

IN THE HIGH COURT OF TANZANIA

(MOROGORO SUB-REGISTRY)

AT MOROGORO

MISC. CIVIL APPLICATION NO. 42 OF 2022

(Arose from the decision of this Court in Civil Appeal No. 47 of 2021, before Hon. P. J. Ngwembe, J., which originates from the Judgment and Decree of the District Court of Morogoro, at Morogoro in Civil Case No. 10 of 2019)

PROPERTY INTERNATIONAL LTD

& COURT BROKERS AND TWO OTHERS APPLICANTS

VERSUS

LAZIMA KUMBUNI..... 1ST RESPONDENT

MAKAU SALIM 2ND RESPONDENT

R U L I N G

30th June, 2023

CHABA, J.

Before the District Court of Morogoro, at Morogoro the respondents were sued by the appellants in Civil Case No. 10 of 2019, a result of which the applicants were ordered to pay the respondents a total of TZS. 188,800,000/=; interest at the rate of 20%; general damages of TZS. 10,000,000/= and costs as well.

Aggrieved by such decision of the District Court, the applicants (appellants) unsuccessfully appealed to this Court (Ngwembe, J.) through Civil Appeal No. 47 of 2021. Still aggrieved, the applicants rushed before



this Court and lodged a notice of appeal on 11/07/2022, and on 09/08/2022 they filed this application for leave to appeal to the Court of Appeal of Tanzania seeking to assail the decision of this Court. The application is made under section 5 (1) (c) and section 5 (2) (c) of the Appellate Jurisdiction Act [CAP. 141 R. E, 2019] (the AJA) and Rule 45 (a) and (b) of the Court of Appeal Rules, 2009.

According to the applicants' submission in support of the application, the applicants intend to challenge the decision of this Court to the effect that, the decision reached by this Honourable Court was in total inconsideration of the absence of the necessary parties namely, the Attorney General, Munyi Kumbuni and Sudi Mabula.

At the hearing of the application, by consensus, parties agreed to dispose of the application by way of written submissions. In this regard, Ms. Joyce Richard, the learned counsel appeared for the applicants whereas the respondents enjoyed the legal service of Ms. Amani Joackim, also learned advocates who prepared and drawn the respondents' written submission in graties.

To kick the ball rolling, the counsel for the applicants prayed to adopt the contents of the affidavit deposed by the applicants so as the same could form part of their written submission and proceeded to amplify that,



the high Court Judge upheld the judgment and decree of the trial Court without considering the issue of misjoinder or non-joinder of a necessary party namely, the Attorney General, Munyi Kumbuni and Subi Mabula who were the beneficiaries of the said execution whereas the applicants herein were just executing the Court Orders.

According to him, the above-mentioned persons were not joined as parties to the suit, but in the circumstance of this case it was very important for them to be joined as necessary parties as per Rule 3 of the Civil Procedure Code, [CAP. 33 R. E, 2019], (the CPC) which provides: -

"All persons may be joined as defendants against whom any right to relief which is alleged to exist against them arises out of the same act or transaction; and the case is of such a character that, if separate suits were brought against such person, any common question of law or fact would arise".

The counsel substantiated that, the issue on non-inclusion of necessary parties is worthy consideration by the Court of Appeal of Tanzania because it touches a point of law. To cement her argument, she referred this Court to the cases of **Rutagina CL vs. The Advocates Committee and Clavery Mtindo Ngalapa**, Civil Application No. 98 of 2010, CAT sitting at Dar Es Salaam (unreported), in which the Court emphasized

that, an application for leave is usually granted if there is a good reason, normally on a point of law or on point of public importance. She further cited the case of **Said Ramadhani Mnyanga vs. Abdallah Salehe (1996) TLR 74**, where the Court held:

"Leave to appeal is granted where the application demonstrates that, there are serious and contentious issues of law or facts for consideration by the Court of Appeal".

For the above reasons, the counsel for the applicants submitted that, looking at the whole circumstance of this application, there is a point of law that calls for determination by the Court of Appeal of Tanzania, hence prayed the Court to grant leave to the applicants so as to enable them appeal to the Court of Appeal of Tanzania.

