

IN THE HIGH COURT OF TANZANIA

(MAIN REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 43 OF 2023

(Arising from Civil Reference No. 21 of 2023, before Hon. Mansoor, J., dated 13th day of September, 2023)

BETWEEN

TANZANIA INSURANCE REGULATORY AUTHORITY.....1ST APPLICANT

ATTORNEY GENERAL 2ND APPLICANT

VERSUS

SALAAMAN HEALTH SERVICES1ST RESPONDENT

BAGHAYO SAQWARE2ND RESPONDENT

ZAKARIA MUYEGI3RD RESPONDENT

RULING

Date of Last Order: 21st November, 2023.

Date of Ruling: 24th November, 2023.

E.E. KAKOLAKI, J.

Under certificate of utmost extreme urgency and by way of chamber summons, the applicants before this court preferred this application for leave to appeal to the Court of Appeal against the decision of this court in Civil Reference No. 21 of 2023 handed down on 13/09/2023. Save for the 2nd and 3rd respondents who on 10/11/2023 when the matter came for mention

expressly indicated that are not contesting the application, the 1st respondent who appeared through her principal officer one Salim Nassoro initially expressed her intention to oppose the application and prayed for time to file the Counter affidavit to that effect before the matter was by consensus set to come for hearing on 21/11/2023 at 7.30 am.

The application has been brought under the provisions of section 5(1)(c) of the Appellate Jurisdiction Act, [Cap. 141 R.E 2019] and is supported by affidavit of Ayoub Gervas Sanga, State Attorney, stating the grounds as to why the same should be granted.

Briefly applicants together with the 2nd and 3rd respondents successfully filed bill of cost against the 1st respondent before this Court in Consolidated Taxation Cause No. 3 and 4 of 2022, as in its ruling of 14/06/2023 by Taxing Officer awarded them the claimed cost, following this Court order condemning the 1st respondent to pay them the said costs in Misc. Civil Application No. 47 of 2022. Displeased the 1st respondent successfully challenged part of the Taxing Officer's decision vide Civil Reference No. 21 of 2023 as in its ruling dated 13/09/2023, this Court speaking through Mansoor J., taxed off the legal fees awarded to the applicants on the ground that, the Law Officer or State Attorney representing them was never paid

fees by the Government and that, the Government is never the client of the Attorney General or Solicitor General, for the later to be entitled to legal fees. Disgruntled the applicants on 26/09/2023 lodged a Notice of Appeal to the Court of Appeal seeking to assail the said decision, hence the present application.

When the matter was called for hearing remotely through video conference both parties appeared before the Court and were heard viva voce. The applicants were represented by Mr. Ayub Sanga, learned State Attorney assisted by Mr. Okoka Mugavilenzi, learned Principal State Attorney while the 1st respondent appeared through her principal officer one Salim Nassoro and the 2nd and 3rd respondents hired the services of Mr. Mlyambelele Mweri, learned advocate.

Before hearing could start as agreed and scheduled at 7.30 am though started at 7.50 am, Mr. Sanga who indicated to the Court applicants' readiness to proceed with hearing informed the Court that, the 1st respondent who was supposed to file her counter affidavit by 17/11/2023 had failed to do so without any justification, the fact which is indicative that she was not contesting the application. In response the said principal officer for the 1st respondent did not dispute to have failed to file the counter

affidavit nor did he seek extension of time to so do. Instead he informed the Court that 1st respondent's advocate one Mr. Juma Nassoro, is attending High Court Criminal Session No. 211 of 2022 at the High Court of Tanzania Dar es salaam Registry before Hon. Justice Mrisha, and therefore was praying for the matter to be heard in written form, the prayer which was vehemently resisted by Ms. Sanga on the ground that, since the session starts as 9.00 am, the learned advocate if truly engaged would have attended this hearing first as agreed and then proceed with his session business at 9.00 am. To him that was insufficient reason for this Court to adjourn hearing or allow hearing in written form in which both parties had agreed to proceed with orally. The therefore pressed that hearing be allowed to proceed orally as the 1st respondent is represented. As for the 2nd and 3rd respondents Mr. Mweri adopted applicants' submission and prayer. Having heard both sides this Court made a finding that, the reason for adjournment of the matter or advancing the prayer for hearing in written form was not viable as Mr. Nassoro learned advocate if truly engaged and seriously wished to defend this matter would have appeared on the agreed time at 7.30 am and proceed to either seek for extension of time to file the counter affidavit or argue the application on legal issues only. Such unjustifiable defaulted

appearance by the said advocate Nassoro who never appeared before the Court since the institution of the matter was held to be a deliberate move aiming at delaying disposal of the matter which has been filed under certificate of utmost extreme urgency. Much as the 1st respondent was represented by the principal officer who has always been in Court the matter was ordered to proceed with hearing on the merit.

