

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

**MOSHI DISTRICT REGISTRY**

**AT MOSHI**

**MISCELLANEOUS CIVIL APPLICATION NO. 57 OF 2021**

*(Arising from the decision of High Court of Tanzania at Moshi in Civil Appeal No. 1/2019 dated 13/12/2019 and originating from decision of District Court of Moshi in Civil Case No. 22/2016)*

**BENJAMIN H. NDERASIO T/A  
HARAMBEE BUS SERVICES/UB 40BUS SERVICE..... APPLICANT**

*Versus*

**M/S RAHISI GENERAL MERCHANT LTD .....1<sup>ST</sup> RESPONDENT  
M/S UHURU PEAK SERVICES STATION.....2<sup>ND</sup> RESPONDENT**

**RULING**

28<sup>th</sup> July & 23<sup>rd</sup> August, 2023

**A.P.KILIMI, J.:**

Initially the applicant was sued by the respondents at the District Court of Moshi in Civil case no. 22 of 2016, therein, the applicant lost the case and was ordered to pay to the respondents damages and the money outstanding of which she failed to pay to the respondents after being supplied fuel services. The applicant dissatisfied appealed at this court in civil appeal no. 01 of 2019 where again lost the case.

Untiring, the applicant aiming to the Court of Appeal hereinafter "CAT", has filed this application in exhausting the mandatory precondition of the law before stepping in that court, the applicant is moving this court under section 5 (1) (c) of the Appellate Jurisdiction Act [CAP. 141 RE 2019] and rule 45(a) and rule 47 of the Tanzania Court of Appeal Rules 2009 praying this court to grant him leave to appeal to the Court of Appeal of Tanzania against the decision of the High Court of Tanzania in the said Civil Appeal No. 1 of 2019.

At the hearing of this application, Mr. Yusuph Mwangazambili learned counsel appeared for applicant while all respondents enjoyed the service of Mr. Gwakisa Sambo learned advocate.

In supporting this application Mr. Mwangazambili prayed to adopt prayers in applicant chamber summons and affidavit thereto, then he submitted that, he intent to raise ground to be determined by the court of appeal as raised at paragraph 6 (i) of (ii) of Applicant affidavit. He further argued that, it is a position that CAT is not required to interfere with two concurrent decisions but there exceptional where there is misapprehension of evidence which occasioned miscarriage of Justice, then the second appellant court should interfere. To buttress this stance the learned

counsel referred the case of **Azimio Machibya Matengo vs. Republic** Criminal Appeal No. 35 of 2016 CAT at Tabora; **Mbaruku S/O Hamisi and 4 others vs. Republic** Consolidated Criminal Appeal No. 141, 143, 145 of 2016 and 391 of 2018; and **Shija Masawe vs. Republic** Criminal Appeal No. 158 of 2007 (Both unreported).

The counsel further submitted, they had an application at the Court of appeal to pray extension of time to serve the notice to the Respondents, Civil Application No. 65/05 of 2020, which on 20/7/2023 the CAT dismissed it with costs. But, on 25/7/2023 since Applicant was aggrieved with that decision of CAT have filed reference to the court of appeal under rule 62(1) (b) and rule 64 (1) (b) and (2) of Court of Appeal of Tanzania rules, which allow once one is aggrieved by decision of single justice can file reference praying to reverse or to vary, and they have already served the respondent to that effect.

In respect to the issue of notice of appeal to be served to the respondent, Mr. Mwangazambili contended that, it is not pre-requirement for the applicant to be granted leave, normally the issue of service to the other part in respect to notice is granted by the Court of Appeal, therefore

it is irrelevant to bring in to this court, or even if is otherwise they have already filed reference at the Court of Appeal, therefore prayed this application be granted.

Responding to the above submissions, Mr. Gwakisa Sambo prayed to adopt amended joint counter affidavit sworn by Erica Thomas, who is the Managing Director of the first and second respondent and further vehemently objected the prayer sought because the applicants has not demonstrated any grounds of appeal, which have of public importance to call the attention at CAT.

