

IN THE HIGH COURT OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

MISC. CIVIL APPLICATION NO. 09 OF 2023

(Arising from Civil Appeal No. 09 of 2022 at High Court of Tanzania at Musoma

Originating from Civil Case No. 01 of 2021 before Tarime District Court)

BETWEEN

MRONI GARDEN CONSTRUCTION LTD APPLICANT

VERSUS

ESTHER NICHOLAS MATIKO..... RESPONDENT

RULING

26th October & 02nd November, 2023

M. L. KOMBA, J.

Before this Court, the applicant, **MRONI GARDEN CONSTRUCTION LTD** has filed the present application through Chamber summons accompanied with affidavit of Mr. Ostack Mligo (Advocate) seeking for the following orders;

- 1. That the honorable court be pleased to grant leave to the applicant to appeal to the court of Appeal of Tanzania against the decision of the high court in Civil Appeal No. 09 of 20222 dated 3rd March, 2023.*
- 2. Costs of this application be provided for.*

From the chamber summons that initiates this application, it reads to be made under S.5 (1) (c) of Appellate Jurisdiction Act, CAP 141 R.E 2019. As said, the application is accompanied by an affidavit deposed by counsel for the applicant. Upon being served with application, the respondent did file a counter affidavit.

A brief fact giving rise to the present application can be summarized as follows; Applicant and respondent (were defendant and plaintiff respectively) in Civil Case No. 01 of 2021 at Tarime District Court (the trial court) where respondent was claiming the sum of Tshs. 75,000,000/ being a specific damage arising from an oral agreement entered in December 2015, which was advance to the applicant for purpose of flourishing respondent's business. The amount was promised to be returned/ paid by March, 2016 but the promise was not honored on the argument by the appellant that there was no contractual relationship between the two and the respondent failed to produce loan contract. The matter was decided in favour of the respondent when the trial court was satisfied that there was an oral agreement between the two. The decision of the trial court aggrieves the applicant herein hence appealed to this court (F. H. Mtulya, J.) in appeal No. 09 of 2022.

During the appeal, the applicant herein was claiming that there was no contract between the two, that the loan was between David Muroi in personal capacity, there was no registered debenture, vouchers were intended for car business and the damages was wrongly awarded. Upon being found that some of issues were raised at appeal level, and when it was confirmed that there was contractual obligation between the two parties the first appellate court dismissed the appeal with costs. Applicant searching for his rights, registered his interest to appeal to the court of appeal.

Mr. Cosmas Tuthuru and Mr. Ostack Mligo represented the applicant in this application, after the prayer that affidavit be adopted, he submitted that grounds which made the dual counsel forward this application is found at paragraph 5 of the affidavit that there were some issues which was supposed to be analysed by the trial court which are exhibits, contract and MEMART. Arguing further about MEMART, learned counsel submitted that from the MEMART, respondent ought to sue the director of the applicant personally or else was supposed to tender MEMART to ensure that the contract was not beyond its memorandum and that the director (DW1)

disclose borrowing arrangement to the board of Directors before he borrow but were not and to them, they need attention of the superior court.

It was their submission that at this stage they are only required to show arguable issue and not substantive one while citing the book of **Company Law, 11th Edition by ASHOK K. BAGRIAL, Department of Commerce, University of Delhi by Vikas Publishing House PVT LTD** at pages 119 and 120 on ultra vires contract and page 397 on consequence of borrowing ultra vires that the lender cannot sue the company for the return of loan.

Resisting this application, Mr. Onyango Otieno for the respondent first define debenture to mean a marketable security that business can issue to obtain long time financing without need of collateral, the same is registered by the company in order to allow the company to solicit fund without collateral. That being the case then, Mr. Otieno was of the view whether failure of the company to register debenture is a point of law worth to be determined by the superior court or do they need the guidance of the Court of Appeal to instruct the Company to register debenture. To him these are frivolous issues. He mentioned criterial including existence of noble point need consideration the CAT, arguable appeal, the appeal

stands chances to succeed and grounds not to be frivolous, vexatious, useless or hypothetical.

Further Mr. Otieno submitted that issue why David Muroi was not sued at his personal capacity was answered in affirmative during appeal and warned all issues which was not discussed on appeal should be treated as afterthought including the issue of debenture. It was his submission that company shareholder advanced money from the respondent, the same company paid Tshs. 20 million by using company check and was not disputed, he said so far as the company paid back the loan then it was right for the company to be sued. Responding from the verses of the book of **Ashok K. Bargrial** (supra) Mr. Otieno said there was an offer and acceptance and there was consideration and later on there was a breach of contract. He doesn't find the need for intervention by the Court of Appeal while the doctrine of promissory estoppel is rightly applicable contrary to the doctrine of ultra vires which was raised by the applicant while analysing the referred book of **Ashok K. Bargrial** (supra).