It was Mr. Sanga who rolled the ball first. Having adopted the applicant's affidavit to form part of his submission the Court was informed that, the application is uncontested by all respondents as the 2nd and 3rd respondents indicated so earlier on, while the 1st respondent defaulted to file the counter affidavit to that effect and had not sought any extension of time to do so. He said, when determining application of this nature, the settled principle is that, the Court is not entitled to look into the merit of the appeal but rather satisfy itself as to whether the applicant has raised arguable issues or legal points worth determination by the Court of Appeal, in which argued the applicant has fully complied with as averred in paragraphs 12 and 13 of the affidavit. In support of the above principle he cited to the Court the case of **National Bank Commerce Vs. Maisha Musa Uledi** [2020] TLR 524 and rested his submission when prayed the Court to grant the application.

On his part the 1st respondent's principal officer had nothing to say apart from leaving the matter to the Court for decision and after the reasons advanced seeking for written submission were defeated by the court. Mr. Mweri, for the 2nd and 3rd respondents reaffirmed their position of conceding to the application, the reason being interest of justice as according to him, if leave is granted both applicants and 1st respondent with benefit out of it for having the appeal heard on merit as both had filed two separate notices of appeal to the Court of Appeal. In rejoinder Mr. Sanga reiterated his submission in chief as he had nothing to add.

I have scanned the submission by both parties and visited the affidavit by the applicant as well as the decision sought to be assailed by the applicants in a bid to answer the issue as to whether this application is worth of grant despite the fact that it is not contested. It is trite law that, in application for leave to appeal, leave is not automatically granted. It is within the discretion of the Court to grant or refuse leave. This Court's duty therefore is to establish whether the decision sought to be impugned raises legal points or issues worth determination by the Court of Appeal. Leave will therefore be granted where the grounds of appeal raise issues of general importance or a novel point of law or where the grounds have a prima facie of arguable

appeal. To the contrary where the grounds of appeal are frivolous, vexatious or useless or hypothetical, no leave will be granted. See the cases of **Wambele Mtimwa Shamte Vs. Asha Juma**, Civil Application No. 45 of 1999, **Rutagatina C.I Vs. The Advocate Committee and Clavery Mtindo Ngalapa**, Civil Application No. 98 of 2010, **British Broadcasting Corporation Vs. Eric Sikujua Ng'imaryo**, Civil Application No. 133 of 2004 (both CAT-unreported) and **Maisha Musa Uledi** (supra). In the case of **Wambele Mtimwa Shamte**(supra), on what factors should be considered the Court of Appeal when considering application for leave to appeal observed thus:

"Unfortunately, it is not provided what factors are to be taken into account when considering whether or not to grant leave to appeal to this court. However, it is obvious that leave will only be granted if the intended appeal has some merits whether factual or legal."

Similarly in the case of **Maisha Musa Uledi** (supra) the Court of Appeal had this to say:

"In an application for leave to appeal, what is required of the court hearing such an application is to determine whether or not the decision sought to be appealed against raises legal points which are worth consideration by the Court of Appeal."

In this matter I note applicants in their affidavit in support of this application in particular paragraph 12 have raised four issues in which Mr. Sanga argued are worth of consideration by the Court of Appeal. These are:

- (1) Whether the relationship between the Government, the Attorney General and Solicitor General is that of advocate and client or not.*
- (2) Whether Government is entitled to recover litigation cost specifically the instruction fees.*
- (3) Whether lack of evidence and/or non-payments of instruction fees can be a reason for not awarding instruction fees to the Government.*
- (4) Whether the trial Court was right not to consider the provisions of section 13 of the Government Proceedings Act, [Cap. 5 R.E 2019] in reaching its decision.*

Going by the settled principle in **Maisha Musa Uledi** (supra) that, this Court's duty is to establish whether in the decision sought to be challenged there are legal points worth determination of the Court of Appeal and given the fact that, this Court in its decision of 13/09/2023 taxed off the legal fees awarded to the applicants was grounded on the reason that, neither the Law Officer or State Attorney was paid fees by the Government and that, the

Government is neither the client of the Attorney General or Solicitor General, and since the above raised issues by the applicants are premised on such reason, I find all the four raised points are worth determination by the Court of Appeal.

All said and done, I find merit in this application and hereby proceed to grant it. The applicants are accordingly granted leave to appeal to the Court of Appeal under s. 5(1) (c) of the AJA against the decision of this Court in Civil Reference No. 21 of 2023, as prayed.

Cost be in the cause.

It is so ordered.

Dated at Mtwara this 24th day of November, 2023.



E. E. KAKOLAKI

JUDGE

24/11/2023.

The Ruling has been delivered at Mtwara via video conference today 24th day of November, 2023 in the presence of Mr. Ayubu Sanga, State Attorney for the applicants, Mr. Mlyambelele Mweri, advocate for 2nd and 3rd respondents and Ms. Catherine Shenkunde, Court clerk all appearing from Dar es salaam and in the absence of the 1st respondent.

Right of Appeal explained.



E. E. KAKOLAKI
JUDGE
24/11/2023.

