

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

MISC LAND APPLICATION NO. 157 OF 2022

(Cf High Court Land Application No. 104 of 2022)

JOHN EMMANUEL GADIE _____ APPLICANT

VS


PETRO META SLAA _____ RESPONDENT

RULING

04/07/2023 & 01/09/2023

BADE, J.

The Applicant is seeking to set aside a Ruling and order arising from Misc. Land Application No 104 of 2022 and reinstate the same so it can be heard *inter partes*. This matter was filed as an application to set aside an *ex parte* Ruling by her lordship Komba, J. dated September 28, 2022 under section 95 of the Civil Procedure Code Cap 33, RE 2019. The filed application was



supported by the sworn affidavit of John Emmanuel Gadie deponed on 24th October 2022. Meanwhile, a counter affidavit in opposition sworn by Petro Meta Slaa and deponed on 21st December 2022 was also filed.

When this application was called for hearing both parties were unrepresented and had fended for themselves.

The Applicant argues that his reasons for seeking to set aside the *ex parte* ruling of the determined application for leave is that it was granted without him being heard, and without any good reasons for not affording him a right to be heard.

The Applicant maintains that the matter was heard and determined on his absence on 28/09/2022. The application was initially assigned to Honourable Masara, Judge and scheduled for mention before Hon. Masara, J. on 19th of October, 2022. Surprisingly, he contends, the Application was re-assigned before Honourable M.L. Komba, J. where it was heard and determined *ex parte*.

My scanning of the court records as well as reading of both parties Affidavit and Counter Affidavit affirms to the fact that the Application was scheduled before Hon. Masara, J. on the 19th of October, 2022, and then re-assigned

to another Judge where it was heard before 19th of October, 2022. Clearly there is no proof on record that the Applicant herein was served with notice of hearing of the Application before Hon. Komba, J. The counsel for the Respondent in his submission has admitted to making fruitless efforts to inform the Respondent then. So in essence, the Applicant herein could not know that the Application is re-assigned before another Judge and the date of hearing without being served with a summons or Notice as the case may be. I also must agree with the Applicant that the duty to serve the Applicant herein lied with the Respondent.

On the other hand, the Respondent is resisting the application to set aside the *ex parte* Ruling for the leave which was granted. The Respondent's counsel argues through written submissions that whether the Application for grant of leave is heard *ex parte* or *inter partes*, the condition for grant of the same remain as enumerated in the case of **Sikujua Eric Ng'maryo vs British Broadcasting Corporation**, Civil Application No 138 of 2004.

Having heard both parties, the issue before me is whether this application is merited, and particularly whether the applicant has adduced sufficient reason to warrant this court to set aside the *ex parte* Ruling to grant leave.

I am aware of the fundamental principle on the right to be heard stated in **SADIKI ATHUMANI vs Republic**, 1986 TLR 235 (HC) as cited by the Applicant that it has always been the cornerstone of "our Justice system" guaranteed in the constitution (see Article 13 (6)(e) of the Constitution of the united Republic of Tanzania.) I also see the logical argument in the criticism by the Applicant that if let to stand, the non-serving of the other party when matters are scheduled in special court session will set bad precedent that whenever cases are assigned in special sessions they may proceed *ex parte* and service is not necessary.

However it is my considered view that setting aside the Ruling to grant leave to appeal will not serve any purpose at this point. This is pertinent because while grant of leave is a discretion of the court, the said discretion has to be exercised judiciously and the Court do take the judicious nature of this exercise seriously. The Black's Law Dictionary has defined 'Judicial discretion' to mean the power and authority granted to Judges to make decisions based on their own judgment and interpretation of the law within the framework of legal principles and precedents. (See Garner, B. A (1891), Black's Law Dictionary, West Publishers, UK).

There was a due consideration of the issues by the learned judge who

considered judiciously the application for leave to appeal as it is not automatically granted and has to be considered against the materials before the court applying the established legal principles. This Court while refusing leave to appeal in **Exim Bank (T) Ltd vs. Rizwan Mohamedali Remtulla**, Misc Civil Application No 154 of 2022 (HC Arusha) it reiterated that leave to appeal is not granted as an automatic exercise, and the party seeking leave has to present materials before the Court for which the court will be able to exercise its discretion, in an application for leave where the respondent opted not to contend the leave to appeal which was sought.

The perusal of this court of the impugned judgment verifies that in an application for grant of leave to appeal like the one in Misc. Application No. 104 of 2022 even though it was heard *ex parte*, the Court fulfilled its duty to determine the application against the legally set requirements. Application No. 104 of 2022 was determined basing on facts stated in affidavit in support of chamber summons and the documents annexed thereto including the impugned judgment. The granting or refusing of the application is mainly dependent on the exercise of discretion of this Court in determining the grounds for grant of leave.

Without overemphasizing the point, the exercise of the said discretion is

granted against considered grounds which are 1) that the applicant is within the time limit to seek the leave to appeal, 2) the person seeking leave has sufficient interest on the case, 3) showing that grounds of appeal raise issues of general importance; or 4) a novel point of law; or 5) where the grounds show a prima facie or arguable appeal (See **British Broadcasting Corporation vs. Erick Sikujua Ng'maryo**, Civil Application No 138 of 2004, **AG vs. Wilfred Onyango Nganyi @Dadii and 11 others**, Criminal Appeal No 276 of 2006 (unreported CAT)).

This is also to say, when the grounds of appeal are frivolous, vexatious, useless or hypothetical, then leave will not be granted. (See **Harban Haji Mosi and Shauri Haji Mosi vs. Omar Hilal Seif and Seif Omar**, Civil Reference No. 19 of 1997 (CAT unreported)). Also, the Court pronounced itself on the cited case supra that "... The purpose of the provisions ... (for leave) is therefore to spare the Court the specter of unmeriting matters and to enable it to give adequate attention to cases of true public importance"

In my considered view, I do not think the Applicants right to be heard is jeopardized or that the grant of leave has occasioned any miscarriage of justice to the Applicant despite the circumstances of the said grant since 1) the grant of leave is a judicious exercise, and 2) the parties will have a full

right of hearing at the Court of Appeal, as the appeal will be considered on merit, meaning the Applicant herein will have a full hearing.

The justice of the matter in my view, while it would have required that enough notice is given to the party, but Judges must have the flexibility to consider individual circumstances of the cases before them when making decisions ensuring that justice is served in the individual cases. Copiously, the applicant in this matter has only invoked and moved this Court through section 95 of the Civil Procedure Code, Cap 33 RE 2019, invoking the same discretion of the court, which provides:

“Nothing in this code shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court”

I am satisfied that there is no good cause that justifies to set aside the *ex parte* Ruling of this court, that has granted leave to appeal to the Court of Appeal of Tanzania, and as such I deny this application. Each party shall bear its own costs.

It is so ordered.

DATED at ARUSHA on the 01st September 2023



**A.Z. BADE
JUDGE
01/09/2023**

DELIVERED at ARUSHA on 01 September 2023 in chambers in the presence of the Counsel for the parties/ and or parties in person.



**A.Z. BADE
JUDGE
01/09/2023**