

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(IRINGA SUB REGISTRY)  
AT IRINGA**

**MISC. CIVIL APPLICATION NO. 8 OF 2022**

*(Originating from Civil Case No. 07/2021 of the High Court of Tanzania before Hon. F.  
N. Matogolo, J.)*

**LION ENERGY COMPANY LIMITED** ..... **APPLICANT**  
**VERSUS**  
**NEW FOREST COMPANY LIMITED** ..... **RESPONDENT**

**RULING**

*04/5/2023 & 23/05/2023*

**I.C MUGETA, J:**

The applicant seeks leave to appeal to the Court of Appeal of Tanzania (CAT) against the decision of this court. Briefly, the background to this application is that the respondent had sued the applicant before this court for breach of contract of supply of poles. The suit proceeded *ex parte* against the applicant as he failed to appear in court. The applicant then filed an application for extension of time to apply for order to set aside the *ex parte* judgment. Her application was dismissed with costs as she had not adduced sufficient reasons for the court to exercise its discretion to extend time. The applicant discontented with this court's ruling filed this application.



According to the affidavit deponed by Musa Mhagama, the grounds for this application are, **one**, that there is a point of law worth consideration of the CAT as the advocate who represented the respondent during hearing had conflicting interest as he attested the counter affidavit in reply to the application. **Two**, the applicant was not notified on the existence of the *ex parte* judgment and not properly served with summons. **Three**, this court's refusal to grant extension of time while the applicant adduced sufficient reasons. **Four**, there are irregularities in the proceedings of this court.

The respondent's counsel, Moses Ambindwile resisted the application. He averred that the application was heard inter parties by way of written submissions and that the applicant has not raised any points of law worth the determination of the CAT. He averred further that the applicant faulted to enter appearance despite being duly served with summons.

In supporting the application, the applicant's counsel submitted that it is trite law that a person intending to appeal to the CAT must first seek leave as provided under section 5(1)(c) of the Appellate Jurisdiction Act [Cap. 141 R.E 2019] (hereinafter referred to as AJA and Rule 45(a) of the Tanzania Court of Appeal Rules, 2009. He added that leave will be granted where there is an important arguable issue of law, facts or mixed facts and

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law which need to be determined by the CAT as it was the holding in the case of **Ramadhan Mnyanga v. Abdala Salehe [1996] TLR.**

He contended further that in the present application there are points of law and facts which need to be determined by the CAT. One of those issues is the conflict of interest as the advocate who attested the respondent's counter affidavit is the same who drafted written submissions. Another issue is the court's refusal to grant extension of time while there was a point of law as the summons were not served in accordance with the law. Moreover, the applicant was not informed of the date of *ex parte* judgment and the existence of the *ex parte* judgment.

Opposing the application, the respondent's counsel argued that the issue raised by the applicant on the conflict of interest as the advocate who attested the Counter affidavit is the same who drafted the written submissions is not a point of law. He submitted further that, this issue was not raised during hearing, it is raised at this stage for the first time.

On issue of irregularities in service of summons, the respondent's counsel argued that after the court process server failed to identify the whereabouts of the applicant, he swore an affidavit and it was admitted as evidence. The respondent then prayed for service of summons by publication. Therefore, all grounds advanced by the applicant are baseless.

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In rejoinder, the applicant's counsel essentially reiterated his submissions in chief.

Applications for leave to appeal to the CAT are governed by Section 5(1) (c) of the AJA, Cap. 141 R.E 2019 which vests the High Court with the discretion to grant leave to litigants intending to appeal to the CAT against High Court decisions not falling under section 5(1)(a) and (b) of the AJA. Leave is grantable on certain conditions as described in the case of **British Broadcasting Corporation V. Erick Sikujua Ng'moryo**, Civil Application No. 138 of 2004, CAT – Dar es Salaam (unreported) The Court held that:

*"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".*

The issue to be determined in this case is whether the applicant has demonstrated an arguable case meriting the consideration of the CAT. Starting with the first ground, that there is conflict of interest as the advocate who attested the respondent's counter affidavit is the same who represented the respondent, I agree with counsel for the respondent that this issue is being raised for the first time. However, since the complaint is

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on the legality of the counter affidavit, I think it raises a point of law worth the attention of the CAT.

On the ground that summons was not issued to the applicant, I have perused the record. It shows that summons was issued to the applicant on 21<sup>st</sup> day of February 2020. However, it was returned as the applicant was not found. On 19<sup>th</sup> March, 2020 the respondent's advocate prayed for substituted service where the applicant was served via Mwananchi newspaper dated 16<sup>th</sup> April, 2020. Again, on 28<sup>th</sup> July via Mwananchi newspaper the applicant was issued with summons before delivery of judgment. The applicant complains that service procedures were violated. As this issue has already been determined by this court in the negative and the applicant is aggrieved, I am of the view that the argument raises a point of general importance that can validly be considered by the CAT.

In the third ground, the applicant's advocate complains that his application for extension of time was not granted while he had adduced sufficient reasons. As this court found such reasons insufficient, it is not upon this court again to consider the correctness of its decision. That, mandate lies with the CAT. This argument, in my view, raises a matter of general importance for determination by the CAT.



In the event, I rule that the applicant has demonstrated an arguable case worth the consideration of the CAT. Leave to appeal to the CAT against the impugned ruling of this court, is, thus, granted. I grant no costs as they ought to be in the course.



*I.C. Mugeta*  
**I.C MUGETA**  
**JUDGE**  
**23/5/2023**

**Court:** Ruling delivered in chambers in the presence of the Teresia Charles, advocate for the respondent and in the absence of the applicant and the respondent.

**Sgd. I.C MUGETA**  
**JUDGE**  
**23/5/2023**