

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(TANGA DISTRICT REGISTRY)

AT TANGA

MISC CIVIL APPLICATION NO. 17 OF 2023

Y. N INVESTMENT CO. LTD.....APPLICANT

VERSUS

MWANAFUNYO AND COMPANY LIMITED.....RESPONDENT

*(Arising from Civil Appeal No. 07 of 2022 of the High Court of the United Republic of
Tanzania at Tanga)*

RULING

13/10/2023 & 27/11/2023

NDESAMBURO, J.:

This is an application by Y. N Investment Co. LTD, the applicant, for leave to appeal to the Court of Appeal against the judgment and decree of this court in Civil Appeal No. 07 of 2022. The application is made under section 5(1)(c) of the Appellate Jurisdiction Act Cap. 141 R.E 2019. It is supported by an affidavit sworn by Julius Joseph Nyandindi, the principal officer of the Applicant.

On 31st August 31, 2023, when the matter was brought up for mention, Ms. Graciana Assenga, representing the respondent,

was granted a seven-day extension to submit a counter affidavit. Nevertheless, the respondent failed to meet this deadline. As a result, she was only allowed to submit on points of law during written submission.

This matter arises from an agreement between the involved parties for the rental of heavy construction equipment. The applicant, in this case, sought the equipment for the construction of a road situated at Issa Mtambo Mwarabu Road, Mountain View, within the jurisdiction of the Korogwe Town Council. The equipment in question included a grader, roller, excavator, tipper, water bowser, and a low bed. As per the terms of the contract, the applicant was obligated to remit a sum of Tshs. 219,000,000/= as a two-month payment for the equipment rental. However, a dispute arose when the applicant allegedly failed to fulfil the conditions agreed-upon contractual payment, leading to the respondent initiating suit at the Korogwe District Court in Civil Case No. 05 of 2021 claiming the following reliefs:

- a) Payment of Tshs. 219,000,000/= as specific damages being actual payment for supplying heavy construction equipment as agreed which was not yet paid to the plaintiff by the defendant.*

- b) Payment of general damages of Tshs. 38,000,000/= or as may be quantified by this honourable Court for the loss suffered by the plaintiff as a result of a breach of contract.*
- c) Interest on the decretal amount from the date of the agreement to the date of filing of the case at the bank's rate of 32% per annum.*
- d) Interest on the decretal amount from the date of filing the case to the date of judgment at the bank's rate of 32% per annum.*
- e) Interest on the decretal amount from the date of the judgment till the date of full payment at the Court's rate of 7% per annum.*
- f) The defendant bears the costs of this case.*
- g) Any other order or relief that the court may deem fit to grant.*

At the end of the case, the District Court ruled in favour of the applicant, Y. N Investment Co. Ltd, and consequently dismissed the respondent's case. Dissatisfied with this decision, the respondent filed an appeal in this court based on three grounds. After full determination of the appeal, this Court reversed the District Court's decision, rendering judgment and decree in favour of the respondent who was the appellant in that matter and awarded the following reliefs to him:

- a) The respondent shall pay the appellant an amount of Tshs. 109,500,000/= being the contractual price for the first 30 days of the contractual term.*
- b) The respondent shall pay the appellant Tshs. 38,000,000/= being payments for General Damages.*
- c) The Respondent shall pay the appellant costs for transporting the hired to and from the site.*
- d) The respondent shall pay the appellant costs of operators.*
- e) The respondent shall pay the appellant interest of the decretal amount at the court's rate from the date of this judgment till the date of payment in full of the decretal amount and the costs of the suit.*

The applicant was aggrieved by this outcome and hence filed a notice of appeal under Rule 83(1) of the Court of Appeal Rules, Cap 141 R.E 2019. She also filed this application for leave to appeal to the Court of Appeal.

With the consent of both parties, the hearing proceeded by way of written submission. The applicant was being represented by Mr. Eliezer Eliakunda Kileo, a learned counsel, while Mr. Justus Ilyarugo, was representing the respondent, also a learned counsel. Both parties complied with the filing schedule.

While adopting their affidavit, the learned counsel for the applicant submitted that there is an arguable appeal that they

intend to pursue in the Court of Appeal. Their contention centres on the contract, asserting that it only required the applicant to cease equipment supply in the event of non-payment and not under any other circumstances. She further claimed that she had diligently fulfilled her obligations as outlined in the contract.

Additionally, the applicant's counsel contended that the respondent failed to substantiate her claim that she had provided equipment to the applicant for the full 60-day period. The sum of Tshs. 45,000,000/=, they asserted, was paid in accordance with the number of days the equipment was utilized. The applicant also argued that the contract explicitly provided a remedy for breaches, and the court's decision was incorrect in contradicting that contractual condition.

Based on these reasons, the applicant prayed that her application be granted.

