

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM SUB REGISTRY)
AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 87 OF 2023

(Originating from Civil Case No. 104 of 2019, Before Hon. Mlyambina, J.)

KURASINI CONTAINER TERMINAL LTD.....APPLICANT

VS

YONO AUCTION MART & CO. LTD.....RESPONDENT

RULING

S. M. MAGHIMBI, J:

Being aggrieved by the decision of this Court in Civil Case No. 104 of 2019, the applicant has moved this Court under the provisions of Section 5 (1) (c) of the Appellate Jurisdiction Act, Cap. 141 R. E. 2002 and Rule 45 (a) of the Court of Appeal Rules, 2009 as amended by G.N. No. 362 of 2017 prays for orders that:

- 1. That, this Honourable Court be pleased to grant leave for the applicant to appeal to the Court of appeal against the Ruling and Order of this Court delivered by Mr. Justice Mlyambina on 13th December, 2019 in Civil Case No. 104 of 2019 between Kurasini Container Terminal Limited and Yono Auction Mart & Co. Limited.*

2. Cost of the application be provided for.

The Application was supported by an affidavit that was dully signed by Mr. Mashaka Ngole, Counsel for the Applicant. When the matter came for hearing the Applicant enjoyed the services of Mr. Mashaka Ngole Learned Counsel while the Respondent was represented by Mr. Samwel Shadrack learned Counsel. The Court ordered the Application be heard by way of Written Submission. Counsels for both parties complied to the scheduling order this Court.

Submitting in support of the application, Mr. Ngole initially prayed that the affidavit deponed by the applicant's Counsel be adopted to form part of the submissions. He then pointed that under paragraph 7 (a), (b), and (c), the said affidavit had set forth the projected legal grounds upon which leave is sought. That the grounds originate from the decision of preliminary objections that were raised and determined, one of the objections being that of jurisdiction of the court to determine the matter. In the decision thereto, he submitted, the applicant found aggrieved and hence a need to appeal to the Court of appeal was desired as the above-named reasons was suitable to be tried by the Court of Appeal. The applicant claimed that the Judge erred in his decision upon upholding the objection on Pecuniary Jurisdiction and erred also in law by applying Section 13 of the CPC along with the provisions of Order VII Rule 10 of

the CPC. Mr. Ngole invited the Court to apply the material wisdom in the case of **Kivumbi Bashir vs Ali Muyangu and Nagira Namuddu, Civil Application No.11 of 2016**, High Court of Uganda (unreported), which cited the decision in the case of **Justice E. M. N Lutaaya vs Sterling Civil Engineering Company Limited, Supreme Court of Appeal of Uganda, Civil Application No. 11 of 2002**.

He went on submitting that Civil Case No. 104 of 2019 was a case based on trespass to land which is a wrong which is impossible to be of monetary value. That it was an error for the Judge to hold that since the applicant had claimed for punitive and general damages, then the Court would be ousted for it lacked jurisdiction. It was the applicants view that it is not general damages that determines the pecuniary jurisdiction of the Court. He urged the court to grant leave on the ground set in the case of **Nyabagaya Mtami vs Nyakanyi Kabera (1983) TLR, 332** in determining this application for leave to appeal to the Court of appeal.

In reply, Mr. Shadrack submitted that Civil Case No. 104 of 2019 was premised on the so called a tort of trespass to land where the applicant alleged that the defendant has trespassed into the plaintiffs landed property and prayed for several reliefs mainly being an order compelling the defendant to pay compensation to the tune of Tshs. 100,000,000/=.

He went on submitting that the two prayers fall in the jurisdiction of the subordinate Court which is provided for under Section 40 (2) (b) of the Magistrates Court Act Cap. 11 R. E. 2019 ("the MCA"). The claim is obvious that it falls under the subordinate Court hence granting the applicant leave to appeal to the Court of appeal will be wastage of precious time of the Court to be dutied to determine an irrelevant appeal which has no element of success. He concluded his submission by citing the provisions of section 13 of the CPC, that directs the cases to be instituted at the lowest grade competent court.

At this point after going through the application and arguments for and against the application, I am not going to belittle the prayers of the applicant who is seeking leave to appeal to the Court of appeal on what he believes to be an error of the Court on decision as enshrined in per paragraph 7 (a) to (c) of the affidavit. The respondent was of the opposing view that the Court was correct in its decision and the grounds that the applicant has identified do not have any value to be tried by the Court of appeal.

In applications for leave under section 5(1) (c) of the Appellate Jurisdiction Act, leave is granted by the discretion of the Court. The powers are based on principles that have not been established by law but on a case-to-case basis and precedents. Needless to say, the powers have

to be judiciously exercised. See the case of **Safari Mwazembe vs Juma Fudisha (Civil Application 503 of 2021) [2022] TZCA 67 (25 February 2022)**, where the Court made reference to the case of **British Broadcasting Corporation v. Eric Sikujua Ngamaryo, Civil Application No. 138 of 2004**; Rutagatina C.L (supra) and **Jireys Nestory Mutalemwa (supra)**. In discussing the grounds to be considered, the court held:

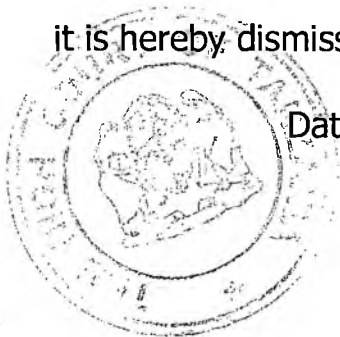
"Needless to say, leave to appeal is not automatic. It is within the discretion of the court to grant or refuse. The discretion must however, be judiciously exercised and on the materials before the court. As a matter of general principle, leave to appeal will be granted where the grounds of appeal raise issues of general importance or novel point of law or where the grounds show a prima facie or arguable appeal."

With the above principle in mind, looking at the affidavit and the submission of the applicant, the applicant is aggrieved on the way the Court upheld the objection on pecuniary jurisdiction. His argument was that the court based the pecuniary jurisdiction on general damages while what was claimed or the cause of action was on trespass which cannot be equated to monetary value. In the outcome of the ruling of the court, the

verdict was to sustain the objection and under the purview of Section 13 of the CPC, the court held that Civil Case No. 104 of 2019 filed at the High Court could be instituted at the District Court or Resident Magistrate Court. The issue here is whether that decision put a bar to the litigation and finally determined the applicant's rights in so far as trespass to the land was concerned.

For a decision to be appealable it must have finally determined the right of parties in so far as a further claim of the same right is concerned in this case, the applicant was given a chance to go and file the suit at the lowest court with competent jurisdiction hence his right of claim was still intact. The decision cannot be said to be appealable as it did not determined the rights of parties to a finality.

In conclusion therefore, I find the points the applicant is seeking to invite to Court of appeal to determine on appeal do not fall under the principles laid down in the case of **Safari Mwazembe Vs Juma Fudisha (supra)**. Consequently, this application is found to be without merits and it is hereby dismissed with costs.



Dated at Dar es salaam this 25th of August 2023.

A handwritten signature in black ink, appearing to read "S. M. Maghimbi", is written over a horizontal dotted line.

S. M. MAGHIMBI

JUDGE