Submitting as to when the director can be sued on his own name Mr. Onyango said is when the corporate veil is lifted, when the contract was fraudulent or there was misrepresentation, to him, the company was

correctly sued as it has a legal capacity warranting to sue or being sued as was in the case of **Solomon vs. Solomon**. Further Mr. Otieno referred this court to page 20 of the obliterated judgment that applicant kept on changing the goal post the moment he faces the challenge. He finally said because the appeal is not automatic then application failed to meet criteria to be granted leave.

During rejoinder, Mr. Tuthuru submitted that their application met criteria as proceedings reveal disturbing features as per page 13 and 14 of the judgment including the absence of the contract, absence of MEMART, whether the contract was valid. The amount paid by the applicant was disputed and there was no Board resolution, to him the breach of contract was between the David Muroi and the respondent but not the applicant as the company bearing in mind that David Muroi did not disclose his payment arrangement to the board. Mr. Mlilo added that there are no new issues raised in this application as all were discussed at trial court and the first appellate court and that in their submission there is no issue of debenture.

Having keenly considered the application and submission by parties, I am moved to determine whether or not this application for leave to the Court

of Appeal of Tanzania has merit. I am alive that in our jurisdiction there are unlegislated principles which guides grant of leave to the Court of Appeal. However, the Court of Appeal and even this court have strived to make the guiding principles which this court or the Court of Appeal vides a second bite may exercise it discretion of either to grant or refuse to grant leave to appeal to the Court of Appeal of Tanzania.

The above principles may be gleaned from a plethora of case law include the following; one, leave may be granted where there is a point of law, or there is a point of public importance to be determined by the Court of Appeal. See, **Rugatina CL vs. The Advocates Committed and Mtindo Ngalapa**, Civil Application 98 of 2010) [2011] TZCA 143, **Herban Haji Mosi and Another vs. Omari Hilal Seif and Another**, [2001] TLR 409, **Flora Auma Nyaronga and 2 Others vs. Samwel Ochieng Ondoto and Another**, Misc. Land Application No. 63 of 2022 and **Twaha Michael Gujwile vs. Kagera Farmers Cooperative Bank Ltd-Respondent**, Land Case Misc. Application No.12 of 2017.

Also, the same principle was articulated in the case of **British Broadcasting Corporation vs. Erick Sikujua Ng'amaryo**, Civil Application No. 138 of 2004 thus: -

'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 material before the Court. As a matter of general importance, 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 prima facie or arguable appeal.'

Again, this court (Commercial Division), in the case of **Citibank Tanzania Limited vs. Tanzania Telecommunications Company Ltd and 5 others**, Misc. Commercial Cause No. 6 of 2003, at Dar es Salaam (unreported) Hon Massati, J. (As he then was) observed that;

'I think it is now settled that, for an application for leave to appeal to succeed, the applicant must demonstrate that the proposed appeal raises contentious issues worth taking to the Court of Appeal or are of such public importance, or contain serious issues of misdirection or non-direction likely to result in a failure of justice and worth consideration by the Court of Appeal....In an application of this nature, all that the Court needs to be addressed on, is whether or not the issues raised are contentious....the Court cannot look at nor decide either way on the merits or otherwise of the proposed grounds of appeal.'

In Paragraph 5 of the affidavit the applicant herein raised issues which can be summarized as follows (i) failure to tender MEMART during trial which

could indicate the borrowing capacity of the applicant and borrowing arrangement of DW1 to the applicant (board of directors) (ii) whether a director can enter into an oral agreement without board of directors' resolution, (iii) whether in absence of debenture the company can admit the loan and (iv) whether exh. P1 and P2 were properly received and admitted in evidence.

I have carefully analysed the reasons advanced by dual counsels of the applicant in pursuing this application and in conjunction with the grounds advanced by the applicant as seen in their affidavit under paragraph 5. Basing on position of the law in the foregoing authorities, the issue of MEMART was not among the grounds at the first appellate court and therefore it is an afterthought. The issue of oral agreement has been discussed and the Court of Appeal has already set the position. See **Mr. Mathias Erasto Manga vs M.S Simon Group (T) Limited (Civil Appeal 43 of 2013) [2014] TZCA 291 (15 March 2014)**. The requirement of board of directors' resolution has been said to be not a purely point of law. See **Ursino Palms Estate Ltd vs Kyela Valley Foods Ltd & Others (Misc. Civil Application 28 of 2014) [2018] TZCA 48 (14 June 2018)**.

Reading the judgement which is the subject of this application, at page 8 I find the first appellate court reproduced issues raised during trial and its analysis at page 18 to 19 it ruled out that the appellant has raised issues which are an afterthought and pointed the habit of the applicant of changing his mind, what is nowadays called, changing a goal post.

Without going in details as this is not an appeal, in my humble opinion, I didn't find anything disturbing to necessitate the Court of Appeal's intervention with regards to the applicant's complaint as most of issues has the position by the Court of Appeal and other issues are an afterthought. I find no point of public importance either.

In view of the discussion above, the applicant has failed to prove his application for leave, as a second bite, to appeal to the Court of appeal. In the circumstances, I am constrained to, as I hereby do, dismiss this application with costs.

DATED at **MUSOMA** this 02nd day of November, 2023.



Nk
M. L. KOMBA
Judge