Even though the respondent, represented by their advocate Mr. Justus Ilyarugo, failed to file a counter affidavit in response to the application, they were expressly directed and ordered to submit a response based solely on points of law. Regrettably, the submission subsequently filed contained factual information, which was inconsistent with the specific order that had been

issued due to their failure to submit the counter affidavit. The case of **Mosses Ndosì v Suzana Ndosì**, Misc. Land application No. 117 of 2013 which was cited with approval in the case of **Emmanuel Gidahotay v Gambanyashita Muhale** Misc Land Application No. 41 of 2017 contains a fundamental legal principle, namely that the failure to file a counter affidavit signifies a lack of factual opposition to the application. Consequently, the respondent was specifically ordered to focus her submission solely on matters of law, however, the submission she filed predominantly revolved around factual elements. Notably, in the closing paragraph, the learned counsel for the respondent criticized the applicant's submission for lacking a certified point of law to be reviewed by the court. While setting aside the remainder of the respondent's submission, which delved into matters of fact rather than law as ordered, I will now address the issue raised by the respondent regarding the certification of a legal point, as brought up by their counsel.

The appeal which was before this court has its origin from the District Court. Consequently, any subsequent appeal to the Court of Appeal would constitute a second appeal. It is important to note that, according to legal requirements, certification on a

point of law is essential when pursuing a third appeal. In cases of a purely civil nature, such as the one at hand, the need for certification on a point of law arises only when the case initially originated from the Primary Court. Further, this application would have been brought under Section 5(2)(c) of Cap 141 and not 5(1)(c). The latter section under which this application hinges provides as follows:

5.-(1) 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 (c) with the leave of the High Court or the Court of Appeal, against every other decree, order, judgment, decision or finding of the High Court.

It is clear that the requirement to certify points of law involved does not exist under Section 5(1)(C) of Cap 141. It follows that a certificate on point of law is only required in respect of appeals originating from the primary Court as provided by Section 5(2)(c) of Cap 141. Having stated so, it is clear that this perception by the respondent was misconceived.

With that matter addressed, I now shift focus to the application currently under consideration by this court. I have gone through the record, and submissions and found that the gist

of this application is whether the applicant has advanced an arguable point of law worthy of consideration by the Court of Appeal.

Courts of law have now and then insisted that for an application for leave to appeal to the Court of Appeal to be granted, it must be shown that there is the existence of an arguable point of law worth consideration by the Court of Appeal. This can be found in cases of **Nurbhai N. Rattansi v Ministry of Water Construction, Energy, Land and Environment and Another** [2005] TLR 220 and also **Jireys Nestory Mtalemwa v Ngorongoro Conservation Area Authority**, Civil Application No. 154 of 2016, CAT at Arusha.

It must also be understood that leave to appeal is not automatic but discretionary. This was pointed out in the Court of Appeal case of **British Broadcasting Corporation v Erick Sikujua Ngimaryo**, Civil Application No. 138 of 2004. In this case, the Court stated that;

"...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 and on the materials before the court...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 a prima facie or arguable appeal...However, where the grounds of appeal are frivolous, vexatious or useless or hypothetical, no leave will be granted".

Applying the above legal principle in the context of the present case, the applicant, in her affidavit, has put forth four specific issues for the Court of Appeal's consideration under paragraph 6(i), (ii), (iii), and (iv). **First**, *the court continued to award special damages which were not specifically pleaded and strictly proved by the respondent.* **Second**, *the court awarded reliefs which were not pleaded and prayed in the pleadings.* **Third**, *the court failed to find out that the remedies from the breach of contract by parties were available as specified in the hiring agreement as per clause 3,* **Four**, *that the court continued to award the Respondent Tshs. 45,000,000/= as costs for transporting the hired equipment to and from the site in spite of the same being clearly stated by the Applicant for the same, but the Court assumed the money was for other matters which were not specified or stated by the Court.*

Having scrutinised the above-laid arguments by the applicant, and bearing in mind that at this stage, it is enough if the application shows that the intended appeal, prima facie, has some merit by raising arguable grounds or a point of law that merits the attention of the Court of appeal; and after scanning through the questions raised by the applicant in this case, I am satisfied that the applicant has sufficiently demonstrated that there are serious questions that merit the attention of the Court of Appeal.

In applications for leave to Appeal, the Court of Appeal in the case of **Jireys Nestory Mtalemwa** (supra) had this to say:

"The duty of the Court at this stage is to confine itself to the determination of whether the proposed grounds raise an arguable issue(s) before the Court in the event leave is granted. It is for this reason the Court brushes away the requirement to show that the appeal stands a better chance of success a factor to be considered for the grant of leave to appeal. It is logical that holding so at this stage amounts to prejudging the merits of the appeal".

Without tending to delve into the substance of the appeal itself as directed above, on the whole, on account of what has been discussed hereinabove, I find merit in this application and allow it. Each party is to bear its costs.

It is so ordered.

DATED at **TANGA** this 27th day of November 2023




H. P. NDESAMBURO

JUDGE