

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

MISC. CIVIL APPLICATION NO. 84 OF 2023

(Originating from Misc. Civil Application No. 67 of 2021)

FIDELIS M. MASEKE.....1ST APPLICANT
LEONCE G. MKIWA.....2ND APPLICANT
JOSEPH NTOGWISANGU.....3RD APPLICANT
ADALAIDE MARIJANI.....4TH APPLICANT
JOSEPH D. URIO.....5TH APPLICANT
MARCEL J. MAUNGO.....6TH APPLICANT
JUSTINE MSUKA.....7TH APPLICANT
AUGUSTIN MZEE NGUMA.....8TH APPLICANT
ARTHUR ORIO.....9TH APPLICANT
MICHAEL METALALI.....10TH APPLICANT

VERSUS

PERMANENT SECRETARY

MINISTRY OF FINANCE.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

RULING

Date of Last Order: 25/05/2023

Date of Ruling: 16/06/2023

E.E. KAKOLAKI, J

By way of Chamber Summons made under *section 5(1)(c)* and 11(1) of the *Appellate, Jurisdiction Act Cap 141 R.E 2019*, and Rules 45 (a) and 47 of Tanzania Courts of Appeal Rules 2009 the Applicants are seeking leave of this Court to Appeal to the Court of Appeal of Tanzania against the decision in Misc. Civil Application No. 67 of 2021 (Nkwabi, J), handed down on 02/02/2023. The Chamber Summons is supported by an affidavit of Dr. Chacha Bhoke Murungu applicants' counsel. Gathered from the affidavit, the applicants in Misc. Civil Application No. 67 of 2021, had applied for extension of time within which to file an application to review the decision of this Court in Civil Case No. 289 of 1998 (R. K. Sameji, J as she then was), the application which was dismissed on the reasons that, firstly, there was no illegality on the impugned ruling, secondly, the applicants had not accounted for each day of delay, and thirdly that, the application for extension of time had already been dismissed by Hon. Masoud J, implying the court was *functus officio*. It is due to the above decision applicants are now seeking leave of this court to appeal to the Court of Appeal on the following triable issues as deposed in paragraph 3 of the affidavit:

One, whether there was no illegality in the decision of the High Court (Hon. Semeji J as she then was) in Civil Case No. 289 of 1998 dated 25th August

2017 and whether it was necessary and correct to hold that, each day of delay had not been accounted for,

Two, Whether High Court (Nkwabi J) misdirect itself as to the true nature of the application before it in Misc. Civil Application No. 67 of 2021 which concerned extension of time to apply for review of the decision of the High Court in Civil Case No. 289 of 1998 dated 25th August 2017 and the nature of the application that was before Massoud J in Misc. Civil Application No. 95 of 2017 concerning extension of time to apply for leave to apply for Judicial Review.

It was further averred that; applicants have lodged notice of appeal on 20th February 2023 and lodged a letter requesting to be supplied with proceedings, ruling and drawn order, on 2nd February 2022 and copy of which was served to the respondents on 2nd February 2023 as per annexure FM4.

The said application was not welcomed by the respondents, as through a counter affidavit duly sworn by Mr. Stephen Noel Kimaro, State Attorney, challenged the application on the grounds that, the decisions by the High Court in Civil Case No. 289 of 1998 of 25th August, 2017 and Misc. Civil

Application No. 67 of 2021 were legally decided in accordance with the law and therefore grant of leave to appeal as preference of this application is abuse of courts process and powers.

On 25/05/2023 when the application was placed for hearing orally, both parties were represented as Dr. Chacha Murungu appeared for the applicants, whereas the respondents enjoyed the services of Ms. Doreen Mhina assisted by Steven Kimaro, both learned counsel.

In support of the application Dr. Murungu's submission were preceded by the prayer to adopt the contents of applicants' affidavit to form part of his submission and went on to submit that, as a matter of law leave is grantable where there are reasonable chances of success in an appeal and where the deposed grounds are raising primacies case, arguable appeal or issues of general importance on point of law warranting interference by the Court of Appeal. To fortify his stance the case of **British Broadcasting Corporation Vs. Eric Sikuja Ngi'maryo**, Civil Application No. 138 of 2004 at page 6 to 7, was cited.

