

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

**(DAR ES SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**MISC. CIVIL APPLICATION NO.120 OF 2023**

*(Arising from the ruling in Misc. Civil Application No. 403 of 2022 delivered on 24<sup>th</sup> February, 2023 Hon. E. Y. Mkwizu, J and Exparte Decree in Civil Case No. 30 of 2019 delivered on 17<sup>th</sup> June, 2021 Hon. Mongella, J)*

**JOFLO COMPANY LIMITED.....1<sup>ST</sup> APPLICANT**

**JOHN BONIFACE TULLA.....2<sup>ND</sup> APPLICANT**

**FIDELIS AGUSTINE MGASHA.....3<sup>RD</sup> APPLICANT**

**FLORA E. MALYEKA.....4<sup>TH</sup> APPLICANT**

**VERSUS**

**BANK OF AFRICA TANZANIA LIMITED.....RESPONDENT**

**RULING**

**POMO, J**

The Applicants herein are applying for leave to appeal to the Court of Appeal of Tanzania against the ruling of this court dismissing for want of merit Misc. Civil Application No. 403 of 2022 delivered on 24<sup>th</sup> February, 2023 Hon. E.Y. Mkwizu, J. In the dismissed Application, the Applicants were

praying for setting aside *ex-parte* judgement in Civil Case No. 30 of 2019 delivered on 17<sup>th</sup> June, 2021 Hon. L. Mongella, J in favour of the Respondent.

This Application is supported by the affidavit jointly deposed on 20<sup>th</sup> March, 2023 by the Applicants. In the Affidavit, the Applicants are stating, under paragraph 4 that, in their dismissed application they raised before this court a legal ground to the effect that they were not served with plaint as such asked the court to set aside the *ex-parte* judgement. Also, under paragraph 5 of the affidavit, they are seeking for leave to appeal to the court of appeal on the legal ground that this court dismissed their application for setting aside *ex-parte* judgment without satisfying itself that they were not served with summons and plaint and the purported summons lacked qualification of proper service to them. Further, have stated under paragraphs 6 that they didn't see any record of substituted summons in the court file. It is their further allegations under paragraph 7 that they were not heard in Civil Case No. 30 of 2019 and the *ex-parte* judgment is against them. Lastly, under paragraph 8, are of the averment that the plaint in Civil Case No. 30 of 2019 is tainted with illegality for being contrary to Order VII Rule 1 of the Civil Procedure Code.

The Application is contested by the respondent through a counter affidavit deposed by Elizabeth Muro, the Principal Officer. It is the Respondent's averment under paragraph (iii) of the counter affidavit that the issue of lack of proper service is just an afterthought and has never been raised and or being a ground for entering *ex-parte* judgment, rather, *ex-parte* judgment was a result of striking out the Applicants' joint written statement of defence on the ground of being filed out of time. Further, under paragraph (iv), the respondent is of the averment that the Applicants were afforded right of hearing which they failed to utilize

When the application was called on for hearing on 3<sup>rd</sup> May, 2023 Mr. Hashim Mziray, learned advocate appeared for the Applicants and on the other hand Ms. Happiness Caroli, learned advocate represented the Respondent. I ordered the Application be disposed by way of written submission of which both sides complied the schedules. I am grateful to the learned minds

Arguing the Application, Mr. Mziray submitted that the ground on which leave is sought is to the effect that the court ruling dismissing their application for setting *ex-parte* judgment is not justified. That, in their application, their focus was, if the court opined the written statement of

defence was out of time, it meant there was a date on which the Applicants were served with summons to file defence. Premised on this, there is no sufficient proof of service of summons on each applicant in respect of Civil Case No.30 of 2019. Likewise, no proof that the one served with summons was the Applicants' agent. In his further submission, Mr. Mziray is of the argument that, whether the Applicants were legally served or not was a question to be determined by the Court of Appeal and not this court as it did in the impugned ruling. That, improper service denied the Applicants opportunity to be heard and also to defend the plaint, the plaint which is tainted with illegality as it does not contain a clause stating the value of the subject matter of the suit for purposes of jurisdiction and court fee which goes against Order VII Rule 1(i) of the Civil Procedure Code, [Cap. 33 R.E. 2019]. Mr. Mziray, thus prayed the Application be allowed

