**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(MAIN REGISTRY)**

**AT DAR ES SALAAM**

**MISC. CIVIL APPLICATION NO. 17 OF 2023**
(Arising from Miscellaneous Cause No. 4 of 2023 of this Court)

**THE REGISTERED TRUSTEES OF NATIONAL CONVENTION FOR CONSTRUCTION AND REFORM (NCCR-MAGEUZI) .....APPLICANT**

**VERSUS**

**JAMES FRANCIS MBATIA..... RESPONDENT**

**RULING**

05/06/2023 & 12/06/2023

**KAGOMBA, J**

The applicant is before this Court praying for leave to appeal to the Court of Appeal of Tanzania against the decision of this Court in Miscellaneous Cause No. 04 of 2023 before hon. L. E. Mgonya delivered on 21st April, 2023 where the respondent was granted leave to file an application for judicial review in this Court.

The application for leave to appeal has been preferred by way of chamber summons made 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 of 2019. The affidavit sworn by Beati A. Mpitabakana, the Chairman of the Board of Registered Trustees of the applicant, supports the application.

The respondent opposed the application through a counter affidavit sworn by himself which was filed in this Court alongside a notice of preliminary objection on points of law, stating that:

1. The applicant's application is premature before this Court as the order for which a leave is sought is not appealable for being interlocutory order, it is a barred by the provision of section 5(2)(d) of the Appellate Jurisdiction Act, [Cap. 141 R.E 2019] ("AJA").
2. The applicant's application is incompetent and bad in law for being frivolous and vexatious.

On the date when the preliminary objection was scheduled for hearing, both parties were represented by learned advocates. Whereas Mr. Hassan Ruhwanya appeared for the applicant, Mr. Hardson Mchau appeared for the respondent.

In arguing the first objection, Mr. Mchau submitted that the application is premature because the order which the applicant intends to appeal against is an interlocutory one and therefore not appealable. He argued that an appeal, being a creature of statute was not automatic. That, where there was no provision of the law permitting the applicant to appeal against the

order granting leave to file application for judicial review, such an application cannot stand.

To clarify the above argument, he said that the decision which the applicant intends to appeal against is an interlocutory order because it did not determine any rights of the parties, save that it gave the respondent a leave to file an application for judicial review, hence unappealable in terms of section 5(2)(e) of AJA. He referred this Court to the cases of **Joseph F. Masanja vs Principal Secretary Prime Minister's Office Regional Administration and Local governments**, Civil Appeal No. 31 of 2009, CAT, Tanga; **Tanzania Posts Corporation vs Jeremiah Mwani**, Civil Appeal No. 474 of 2020, CAT; and **Hon. Minister for Finance and Planning and 2 Others vs Legal and Human Rights Center**, Misc. Civil Application No. 16 of 2021, to cement his contention.

On the second point of objection, Mr. Mchau submitted that the application before the Court is frivolous and vexatious because there is no any right which was determined by Mgonya, J (as she then was) in Miscellaneous Cause No. 4 of 2023. For this reason, he argued, the application is rendered groundless with no substance for the Court of Appeal to determine. He referred to the case of **Wangai vs Mugamba and**

**Another** [2003] 2 EA 474 where the terms "frivolous" and "vexatious" were defined. He also cited the case of **Tanga Cement Plc vs The Fair Competition Commission and Another**, Misc. Commercial Application No. 152 of 2021, High Court, Commercial Division, Dar es salaam, for a contention that when an application is frivolous and vexatious such points constituted points of law worthy consideration of by the Court.

To further concretize his submission, Mr. Mchau cited the decision of the Court of Appeal in **British Broadcasting Corporation vs Eric Sikujua Ng'maryo**, Civil Application No. 138 of 2004, CAT, Dar es salaam (unreported), for a contention that where an application is frivolous and vexatious it cannot be granted by Court. He wound up by praying this Court to struck out the application with costs.

In his reply, Mr. Ruhwanya argued that the preliminary objection was misplaced for a reason that the moment a notice of appeal was filed by the applicant in the Court of Appeal, this Court ceased to have jurisdiction over this matter. He said that the jurisdiction of this Court, under such circumstance, is limited to considering whether or not to grant the application for leave to appeal to the Court of Appeal, but not to determine the legality of the appeal itself, which henceforth turns to be the duty of the

Court of Appeal. To support this contention, he cited the case of **Jireys Nestory Mutalemwa vs Ngorongoro Conservation Area Authority**, Civil Application No. 154 of 2016, CAT at Arusha, in which the Court of Appeal quoted with approval the decision in **Regional Manager-TANROADS Lindi vs DB Shapriya and Company Ltd**, Civil Application No. 29 of 2012 CAT (unreported).

