

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

MBEYA DISTRICT REGISTRY

MISC. CIVIL APPLICATION NO 27 OF 2023

(Arising from the decision of the High Court of Tanzania at Mbeya in Civil
Appeal No. 12 of 2019)

TWALIB LUBANDAMO..... APPLICANT

VERSUS

MACHEMBA TENGIMU GAMANORESPONDENT

RULING

Date: 25 October 2023 & 06 November 2023

SINDA, J.:

The applicant seeks leave to appeal to the Court of Appeal of Tanzania (the **CAT**) against the decision of this Court (Mambi,J.) in Civil Appeal No. 12 of 2019. The application is made under section 5 (1) (c) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019 (the **AJA**). The application is supported by the sworn affidavit of Mr. Twalib Lubandamo, the applicant herein.


The brief facts of the case are the respondent herein sued the applicant for a breach of contract in Civil Case No. 46/2018 at the Resident Magistrate's Court of Mbeya (**Trial Court**). The respondent prayed for the court to award him Tshs. 100,000,000.00/=, general damages, interests

and costs of the case. The Trial Court awarded the respondent Tshs. 36,000,000.00/= only although he claimed Tshs. 100,000,000/=. The respondent was aggrieved by the decision of the Trial Court and lodged an appeal in this Court. The appeal was successful. The applicant was unsatisfied with the decision of this Court as the first appellate court. Hence this application.

The applicant's grounds for leave are reproduced hereunder:

1. Whether the respondent was entitled to be paid Tshs. 100,000,000/= as unpaid balance of the loan as part of the whole amount out of Tshs. 164,000,000/= of the loan agreed;
2. Whether there was a contract of Tshs. 164,000,000/= between the applicant and the respondent as claimed by the first appellate court;
3. Whether the Trial Court awarded the respondent Tshs. 50,000,000/= as a general damage as ruled by the first appellate court; and
4. Whether the first appellate Judge was right in ordering the applicant to pay the amount of money in four instalments within four months after twenty-one (21) days from the date of the judgment.

When the matter came for hearing of this application on 25 October 2023, the applicant was represented by Mr. Alfred Chapa, learned advocate. The respondent was represented by Mr. Ladislaus Rugemelira Rwekaza,



learned advocate assisted by Ms. Consesa Desderi, learned advocate and Mr. Machemba Tangimu Gamano, learned advocate.

Mr. Chapa prayed for the Court to adopt the contents of his affidavit as part of his submission and urged the court to grant the leave.

On the first ground of appeal, Mr. Chapa argued that on page fifteen (15) of the first appellate court judgment (the **Judgment**), this Court ordered the applicant to pay the respondent the amount of Tshs. 100,000,000.00/= as unpaid balance of the loan as part of the whole amount of Tshs. 164,000,000/= of the agreed loan.

Mr. Chapa further argued that on page one (1) of the Trial Court judgment, the respondent requested to be paid Tshs. 100,000,000.00/= as specific damages. Mr. Chapa added that the issue of 164,000,000/= was not claimed by the respondent anywhere in the Trial Court Judgment. Mr. Alfredy contended that on page two (2), second paragraph of the Trial Court judgment, the respondent prayed before the Trial Court to be paid Tshs. 100,000,000.00/= as a result of a breach of contract by the applicant. Mr. Chapa stated that there is nowhere stated that the respondent claimed for Tshs. 164,000,000.00/=. The applicant does not understand where this Court found the agreed loan was Tshs. 164,000,000.00/=.

On the second ground of appeal, Mr. Chapa contended that on page fifteen (15) of the Judgment, it was stated that there was a contract for Tshs. 164,000,000.00/=. He added that on page two (2) of the Trial Court

judgement, the respondent said he gave the applicant Tshs. 100,000,000.00/= at GR City Hotel in the presence of Mr. Bakita Sanga. Mr. Chapa further contended that Mr. Bakita Sanga testified and confirmed that the applicant received Tshs. 100,000,000.00/= from the respondent. He added that nowhere in the Court records show that the respondent gave Tshs. 164,000,000.00/= to the applicant.

Submitting on the third ground of appeal, Mr. Chapa submitted that on page thirteen (13) of the Trial Court judgment, the court said that there is no order made as to general damage and interests not established. He added that on page twelve (12) of the Judgment, it is said that the Trial Court awarded general damages of Tshs. 50,000,000.00/=, while it is not true. The first appellate court lowered it to Tshs. 10,000,000.00/=.

On the fourth ground of appeal, Mr. Chapa further argued that the first appellate court was not an executing court, and there was no execution order. The first appellate court was supposed only to say what needs to be done, i.e., the applicant shall pay the respondent Tshs. 10,00,000.00/= as damages only.