In reply, Ms. Caroli, in the first place argued that as long as this matter does not originate from the primary court, it is therefore wrong for the Applicants to apply for certificate on point of law from this court hence the order prayed for is misconceived and prayed not to be granted

Again, having adopted the counter affidavit, Ms. Caroli countered the applicants' assertion that the impugned ruling of this court refusing their

prayer to set aside *ex-parte* judgment in Civil Case No.30 of 2019 that it was not justified. That, the ruling of this court, in refusing the application, reasoned that improper service of summons raised by the Applicants as ground for setting aside *ex-parte* judgment in Civil Case No. 30 of 2019 didn't feature anywhere instead Civil Case No. 30 of 2019 proceeded *ex-parte* because the Applicants' written statement of defence was expunged for being filed out of time and they didn't raise such concern of improper service hence are estopped from raising such argument as ground for setting aside the *ex-parte* judgment and decree.

Arguing further, Ms. Caroli, contends that the Applicants have failed to indicate any ground of general importance or novel point of law or prima facie case. That, the mere ground that the learned judge, in Misc. Civil Application No. 403 of 2022 did not justify her reason of refusing to set aside *ex-parte* judgment is a mere allegation which has no truth in it.

That, the Applicants have focused much on improper service while ignoring the main issue for them is to show arguable appeal or grounds of appeal which raises issues of general importance. She prayed the Application be dismissed with costs for want of merit

I have given due consideration the Application and its supporting affidavit, the court affidavit, both parties' submissions for and against the application and the court record. The instant Application being an application for leave to appeal to the Court of Appeal against the ruling in Misc. Civil Application No. 403 of 2022 refusing to set aside *ex-parte* judgment in Civil Case No. 30 of 2019, the issue I am tasked to determination is whether the Applicants have paraded grounds of appeal worthy granting leave for consideration and determination by the Court of Appeal.

In **Markus Kindole versus Burton Mdinge**, Civil Application No. 137/13 of 2020 CAT at Iringa (Unreported) at page 5, the Court of Appeal had this to state: -

*"In determining the only issue which arises in this matter; that is, whether or not the Application has merit, **what is to be ascertained is existence or otherwise of a point of law worth consideration by the Court**".*

The Court of Appeal went on stating at page 6 thus: -

*"As stated above however, for an application for leave to appeal to the Court of Appeal **to be granted, the applicant must establish existence of a point of law which deserves consideration by the Court**".*

[Also see: **British Broadcasting Corporation versus Eric Sikujua Ng'maryo**, Civil Application No. 138 of 2004 CAT at ; **Hamis Mdida and Another versus The Registered Trustees of Islamic Foundation**, Civil Appeal No. 232 of 2018 CAT at Tabora; **Gaudencia Mzungu versus the IDM Mzumbe**, Civil Application No. 94 of 1999 CAT, **Wambele Mtumwa Chamte versus Asha Juma**, Civil Application No. 45 of 1999 CAT (All unreported)].

Guided by the above, now from the facts obtaining in the affidavit supporting the Application, can it be said the Applicants established the existence of any point of law which deserves consideration by the Court of Appeal? My reading of the Affidavit, which contains paragraphs 1 – 9, I find none. This is based on the fact that, from the impugned ruling, the learned judge dismissed the Applicants' Application, Misc. Civil Application No.403 of 2022 on the ground that the reasons advanced by the Applicants in seeking to set aside *ex-parte* judgment that they were not properly served, are grounds they didn't raise when Civil Case No.30 of 2019 was ordered to proceed *ex-parte* against them. That, the only ground which led the suit to proceed *ex-parte* was that their written statement of defence was filed out

of time, thereby expunged from court record. Now, in all 9 paragraphs of the affidavit, there is nowhere the Applicants are questioning such findings.

In the circumstances, I find the Application is not merited and dismiss it with costs on the ground that the Applicant has failed to raise any ground of appeal worth consideration and determination by the Court of Appeal.

It is so ordered

Dated at Dar es Salaam this 30<sup>th</sup> day of November, 2023



**MUSA K. POMO**

**JUDGE**

**30/11/2023**



Ruling delivered this 30/11/2023 in the presence of Mr. Karoli Tarimo for the Respondent only

**Sgd: S. B. Fimbo**

**Deputy Registrar**

**30/11/2023**