Opposing the application, Ms. Nambuo, learned counsel for the respondents submitted that, the need to join the Attorney General, Munyi Kumbuni and Subi Mabula was not in the interest of the respondents herein because those three persons did not commit any violation associated with the matter registered as Civil Case No. 10 of 2019 instituted before the District Court of Morogoro, at Morogoro. She however averred that, by virtue of Order 1, Rule 14 of the CPC (supra), the applicants had an opportunity to



join the said parties through third party procedure, but the same was not done.

Mr. Amani Joackim contended further that, the Attorney General vide sections 6 and 10 of the Government Proceedings Act [CAP. 5 R. E, 2019] has mandate to apply to be joined or intervene in any suit or matter so long as the Government has interest to protect. This is because the heads of cattle were not the property of the Government in this civil suit. She stated that, the Government discharged its duties in the criminal case and execution proceedings. The counsel had the view that, negligence on collecting wrong cows has nothing to bring the Government into any sort of liability.

The counsel highlighted further that, in this application there is a single point of law to be determined in granting the orders sought by the applicant which is joinder of parties pursuant to Order 1, Rule 3 of the CPC (supra). He was of the firm view that, since there was abundant opportunity for the applicants to join the alleged parties, failure to act upon as hinted above, cannot be taken and shifted as a burden to the Court under the umbrella of the respondents herein.

He submitted that applicants are requesting for leave grounding their arguments in their own failure to perform well in defending a civil suit in accordance with the law. He insisted that, a man cannot be permitted to take advantage of his own wrong, referring to the maxim, "*Exi turpi causa*

non oritur action”, meaning no action can arise from an illegal act. She therefore prayed the Court to dismiss the application on the ground that, already the point of law had been determined and this Court reached to a sound decision that, the applicants failed to adhere to the right procedures to join the parties needed in the suit.

In a brief rejoinder, the counsel for the applicants insisted that, the said parties were to be joined as necessary parties since they were directly connected to the matter at hand. To reinforce and strengthen her contention, Ms. Joyce Richard cited the case of **Tang Gas Distributors Ltd vs. Mohammed Salim Said and Two Others**, Civil Revision No. 6 of 2011, Land Division – Da Es Salaam, where this Court emphasized that once it is discovered that a necessary party has not been joined in the suit and neither party is ready to apply to have him added as a party, the Court has a separate and independent duty from the parties to have the necessary party added.

She therefore insisted that, there is a point of law that calls for determination by the Court of Appeal of Tanzania and therefore prayed the Court to grant leave to the applicants to appeal to the CAT.

Having summarised the rival submissions by the parties, and upon considering the entire Court records and parties’ submissions, the central



issue for determination is whether this application for leave to appeal to the Court of Appeal is meritorious.

However before venturing into the merits of this application, I feel obliged to imperatively put it clear that the enabling provision moving the court to grant applications of this nature is section 5(1)(c) of the Appellate Jurisdiction Act (Supra). It therefore goes without saying that, the other provisions cited by the applicants in their chamber summons are irrelevant as some i.e., Rule 45(a) and (b) of the Tanzania Court of Appeal Rules are merely prescriptive/procedural whereas Section 5(2) (c) of the Appellate Jurisdiction Act applies to certification of points of law for appeals emanating from Primary Courts. In this respect, it is a common knowledge that where a party cites relevant and irrelevant provisions, the Court should ignore the irrelevant and consider the relevant ones. This position has been stressed in numerous decisions of this Court and the Court of Appeal of Tanzania, some of which are **Duda Dungali vs the Republic**, Criminal Application No. 5 of 2014, CAT at Mbeya, **Lilian Stephen Ihema (executrix of the Estate of the Late Stephene Ernest Ihema) Vs. Receivership and Manager of Sky Developers Limited & Another** (Misc. Land Application 328 of 2021) [2021] TZHCLD 6855, **Moona Pharmacy Limited vs Highnoon Laboratories Limited and Others** (Misc. Civil Application 72 of 2016) [2016] TZHC 2066 (19 July 2016) and

Alliance One Tobacco Tanzania Limited and Another vs Mwajuma Hamisi(as admininistratix of the late Philemoni R. Kilenyi and another, Miscellaneous Civil Application No. 803 of 2018. In the latter, this court (Feleshi, J) observed that;

".....On the other hand, this Court agrees that the other cited sections 93 and 95 were inordinately cited for the sought prayers of Temporary Injunction, but it will be unjust for a Court of law vested with the core duty of adjudicating individual rights to struck out a matter simply because though the applicant has cited the proper provision, the same has further cited other provisions irrelevant to the matter or has rather improperly cited irrelevant provisions: Such option will trap up the ends of justice. The contrary could have been the stand in case the applicant had cited wrong provisions or rather, had improperly cited the requisite enabling provisions, that is, in circumstances where the enabling provisions are nonexistent at all.."

