

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

MISC. CIVIL APPLICATION NO. 462 OF 2023

(Arising from Misc. Application No. 109 of 2023)

KAMALA RWIZA STAPHANO APPLICANT

VERSUS

TANZANIA WOMEN'S BANK PLC RESPONDENT

RULING

31st Oct & 3rd Nov 2023

KIREKIANO, J.:

The applicant herein seeks this court of grant leave to appeal to court of appeal against the decision of this court in Misc. Civil Application No. 109/2023. The application is brought under Section 5 (1) (c) of the Appellate Jurisdiction Act Cap 141 [R.E 2019] and Rule 45 (a) and 46 (1) of the Tanzania Court of Appeal Rules 2009 as amended by GN 344 of 2019. The same is supported by affidavit of the applicant. The application is contested by the respondent who also filed counter affidavit of Innocent Mhina the principal officer of the respondent.

Briefly the applicant was sued by the respondent at the Resident Magistrate of Dar es Salaam at Kisutu. This was civil case no 196 of 2017,

The suit arose from allegation of breach of loan facility agreement. Leaving the details behind, suffice it to say here that, the trial Court adjudged the same in favor of the respondent.

Dissatisfied the applicant filed Civil Appeal No. 207/2022 before this court. It appears that the applicant defaulted appearance, this court Hon. Pomo, J. on 1/03/2023 made an order dismissing the appeal with cost for want of prosecution. The applicant filed Misc. Civil Application No. 109/2023. Seeking an order of restoration of the Civil Appeal No. 207/2022. On 28/07/2023 the application was equally refused by this court.

The applicant now wishes to appeal to the Court of Appeal against this decision. However, since appeal to Court of appeal in this scenario is not automatic, leave is sought on the grounds indicated in the applicant's affidavit which are posed as the anticipated grounds of appeal thus;

- 1. That the High Court erred in law for failure to readmit Civil Appeal No. 207/2022 without any justifiable grounds and despite the grounds advanced by the applicant for non-attendance on the material dates.*
- 2. That the High Court erred in Law for denying the appellant right to be heard a constitutional right without lawful reasons.*

3. That the High Court erred in law for dismissing the applicant's appeal despite the facts that it was the first appearance and the trial court file was not remitted at the High Court for disposing the appeal.

This application was heard by way of written submissions, the applicant had service of Mr. Sabas Shayo, learned advocate while the respondent was represented by Mr. David Mganga Chillo, learned advocate.

It was submitted by Mr. Shayo that, in view of the grounds stated in the affidavit as shown above, the applicant has arguable case to make in the Court of Appeal. He argued this court to consider the principle in granting application for leave submitting that on basis of the grounds stated in the affidavit the applicant believe he has arguable case to make before the Court of Appeal.

He cited number of decisions including **Mexon Sanga vs. Total Tanzanian Ltd**, Civil Application No. 507/13 of 2022 that;

"Applicant has to demonstrate by affidavit or otherwise existence of some serious issues in the intended appeal worth of attention of the Court of Appeal".

As such, he cited decisions in **British Broadcasting Corporation vs. Erick Sikujua Ngimaryo, Misc. civil Application No. 138 of 2004** and **Harban Haji Mosi & Another vs. Omari Hilal Seif & Another [2001] TLR 409** to the effect that, leave may be granted where records reveal disturbing features as to require the guidance of Court of Appeal.

On the other hand, the respondent counsel opposed the application arguing that the applicants have not raised any prima facie arguable issues. He submitted that the applicant's affidavit is silent on alleged denial of right to be heard. He cited decision in **Hashim Juma Napepa vs. Bakari Ahmadi Ng'itu & Another**, Civil Application No. 07/07 of 2022 that: -

"There was no material in the affidavit upon which one can express an opinion pointy towards failure by the High Court to appreciate applicant complaint".

As such the respondent counsel argued that the applicant has no clean hands to complain in this application.

In his brief rejoinder submission, Mr. Shayo submitted that the decision in **Hashim Juma Napepa** is distinguishable in this application

because the same involved advocates failure to keep his diary properly leading to dismissal of a case.

As such on aspect of clean hand, he referred to the cited case of **Walter Kiwoli vs. International Commercial Bank**, Misc. Application No. 267 of 2019 to the effect that this was distinguishable since the same involved extension of time.

Having considered the competing submissions by the parties, the question remains whether this application is merited.

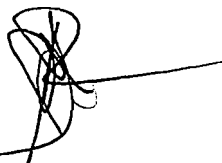
The position of Law to warrant the grant of application for leave is well set in several decisions including the cited decision of **British Broadcasting Corporation**, but also **Rutagatina V.L vs. The Advocates Committee and Another**, Civil Application No. 98 of 2010 and **Airport Properties Ltd vs. Registrar of Title and Another**, Civil application No. 389/17 of 2020 to the effect that the applicant has to demonstrate that there are arguable points of law or matters of general importance.

Being so guided, I have revisited the parties' affidavits. The applicant's grievance and argument is on the correctness of this court's

decision in refusing the application to restore his appeal. The applicant has narrated facts in the affidavit which he wishes to challenge the decision of the high court in refusing to restore and wish to call upon the court of appeal to decide whether it was the correct position of law.

I have considered the respondent's arguments opposing the application, with respect the respondent's counsel appears to have crossed a thin lane between challenging this application and considering the merit or other wise of the applicant's grievances. Whether the applicant complaints are merited or not, this will be the domain of the Court of Appeal to decide.

In view of the foregoing and on reasons stated, I make finding that there is arguable appeal before the Court of Appeal. This application is granted, the applicant is granted leave to appeal to the Court of Appeal. I make no order as to cost. It is so ordered.



A.J KIREKIANO

JUDGE

3/11/2023

COURT: Ruling delivered in presence of the applicant counsel Mr. Antipas
Lakam and in absence of the respondent.

Sgd: A. J. KIREKIANO

JUDGE

3/11/2023