It was Mr. Ruhwanya's further contention that an appeal is a right of the applicant which should not be obstructed by this Court, adding that in event the applicant is granted leave to appeal, the respondent shall not be prejudiced. He thus prayed this Court, in terms of section 95 of the Civil Procedure Code, [Cap 33 R.E 2019] ("**CPC**") to disregard the preliminary objection raised by the respondent but direct itself to the merits of the application.

With regard to the second point of objection, it was Mr. Ruhwanya's contention the same does not constitute a pure point of law. He argued that for the Court to determine if the application is frivolous and vexatious ascertainment of evidence would be required. On these grounds, he prayed the preliminary objection raised by the respondent be dismissed to enable the hearing of the application to proceed on merit.

In his rejoinder, Mr. Mchau denied to have touched on the substance of the intended appeal, but emphatically reiterated his submission in chief. Regarding the provision of section 95 of the **CPC** cited by the advocate for the applicant, Mr. Mchau said that that was applicable where there were no other provisions to cater for a matter in question, but not in the matter at hand where section 5(1)(c) of AJA is applicable.

He rejoined further that, contrary to the contention made by Mr. Ruhwanya on the second limb of the preliminary objection, the same is also on pure point of law, because for being frivolous and vexatious the applicant's application lacked no legal basis to stand on. He prayed for the application to be struck out with costs.

Having heard the submissions from both advocates for and against the preliminary objection, along with the authorities cited, the main issue for this Court to determine is whether the preliminary objection has merit. However, as a matter of legal requirement, where jurisdiction of the Court is put to question, that question has to be determined first.

It was one of the contentions by Mr. Ruhwanya that this Court ceased to have jurisdiction to entertain this preliminary objection the moment the

applicant filed a notice of appeal to the Court of Appeal to challenge the decision of granting leave to the respondent to file judicial review vide Miscellaneous Cause No. 4 of 2023. Ostensibly, that would appear to be the general rule. However, Mr. Ruhwanya's contention does not tell it all, as there are exceptions as well as condition for the jurisdiction of this Court to be ousted once a notice to the Court of Appeal is filed.

In **Awiniel Mtui & Three Others v. Stanley Ephata Kimambo**, Civil Application No. 19 of 2014, CAT at Arusha, clarification was made to the effect that the High Court jurisdiction ouster clause would not apply in instances such as applications for leave or provision of a certificate of law. In its own words the Court of Appeal stated:

> *"But, we should quickly rejoin, applications for certificate of law or leave to appeal are on a different footing. In this regard we need do no more than reiterate what we stated in the unreported Civil Application No. 71 of 2001 –* ***Matsushita Electric Co. Ltd vs Charles George t/a CG Travers***
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> > *"Once a notice of appeal is filed under rule 76 then this Court is seized of the matter in exclusion of the High Court* ***except for applications specifically provided for, such as leave to appeal or provision of a certificate of law****".*
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> > *[Emphasis supplied]*

*The bolded expression tells it all:* ***Applications for leave to appeal and the provisions of a certificate on a point of law are not caught up by the ouster rule."***

From the above excerpt, it is apparent that this Court is, under the exceptions to the general rule, competent to hear and determine the application for leave before it. *Ipso facto*, the Court also has jurisdiction to determine the preliminary objection raised by the respondent against the leave application. For this reason, the contention that this Court lacks jurisdiction to determine the preliminary objection falls short of merit. The same is therefore disregarded.

It is also worth noting that in **Tanzania Electric Supply Company Limited v. Dowans Holding SA & Another**, Civil Application No. 142 of 2012, CAT at Dar es salaam, the Court of Appeal appears to set a condition that for the jurisdiction of this Court to be ousted, the notice of appeal filed in the Court of Appeal has to be against "an appealable decree or order" of this Court. This can be gleaned from the following excerpt from the above cited case:

*"It is settled law in our jurisprudence, which is not disputed by counsel for the applicant, that* ***the lodging of a notice of appeal in this Court against an appealable decree or***

***order of the High Court**, commences proceedings in the Court. We are equally convinced that it has long been established law that once a notice of appeal has been duly lodged, the High Court ceases to have jurisdiction over the matter."*

*[Emphasis added].*

Whether or not the notice of appeal filed by the applicant in the Court of Appeal is against an appealable order of this Court, is a matter to be determined very shortly when considering the first limb of the preliminary objection.