Likewise, having so observed, in the application under consideration, despite the citation of other irrelevant provisions of law in the applicant's chamber summons, since section 5(1)(c) of the Appellate Jurisdiction Act was cited therein, then it suffices to say that this court has been properly moved and hence will proceed to delve into the merit of the application at hand.



I will start my determination by stating the law applicable in applications of this nature. It is the settled law that, in applications for leave to appeal to the Court of Appeal of Tanzania, the High Court is supposed to be satisfied that the intended appeal on prima facie, has some merits, whether factual or legal. In **Henry Julius Nyela vs. Sauda Mtunguja Rajabu (Civil Application No. 514/17 of 2020) [2023] TZCA 115 (14 March 2023) extracted from tnzlii.go.tz.,** the Court had the following to state: -

"Leave to appeal from an order in civil proceedings will be granted where, prima facie, it appears to the court seized with that application that there are grounds of appeal which merit serious judicial consideration."

Similarly, in **British Broadcasting Corporation vs. Eric Sikujua Ng'maryo**, Civil Application No. 133 of 2004 (CAT), the Court held:

"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 raise issues of general importance or a novel point

*of law or where the grounds show a prima facie or arguable appeal [See: **Buckle V. Holmes (1926) ALL RE Rep. 90 at Page 91**]. However, where the grounds of appeal are frivolous, vexatious or useless or hypothetical no leave will be granted."*

From the above excerpt of the decision of the Court of Appeal of Tanzania, it is clear that, not every leave to appeal to the Court of Appeal that is sought by the applicant(s) necessarily must be granted as prayed. However, the Courts have all along been wary to withhold leave to appeal to a Superior Court if there are grounds meriting the attention of that Superior Court.

From the quoted statement above, it is now my obligation to confine myself on a single issue for consideration and determination as to whether the applicant has presented any arguable issue worth for consideration by the Court of Appeal of Tanzania.

In the present application, the applicants wish to challenge the decision of this Court on the ground of non-inclusion of necessary parties in the trial at the District Court of Morogoro, at Morogoro in Civil Case No. 10 of 2019. Now, the question whether the Attorney General, Munyi Kumbuni and Sudi Mabula were necessary parties to the original suit, in



my considered view, cannot be determined at this stage because apart from being a point of law which can be raised at any stage of proceedings, but still the issue non-joinder of a necessary party remain a serious question that requires the attention of the Court of Appeal.

I should state at this juncture that, my task is not to consider whether my brethren Hon. Ngwembe, J., rightly or wrongly decided the matter in question. The respondents' response to the issues raised by the applicants by itself indicates that, there is an argument which goes to the merits of the issues which, in my opinion, is an indication that the issues are arguable. In **Jireys Nestory Mutalemwa vs. Ngorongoro Conservation Area Authority (Civil Application No. 154 of 2016) [2021] TZCA 9 (11 February 2021)** extracted from tanzlii.go.tz., the Court of Appeal of Tanzania had the following to state:

".....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 Sikujua Ng'maryo (supra).


Guided by the decision of our Apex Court and upon a close scrutiny of the instant application and the decision of this Court, which is a subject of this application, I find the complaint raised by the applicants raises issues of importance and important point of law calling for judicial consideration by the Superior Court as the same is a matter of law worth being investigated by the CAT. In the circumstance, I am of the view that, the merits of the issues raised by the applicant cannot be resolved without going into the details of the decision which in my opinion, is not within the control and power of this Court.

From the foregoing, the crucial issue worth for consideration by the CAT is, whether or not the decision reached by this Honourable Court was in total non-inclusion of the necessary parties namely, the Hon. Attorney General, Munyi Kumbuni and Sudi Mabula.

For the above reasons, and to the extent of my finding that I have endeavoured to deliberate herein above, I find the application is

meritorious and I proceed to grant the applicants with the leave to appeal to the Court of Appeal of Tanzania against the decision of this Court in Land Appeal No. 47 of 2021 between the contending parties. Costs shall abide the results of the intended appeal. Order accordingly.

DATED at **MOROGORO** this 30th day of June, 2023.


M. J. CHABA



JUDGE

30/06/2023