It was the learned Counsel's submission that, as per paragraphs 2,3 and 4 of the affidavits the applicants have presented triable issues to be considered

by this Court for grant of the sought leave to appeal to the Court of Appeal in order to challenge the illegality obtained in the decision sought to be challenged annexed as annexure FM2. On the first ground he contended, it was wrong for this Court (Nkwabi, J) to hold there was no illegality of the decision sought to be impugned warranting grant of extension of time to file an application for its review, as the same was apparent on face of record of the said decision, when this Court Sameji J, (as she then was) in its decision in Civil Case No. 289 of 1998, held that, the Civil Case before it was a trade dispute while in fact is not true and further, she proceeded to dismiss it for want of jurisdiction, instead of striking it out despite of not being heard on merit. He took the view that, with such apparent illegality there was no need for the applicants to accounting each delayed day as held by the Court in *Misc. Civil Application No. 67 of 2021*. That aside on the second ground he argued that, applicants had in fact accounted for each and every day delayed, hence the Court was unjustified to dismiss the application on that reason. Regarding the third ground it was his argument that, this Court in *Misc. Civil Application No. 67 of 2021*, misdirected itself as regard to application for extension of time to apply for review of the decision of the High Court in Civil Case No. 289 of 1998 visa vis the application for extension

of time to apply for leave to appeal for judicial review in Misc. Civil Application No. 95 of 2017 by Hon Masoud J. (as he then was) annexure FJ29, as the decision by Masoud J, was not for review of the decision of the High Court but rather for extension of time for leave to apply for judicial review, thus two different decisions. In his view it was a misdirection of this Court to hold the application before it was already determined in *Misc. Civil Application No. 95 of 2017*, hence erroneous finding that, the applicants had failed to demonstrate sufficient cause for extension of time as prayed. It was his prayer therefore that this application be granted as prayed.

On adversary, Mr. Kimaro who appeared for the respondent started by seeking leave of the court to adopt the counter affidavit to form party of the submission in opposing the application. Referring to several cases essentially was in agreement with Dr. Chacha's proposition that, leave is granted where a matter raises a legal point worth the consideration of the court. on the ground of illegality he argued, the same does not exist in the decision sought to be impugned as Hon. Justice Nkwabi correctly held that, there was no illegality on the face of record shown by the applicants and further that, the ground of illegality submitted and relied upon by the applicants is not disclosed in applicant's affidavit. On the second ground Mr. Kimaro

contended that, applicants failed to account for each and every day of delay as rightly decided by Hon Nkwabi J. Regarding misdirection on the two applications relied upon to dismiss the applicants' application in *Misc. Civil Application No. 67 of 2021*, he conceded that, the court misdirected itself on that point as there is difference between an application for extension of time to apply for review and that of extension of time for leave to apply for judicial review. He took the view that, despite of the above stated the applicants had an opportunity to pursue their rights after the decision in Civil Case No. 289 of 1998, through proper channel instead of insisting to appeal against the decision in *Misc. Civil Application No. 67 of 2021*, hence this application should be dismissed for being unmerited. In a short rejoinder, Dr. Murungu reiterated his submission in chief and prayed that, the application be granted as even the days of delay were accounted for.

I have keenly considered the rival arguments by both parties' counsel and thoroughly perused the affidavit, counter affidavit and the annexures thereto as well as the law applicable under section 5 (1) (c) of AJA requiring appeals to the Court of Appeal from this Court against the Decree, Order or Judgment to be with the leave of High Court or the Court of Appeal itself. It is apparent therefore that; this Court is seized with necessary powers to consider and

grant the applicant with the sought prayer for leave to appeal to the Court of Appeal. The rationale behind such requirement for leave no doubt is to vest this Court with the duty to filter out frivolous and vexatious appeals and in so doing, spare the Court of Appeal from unmerited matters, so as to offer adequate attention to cases of true public nature and other serious matter. See the case of **Harban Haji Mosi Vs. Omari Hilal seif and Another** Civil Reference No. 19 of 1997 (CAT-Unreported). Though its grant is discretionary, leave is not automatically granted, as such discretion must be judiciously exercised depending on the materials put before the Court by the applicant for consideration. With that understanding therefore, an application like the one at hand can only be granted if there is good reasons to do so, more often sufficient point(s) of law or such disturbing features as to call for attention of the apex court in this land. Applicant is therefore expected to demonstrate to the Court's satisfaction that, there is arguable appeal or novel points of law or public importance or that, the grounds of appeal raise issues of general importance worth consideration by the apex court. This sound principle of the law was exemplified in the case **British Broadcasting Corporation** (supra), where the Court of Appeal said:

"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 be judiciously exercised on the materials before the Court. As a matter of general principle leave to Appeal will be granted where the grounds of Appeal raised issue of general importance or novel point of law or where the grounds show a prima facie or arguable Appeal. However, where the grounds of appeal are frivolous, vexation or useless or hypothetical no leave will be granted."