Arguing in respect to prerequisite before granting leave to appeal, Mr. Sambo contended that is cardinal principle the applicant before is granted leave, is supposed to demonstrated that purported grounds are important or alternative there is trouble issue leading to the complained judgment. To bolster this position, he referred for guidance the case of **Godwin Lyaki and another vs. Ardhi University** Civil Application No. 491/01 of 2021 CAT at Dsm and **Kadiri Zahoro (Administrator of Estate of late Bahati Ramadhan Mponda) vs. Mwanahawa**

**Selemani** Civil Application No. 137/01 of 2019 CAT at Dsm. (Both unreported).

Mr. Sambo applying principles of above cases to the application at hand, contended that, the only paragraph which fault the first appellant court is paragraph 6 (i) and (ii) of the Applicant affidavit, but there is no any explanation on how those two grounds are of public importance, no explanation how prejudice the Applicant, no any troubling feature explained affected lower court proceeding, so failure to show those three things, as shown above make this application devoid of merit.

Mr. Sambo further distinguished the case cited by applicant counsel, **Azimio Machibya Matengo vs. Republic Mbaruku S/O Hamisi and 4 others vs. Republic, and Shija Masawe vs. Republic** (Both supra) by submitting that first these are Criminal Appeals, in Criminal Appeal there is no need of leave unlike in Civil Appeal but secondly the standard of proof and evaluation of evidence in Criminal differ with those in Civil, hence cannot be related in this matter and thirdly the circumstance in the said case completely in each case differs, in the first case, it was pure appeal not application like this, and there was a complaint was the testimony of

PW1 was not considered, if you look two grounds raised by applicants there is no complaint that there is certain evidence was not considered hence reached on erroneous decision. In the second case above, the court was dealing with improperly admitted evidence, but the two grounds mention at paragraph 6 of Applicant affidavit, is not in such respect. And in third case, the complains was the defence was not considered at all, this is not featured in this application on the face of record and no such complaints at all.

The counsel for respondent also contended that, submissions by the applicant are an afterthought and is from the bar and not the affidavit, he then said it is cardinal principal submission not on affidavit not to be considered. This is respect what have been said by the applicant counsel about filing of reference, they had an opportunity to file a reply to amended counter affidavit, therefore they cannot be allowed to bring other things through the bar.

In respect to service of the notice of appeal, Mr. Sambo contended that the same is mandatory requirement, and failure to serve notice of appeal cannot even be cured by overriding principles, therefore, the

intended appeal is incompetent and can stand before the court of appeal before it was filed, to buttress his assertion Mr. Sambo invited me to refer the case of **National Bank of Commerce Limited and Another vs. Ballast Construction Company Limited** Civil Appeal No. 72 of 2017 CAT at Tanga and **Phoenix of Tanzania Assurance Company Limited vs. Jilala Julius Kakenyeli** Civil Appeal No. 14 of 2012 CAT at Dar-es-Salaam. (Both unreported).

In his brief rejoinder, Mr. Mwangazambili reiterated his submission in chief and further said although the cited case are criminal cases, what matters is the duty of the second appellate court when there are concurrent decisions and concluded the issue of service of notice is irrelevant, since is not a pre-requirement to be granted leave.

I have considered the rival submissions of both parties above, and before I proceed, I find convenient to highlight the law in respect to this kind of application. It is a settled position of the law that for this court to consider application for leave to appeal to the Court of Appeal, there must be clear points of law to be determined or issues of general importance or grounds show prima facie of arguable appeal. This has been emphasized in a number of cases including the cases of **British Broadcasting**

**Corporation vs. Eric Sikujua Ngamaryo**, Civil Application No. 138 of 2004; **Rutagatina C.L. vs. The Advocates Committee and Another**, Civil Application No. 98 of 2010 and **Jireys Nestory Mutalemwa vs. Ngorongoro Conservation Area Authority**, Civil Application No. 154 of 2016 (Both unreported). In **British Broadcasting Corporation vs. Eric Sikujua Ng'amaryo**, (supra) the court of appeal while determining the application before it stated at page 6 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 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 issue of general importance or a novel point of law or where the grounds show a prima facie or arguable appeal**"*

(Emphasis added).