Mr. Chapa urged the Court to grant leave as there are serious issues to be argued in the CAT. He referred to ***National Bank of Commerce vs. Maisha Musa Uledi (Life Business Centre)*** Civil Application No 410/07 of 2019 (CAT at Mtwara, unreported) and ***The Registered Trustees of Biafra Secondary School and Usafirishaji Mikoani Union Ltd vs. Enock Daniel T/A Unilife Group Investment***, Misc. Civil Application No. 575 of 2019 (High Court at Mbeya, unreported), where the Court

referred to the case of ***Harban Haji and Another vs. Omar Hilal Seif and Another***, (Civil Reference 19 of 1997) [2000] TZCA 11 (CAT at Zanzibar, unreported) to support his argument and the application.

In his reply to the submission, Mr. Rwekaza urged the Court not to grant leave because the application was not based on a point of law as stated in various cases including ***British Broadcasting Corporation vs Erick Sikujua Ng'maryo***, Civil Application No. 138 of 2004 (CAT at Dar es Salaam, unreported) and ***Rutagatina C.L vs The Advocates Committee & Clavery Mtindo Ngalapa***, Civil Application No. 98 of 2010 (CAT at Dar es Salaam, unreported).

Mr. Rwekaza submitted that the first ground of appeal is not on a point of law but on evidence. He invited the Court to look at page two (2), the second paragraph of the Trial Court judgment, where the respondent testified about Tshs. 100,000,000.00/=. Mr. Rwekaza further argued that on page three (3) of the Trial Court judgment, the applicant (**DW1**) testified about Tshs. 64,000,000/=. He added that the amount of Tshs. 164,000,000.00/= is reflected in the first appellate court Judgment.

On the second ground of appeal, Mr. Rwekaza submitted that, per the Court records, a contract occurred at GR City Hotel. Both the applicant and the respondent were present, as shown in the Trial Court judgment on pages two (2), three (3), four (4), five (5) and six (6). Mr. Rwekaza contended that it was incorrect for the applicant to raise a point of law on whether there was a contract of Tshs. 164,000,000/=:, while it is clearly stated in the Trial Court judgment.

Submitting on the third ground of appeal, the respondent counsel argued that general damages are given at the court's discretion. He added that the first appellate court awarded Tshs. 10,000,000.00/= as general damages. As such, he had expected the applicant to dispute on Tshs. 10,000,000/= as general damages. Mr. Rwekaza maintained that the general damages granted by the first appellate court are not on the point of law. He argued that the first appellate court has jurisdiction to re-evaluate all the evidence given in the Trial Court and to increase or decrease general damages awarded by the Trial Court. He referred to the case of ***Kulwa Ramadhani Nassoro vs. The Republic***, Criminal Appeal No. 94 of 2020 (High Court at Morogoro, unreported), where the Court referred to ***Siza Patrice vs Republic***, Criminal Appeal No. 19 of 2010 (CAT, unreported) to support his argument.

Mr. Rwekaza also opposed the fourth ground of appeal, which is not on the point of law. He added that the applicant's counsel did not cite any law that the first appellate court contravened to order that the applicant pay the amount of money in four (4) instalments within four months after 21 days from the date of the judgment.

In addition, Ms. Desderi argued that the grounds of appeal, as stated by the applicant's counsel, are not on point of law and are cured by evidence adduced in the Trial Court. She referred to ***Justus Ntibandetse vs CRDB Bank PLC***, Misc. Civil Application No. 41 of 2021 (High Court at Moshi, unreported) to support her argument.

Ms. Desderi further maintained that the case of ***National Bank of Commerce vs. Maisha Musa Uledi (Life Business Centre)*** (supra) is distinguishable from what is before this Court. She argued that the case was on the issue of the discretion of the Court to grant general damages. She prayed for the Court not to rely on the case. She further maintained that in the judgement of the Trial Court on page two (2), the respondent prayed for the applicant to be compelled to pay the claimed amount of Tshs. 100,000,000/= and Tshs. 50,000,000/= as general damages. Therefore, the first appellate court analysed the Trial Court's judgement to reach its decision. She urged the court not to grant leave with costs.

She added that on the third ground of appeal, the first appellate court had the mandate to re-evaluate the evidence on record before it and order the applicant to pay the amount of money in four instalments within four months after twenty-one (21) days from the date of the judgment as addressed by the CAT in ***Siza Patrice vs Republic*** (supra).

In rejoinder, Mr. Chapa agreed with the respondent's counsel that to seek leave to appeal to the CAT, the applicant has to establish that there is a serious legal point to be argued at the CAT. The applicant's counsel contended that he did not cite any law because they were not arguing on the appeal.

