the courts' decrees shall not be executable since there are persons/ judgment debtors who after having courts' decrees against them not enforceable.

That said and done, I hereby dismiss this application. The applicant shall bear the costs of this application

It is so ordered.

**DATED and DELIVERED** at Arusha this 3<sup>rd</sup> day of May, 2023.

  
**M.R. GWAE**  
**JUDGE**

**Order:** The order of the Resident Magistrate's Court should be complied with as soon as practicable



  
**M.R. GWAE**  
**JUDGE**  
**03/05/2023**