The pending sub-issue arising from the first limb of objection is whether or not the leave to file an application for judicial review, granted by this Court to the respondent, is interlocutory decision hence not appealable. As correctly contended by Mr. Mchau, the provision of section 5(2)(d) of AJA clearly prohibits any appeal against an interlocutory decision or order of this Court, save where such decision or order has the effect of finally determining the suit. The cited provision states;

*"2) Notwithstanding the provisions of subsection (1) –*

*a) N/A*

*b) N/A*

*c) N/A*

*d) no appeal or application for revision shall lie against or be made in respect of any preliminary or interlocutory decision or order of the High Court unless such decision or order has the effect of finally determining the suit."*

In interpretation of the above position of the law, the Court of Appeal held, in several decisions, to the effect that a decision is considered interlocutory when during its determination, the Court did neither consider the rights of the parties nor the issues of law or fact which initiated the dispute between them. On page 5 of the Ruling of this Court which is intended to be impugned by the applicant, Mgonya,J (as she then was) made herself clear when she stated;

*"While determining this matter, I will confine myself on the content of the pleadings and see whether this application has merits".*

Indeed, guided by the principle stated in the case of **Njuguna v. Minster for Agriculture** [2000] 1 EA 184, her Ladyship went on to consider only if there was an arguable case that indicated a possibility for the reliefs sought by the respondent to be granted on hearing of the merits of his application for judicial review. This being the case, the order granting leave was very much interlocutory.

The position above, is supported not only by the cited decision of the Court of Appeal in **Tanzania Posts Corporation** (supra) as referred by Mr. Mchau, but also in several other decisions including **Tanzania Motors Services Ltd and Another vs Mehar Singh t/a Thaker Singh**, Civil Appeal No. 115 of 2005, CAT, Dodoma; **Yusuf Hamis Mushi and Another vs Abubakari Khalid Hajj and 2 Others**, Civil Application No. 55 of 2020, CAT, Dar es salaam; and **Pardeep Singh Hans vs Merey Ally Saleh and 3 Others**, Civil Application No. 422/01 of 2018, CAT, Dar es salaam. For instance, in **Tanzania Motors Services Ltd** (supra) the Court of Appeal stated that:

> *"The fundamental question is whether the issues concerning the appellant's petition were fully canvassed and finally determined by the Court below. We have sought guidance from the case of* ***Bozson v. Artrincham Urban District Council*** *(1903) 1KB 547 wherein Lord Alverston stated as follows at page 548 –*
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> > *'It seems to me that the real test for determining this question ought to be this: Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order".*

In the same vein, in **Tanzania Motors Services Ltd and Another vs Mehar Singh t/a Thaker Singh,** the Court of Appeal held that;

> *"In our view, what the above definitions entail, is that the orders that do not completely dispose of all issues of law and fact that were presented to the Court are interlocutory decisions or orders; and the proceedings from which they emanate, interlocutory proceedings. Such orders, under the law of this country are not appealable to this Court in view of section 5(2)(d) of the AJA quoted above".*

Guided by the above-cited decisions, I am firm in my mind that the order of this Court granting leave to the respondent to file for judicial review, wasn't conclusive, hence the same falls in the ambit of interlocutory decisions. As correctly argued by Mr. Mchau, the impugned order is not appealable in terms of section 5(2)(d) of AJA, and I so hold.

It is for above reasons, I fully subscribe to the decision of this Court in the case of **Hon. Minister of Finance and Planning** (supra) which was referred to me by Mr. Mchau, where the Court had the following to say, in a similar matter;

> *"In the present application, a prayer is for leave to challenge a decision which granted a leave to apply for judicial review, the decision which did not determine substantive rights of either*

*party. In lieu of the above authority and materials before this Court, without going into the depth of ground of appeal, I find that the ground given is pre mature and the applicants still can challenge this in the main application for judicial review. To go to the Court of appeal at this stage will be a mis use of the Court process".*

Mr. Ruhwanya had also implored this Court to refrain itself from obstructing the applicant from enjoying his right to appeal. I agree with his contention. However, it is common knowledge that despite of the fact that an appeal is a constitutional right under Article 13(6)(a) of the Constitution of the United Republic of Tanzania [Cap 2 R.E 2019], the right is not absolute. The same must be exercised in accordance with the procedure and boundaries set by the law. One such boundary is the express restriction set under section 5(2)(d) of AJA, that no appeal shall lie against an interlocutory order.

Basing on the reasons above, this Court finds merit in the 1st point of preliminary objection raised by the respondent, and the same is sustained. Having decided so, the need to determine the 2nd point of objection does not arise, considering that the above determination is sufficient to dispose of this matter.

Therefore, the application before this Court is premature and the same is struck out for being filed contrary to the provisions of section 5(2)(d) of the Appellate Jurisdiction Act, [Cap. 141 R.E 2019]. Costs be borne by the applicant.

**Dated** at **Dodoma** this 12th day of June, 2023.


**ABDI S. KAGOMBA**

**JUDGE**