Similarly in the case of **Rutagatina C. L Vs. The Advocate Committee and Another**, Civil Application No.98 of 2010 (unreported), the Court of Appeal stated that:

*An application for leave is usually granted if there is good reason, normally on a point of law or point of public importance that calls for this Court's intervention. Indeed, on the aspect of leave to appeal, the underlying principle was well stated by this Court in **Harban Haji Mosi and Another v Omar Hilal Seif and Another**, Civil Ref.No.19 of 1997 (unreported) thus: Leave is grantable where the proposed appeal stands reasonable chances of success or where, but not necessarily, the proceedings as a whole, reveal such disturbing features as to require the guidance of the Court of Appeal. The purpose of the provision is, therefore, to spare the Court the spectre of*

unmeriting matters and to enable it to give adequate attention to cases of true public importance.

Guided by the above principles of law, the issue which this court is called to determine is whether, the applicant has advanced novel points of law or arguable appeal or issues of sufficient importance worth determination by the Court of Appeal.

In discharging their duty, applicants in paragraph 3 of the affidavit raised three points claiming to be arguable issues worth determination by the Court of Appeal as listed above. Starting with the first ground, my scrutiny of the ruling sought to be impugned as well as revisiting of the fighting submission by the two legal minds has demonstrated to this Court that, there is arguable issue as to whether the remedy for the suit in which the court finds itself to have no jurisdiction to entertain, is to dismiss it instead of striking it out as held by this Court in Misc. Civil Application No. 67 of 2021.

Next for determination is the issue as to whether it was necessary and correct to for this Court in Misc. Civil Application No. 67 of 2021 hold that, each day of delay had not been accounted for. In my profound view this ground does not raise arguable issue, as Mr. Murungu apart from merely claiming that the applicants accounted for delayed days in filing the

application for review, he failed to demonstrate how so as to convince this Court to believe that, there is prima facie issue for consideration by the Court of Appeal. Thus, the same is not worth determination by the Court of Appeal.

Lastly is on the third ground, in which the complaint is that, this Court in Misc. Civil Application No. 67 of 2021, misdirected itself as to the nature of the application before it when dismissed the applicants' application for extension of time within which to file an application for review of its decision in Civil Case No. 289 of 1998, believing that, similar application for extension of time to apply leave to apply for judicial review was determined by same Court Masoud J, (as he then was) in Misc. Civil Application No. 95 of 2017, hence Court was functus officio to entertain the matter, which alleged misdirection was conceded by the respondents' counsel in his submission. Whether this Court was correct to dismiss applicants' application on the ground that, the application before it was similar to that of extension of time to apply for leave to apply for judicial review in Misc. Civil Application No. 95 of 2017, already determined, I find is arguable ground of appeal worth consideration by the Court of Appeal.

In arriving to such conclusion, I am alive to the principle that, this court's duty in entertaining applications of this nature is not to determine the merit

or demerits of the appeal but rather consider whether the proposed issues are embraced in conditions set out in the case of **British Broadcasting Corporation** (supra) and the case of **National Bank of Commerce vs Maisha Musa Uledi** (*Life Business Centre*), Civil Application No. 410/7 of 2019 Court of Appeal at Mtwara at page 9, where it was held that:

"In application for Leave to Appeal, what is required of the Court hearing such an application is to determine whether or not the decision sought to be appealed against raises legal points which are worth consideration by the Court of Appeal."

Applying the above-mentioned authority in the circumstances of this case, I am satisfied that, the applicants in the present application have sufficiently set out the controversies which need interference by the Court of Appeal.

In the upshot the application for leave to appeal to the court of appeal is granted as prayed.

No order as to cost.

It is so ordered.

Dated at Dar es Salaam this 16th day of June, 2023.



E. E. KAKOLAKI

JUDGE

16/06/2023.

The Ruling has been delivered at Dar es Salaam today 16th day of June, 2023 in the presence of the 1st, 3rd, 6th, 8th and 10th applicants, Mr. Stephen Kimaro, State Attorney, for the 1st and 2nd respondents and Ms. Asha Livanga, Court clerk and in the absence of other applicants.

Right of Appeal explained.



E. E. KAKOLAKI

JUDGE

16/06/2023.