(See also the cases of **Godwin Lyaki and another vs. Ardhi University and Kadiri Zahoro (Administrator of Estate of late Bahati Ramadhan Mponda) vs. Mwanahawa Selemani** (supra).



In the premises above, the vital point for determination is whether the applicant's application has merit.

I have read paragraph 6 of the applicant's affidavit; I subscribe with the applicant that, the grounds contended therein shows points of judicial consideration and arguable issues to be taken on board at the court of appeal. But I have considered the point prompted by both learned counsels on the legal requirement of the intended appeal, I am persuaded to ask myself whether allowing this application is proper, if the said legal requirement was not complied to.

As pointed out by both counsels, in respect to the intended appeal, there is no dispute that there is no notice of appeal served to the respondent to date, the applicant prayed extension of time to serve the notice to the Respondents at the Court of Appeal in Civil Application No. 65/05 of 2020 and lost the case, he is saying that he has applied reference praying to reverse or varied, the decision of single justice of appeal and also is saying such a notice is not pre-requirement for the applicant to be granted leave.

In my view of the law, the procedure governing the conduct of proceedings in the Court of Appeal is as provided by the Court of Appeal Rules (supra). In respect the service of notice of appeal is provided under rule 84(1) and for easy reference I reproduce hereunder;

*"An intended appellant **shall**, before or within fourteen days after lodging the notice of appeal, **serve copies of it on all persons who seem to him to be directly affected by the appeal**: but the Court may, on an ex parte application direct that service need not be effected on any person who took no part in the proceedings in the High Court."*

[ Emphasis added]

In my interpretation of the law above, this rule is couched in mandatory terms. Therefore, the rule gives a right to one party and imposes an obligation to the other party. In view thereof, I subscribe with Mr. Sambo that respondent's right to be served with the copy of the notice of appeal to the intended appellant is mandatory. See **National Bank of Commerce Limited and Another vs. Ballast Construction Company Limited** (supra), **Goodhope Hance Mkaro vs. TPB Bank PLC and another**, Civil Appeal

No. 171 of 2017 and **Wilfred Rwakatare vs. Hamisi Kagasheki and another**, Civil Appeal No. 118 of 2011 (Both unreported).

In the circumstances, I am of considered opinion, even if leave is granted, the intended appeal will serve no meaningful purpose in law as the court of appeal cannot proceed with the hearing of the appeal without notice of appeal duly served to the respondents as the law provides above. Therefore, it is my considered opinion, granting the applicant the sought leave will be nugatory, meaningless and a waste of the precious time of the Court dealing with something which is not proper in court in the eyes of the law. Therefore, I am declined to agree with Mr. Mwangazambili that the same is not pre-requirement for the applicant to be granted leave.

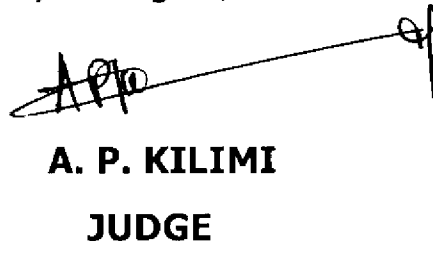
To add more, it is my view, the intention of law of seeking leave to the court of appeal, is for this court to filter for purpose of ascertaining that the expected appeal is presented having all necessary requisites to be adjudicated by the court of appeal, thus allowing it with impediments will serve no purpose of this law.

On the whole, on account of what I have endeavored to discuss hereinabove, I find this application devoid of merit, and consequently I proceed to struck it out with costs.

It is so ordered.

**DATED** at **MOSHI** this 23<sup>rd</sup> day of August, 2023.



  
**A. P. KILIMI**  
**JUDGE**  
**23/8/2023**

**Court:** - Judgment delivered today on 23<sup>rd</sup> day of August, 2023 in the presence Mr. Gwakisa Kakusulo Sambo appearing for both respondents and the applicant is present in person.

**Sgd: A. P. KILIMI**  
**JUDGE**  
**23/8/2023**