The counsel of the applicant further contended that the applicant is here to pray for leave to appeal to the CAT and not to argue on the appeal. That is why he did not dispute the Tshs. 10,000,000.00/=. He added that on page twelve (12) of the Judgement, there is a legal point to argue that

the first appellate court had no mandate to reduce general damages from Tshs. 50,000,000.00/= to Tshs. 10,000,000.00/=. To support his argument, he referred to ***National Bank of Commerce vs. Maisha Musa Uledi (Life Business Centre)*** (supra).

On the contract issue for which amount, the applicant's counsel submitted that on pages one (1) and two (2) of the Trial Court judgment, the respondent claimed the amount of Tshs. 100,000,000.00/=. but on page fifteen (15) of the Judgement, the Court talks about the amount of Tshs. 164,000,000.00/=. .

He further submitted that the court should not consider the case of ***Kulwa Nassoro Vs. The Republic***, (supra) presented by the counsel for the respondent because the Court was looking at whether they could re-evaluate the evidence of trial court. Therefore, if given leave the CAT will decide whether the first appellate court can re-evaluate the evidence of the Trial Court. As such, the case cannot be considered because this Court is not sitting as the first appellate court.

I have considered the instant application, the grounds in support thereof, the affidavit sworn by the applicant's counsel, the record of this application and the law. Section 5 (1) (C) of the AJA provides as follows:

"5 (1) (C) In civil proceedings, except where any other written law for the time being in force provides otherwise, an appeal shall lie to the Court of Appeal with the leave of the High Court or of the Court

of Appeal, against every other decree, order, judgment, decision or finding of the High Court.”

The applicants invoke the foregoing provisions of the AJA and seek leave to appeal to the CAT. This Court has been moved to determine whether the arguments raised by the applicant are worth consideration by the CAT.

It is settled law that leave to appeal to the CAT is granted only when the intended appeal has some factual or legal merits. See ***British Broadcasting Corporation vs Erick Sikujua Ng’maryo*** (supra), ***Rutagatina C.L vs The Advocates Committee & Clavery Mtindo Ngalapa*** (supra), ***Lightness Damian & Others vs Said Kasim Chageka***, Civil Application No. 450/1 of 2020 (CAT at Dar es Salaam, Tanzlii) and ***Jireys Nestory Mutalemwa vs Ngorongoro Conservation Area Authority***, Civil Application No 154 of 2016 (CAT Arusha).

The CAT gave the test for granting leave to appeal to the CAT in the case of ***Lightness Damiani and 5 Others vs Said Kasim Chageka*** (supra) whereby it stated that:

*"In the light of the above stance of the law, and with respect to the learned judge, it seems clear to us that all that applicants are required to do in applications of this kind is **simply to raise arguments whether legal or factual which are worth of consideration by the Court.** Once they pass that test, the court*

is obligated to grant leave to appeal. It is not the duty of the judge to determine whether or not they have any merit."

In the case of ***British Broadcasting Corporation vs Erick Sikuju Ng'maryo***, (supra) the Court of Appeal of Tanzania stated 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 judiciously exercised and on the materials before the court. As a matter of general principle, **leave to appeal will be granted where grounds of appeal raise issues of general importance or a novel point of law or where the grounds show a prima facie arguable appeal** (see: ***Buckle vs Holmes*** (1926) ALL ER. 90 at page 91). However, where the grounds of appeal are frivolous, vexatious or useless or hypothetical, no leave will be granted."*

In the case of ***Jireys Nestory Mutalemwa vs Ngorongoro Conservation Area Authority***, (supra) the Court of Appeal of Tanzania further stated that:

"Similarly, in applications of this nature, it is a well-established principle of law that the Court is not expected to determine the merits or otherwise of the substantive issues before the appeal itself is heard..."

The issue for consideration now is to determine whether or not the arguments raised by the applicants in support of the application for leave

to appeal to the CAT are pertinent questions for determination by the CAT and meet the conditions explained in the cases above.

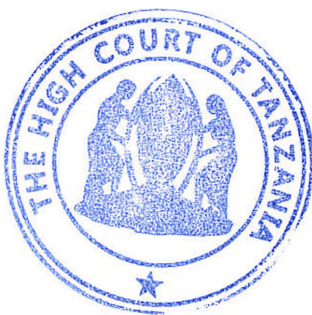
I have analysed the grounds of appeal raised by the applicant's counsel, particularly in paragraphs six (6) (i) to (iv) of the affidavit. I believe the present application raises matters worth considering by the CAT as established in the cases mentioned above.


The application is merited. I therefore grant leave to appeal to the CAT. No order as to cost is made.

DATED at MBEYA on this 06th day of November 2023.


A. A. SINDA
JUDGE

The Judgment is delivered on this 06th day of November 2023, in the presence of the applicant, represented by Mr. Chapa, and the respondent, represented by Ms. Desderi.




A. A. SINDA
JUDGE