

**IN THE HIGH COURT OF TANZANIA
(IN THE SUBREGISTRY OF MWANZA)**

AT MWANZA

MISCELLANEOUS CIVIL APPLICATION NO. 10 OF 2023

SHEKINA ENGINEERING.....1ST APPLICANT

INTERCOUNTRY ROAD CONSTRUCTION CO. LTD.....2ND APPLICANT

VERSUS

JOHNSON AMIR GARUMA.....RESPONDENT

RULING

Date of Last Order:20/02/2023

Date of the Ruling:21/02/2023

Kamana, J:

This is an application filed by Shekina Engineering, the first Applicant and Intercountry Road Construction Co. Ltd, the second Applicant for a leave to appeal against the decision of the High Court dated 16th December, 2022 in Civil Appeal No. 03 of 2022 which was in favour of Johnson Amir Garuma, the Respondent. The Application was made through Chamber Summons made under section 5(1)(c) of the Appellate Jurisdiction Act, Cap. 141 [RE.2019] and rule 45(a) of the Tanzania Court of Appeal Rules, 2009 as amended several times.

The application is supported by an affidavit sworn by Mr. Maduhu Ngassa, learned Counsel for the Applicants and countered by Mr. Ditrick

Raphael, learned Counsel for the Respondent. Both Counsel represented their clients during the oral hearing of this application.

Mr. Ngassa prefaced his submission by praying this Court to adopt his affidavit. He contended that the application is meritorious as there are issues worthy consideration of the Court of Appeal. In substantiating his arguments, the learned Counsel referred this Court to paragraph 4 of his affidavit which itemized the issues as follows:

1. Whether the first Applicant is vicariously responsible as an employer for the acts of Ephraim Mpeko to enter into the agreement with the Respondent.
2. Whether there was a valid contract between the Applicants and the Respondent.
3. Whether the Respondent in entering into the agreement with Ephraim Mpeko in the absence of the Applicants acted in good faith to make the Applicants responsible for such agreement.
4. Whether the cheque issued by the first Applicant made her to be responsible in the execution of the agreement between Ephraim Mpeko and the Respondent.
5. Whether the appellate Court was correct in awarding interest of 12 percent in the absence of the clause to that effect in the agreement.

To bolster his position, Mr. Ngassa referred this Court to the persuasive decisions of this Court in the cases of **Suleiman Nchambi v. Sunny Auto Works**, Misc. Civil Application No.89 of 2019 and **Cosmas Anton Itungulu v. Timoth M. Irunde**, Misc. Land Application No. 69 pf 2021.

Responding, Mr. Raphael, learned Counsel for the Respondent commenced by imploring this Court to adopt his counter affidavit. In his submission, the learned Counsel contended that the application is devoid of merits as it contains no points of law. He stressed that the issues raised in paragraph 4 of the affidavit lack legal basis and they are not new as they were determined by this Court. In buttressing his arguments, the learned Counsel cited the cases of **Sango Bay Estate Ltd & Others v Distributor Bank** [1971] EA 17 and **Said Ramadwani Mnyanga v. Abdallah Salehe**, 1996 TLR 74.

Rejoining, Mr. Ngassa reiterated his position that the issues raised in paragraph 4 of his affidavit are purely points of law worthy determination of the Court of the Appeal.

The issue for my determination at this stage is whether this application is meritorious. In considering the application, I will be guided by the principles established in our jurisdiction when determining applications for leave to appeal.

Principally, application for leave to appeal is filed under section 5(1)(c) of the Appellate Jurisdiction Act, Cap.141 [RE.2019]. The said section reads:

'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—

(a).....;

(b);

(c) 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. '

From the wording of the quoted section, undoubtedly, it does not provide for the factors to be considered by courts as meriting the application for leave to appeal. That being the case, courts in our jurisdiction have developed conditions upon which leave to appeal to the Court of Appeal may be applied and granted. The Court of Appeal in the case of **British Broadcasting Corporation v. Erick Sikujua Ngimaryo**, Civil Application No. 138 of 2004 set the conditions as follows:

'.... leave to appeal is not automatic. It is within the discretion of the court to grant or refuse leave. The

discretion must, however he 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' (Emphasis added).

See: Airtel Tanzania Limited v. KMJ Telecommunications Limited, Civil Application No.393/16 of 2021.

Deducing from the above cited cases, it goes without saying that leave to appeal is not automatically granted. For the leave to be granted, either of the conditions must be met to the satisfaction of the Court. The conditions are based on whether the intended grounds of appeal contain issues which are of general importance, or are based on a point of law or are arguable.

In view of the established position with regard to leave to appeal to the Court of Appeal, I am satisfied that the application is meritorious as it contains issues which are contentious and arguable. Consequently, I grant the application for leave to appeal against the decision of this

Court in Civil Appeal No. 03 of 2022. Costs shall follow the results of the intended appeal.

DATED at **MWANZA** this 21st day of February, 2023



KS KAMANA

JUDGE