

**THE UNITED REPUBLIC OF TANZANIA  
JUDICIARY  
IN THE HIGH COURT OF TANZANIA  
MBEYA SUB-REGISTRY  
AT MBEYA**

**MISC. LAND APPLICATION NO. 1238 OF 2024**

*(From Land Reference No. 02/2023 arising from Taxation Cause No. 35 of 2021  
originating from Land Case No. 08 of 2021)*

**NMB BANK PLC.....APPLICANT**

**VERSUS**

**SHIMILANGWADA ESTATE COMPANY LTD.....RESPONDENT**

**RULING**

*Last order 16<sup>th</sup> April, 2024*

*Date of Ruling 10<sup>th</sup> May, 2024*

**KAWISHE, J.:**

The applicant approached this court seeking leave to appeal to the Court of Appeal on Land Reference No. 02 of 2023. The application is pegged under section 5 (1) (c) of the Appellate Jurisdiction Act, Cap 141 R.E 2019 (AJA) with Rule 45 (a) of the Court of Appeal Rules.

*RUE*

The application was objected by the respondent on the account that the application is brought under repealed law and the leave to appeal to the Court of Appeal is no longer a requirement.

Briefly, the facts of the application are that; the applicant was granted with an award claiming Tshs. 233,255,585.9, that the Taxing Officer awarded the applicant Tshs. 21,550,000, aggrieved by the decision, filed Reference No. 2 of 2023 where the ruling delivered by the High Court the amount was reduced to 4,500,000. Dissatisfied with the ruling, the applicant filed a leave to appeal to the Court of Appeal. The same was objected by the respondent's counsel.

When the application was called for hearing, the applicant was represented by Mr. Baraka Mbwilo, learned counsel assisted by Mr. Ezekia Ndambasya learned counsel while, the respondent enjoyed the service of Ms. Mary Gatuna, learned counsel.

Ms. Gatuna, submitting on the preliminary objection, stated that the application is made under section 5 (1) (c) of the Appellate Jurisdiction Act, Cap. 141 R.E 2019 with Rule 45 (a) of the Court of Appeal Rules, which do not exist as they were repealed under section 10 of Legal Sector Law

(Misc. Amendment) Act, No. 11 of 2023. Section 5 of the AJA was amended by being repealed and substituted for by sub-section (1). The section renounced the requirement of leave to appeal to the Court of Appeal. That there is no longer requirement to apply for leave in the High Court. That rule 45 (a) of the Court of Appeal Rules provides for the procedure of application for leave and the time to file leave after court's decision which is in-line with section 5 of the AJA. She supported her argument with the case of **Petro Robert Myavilwa vs. Zera Myavilwa and Erica Myavilwa Civil Application No. 117/06 of 2022** at page 5 and 6 where the Court of Appeal gave position on the leave to appeal to the Court.

Ms. Gatuna insisted that the application before this court is improper. She supported her submission by citing the case of **Modestus Daud Kangalawe (administrator) vs. Dominicus Utenga** Civil Reference No. 01 of 2022 at page 7, **Dominic Ishengoma vs. Geita Gold Mining LTD,** Civil Reference No. 8 of 2023 at page 10, that the application is against the law and Court of Appeal's decisions, thus has to be struck out with costs.

In reply, Mr. Baraka Mbwilo, learned counsel for the Applicant conceded the fact that section 5 (1) of the AJA was repealed by Act No. 11

of 2023. He was sharp to make an about turn and argued that, it is not true that all the decisions of the High Court are not subject for leave to go to the Court of Appeal. That he has done a lot of research and consultancy but never found a position regarding the application for leave against a decision of a Judge who was exercising his power by way of reference. That in their Reference No. 2 of 2023, reading the amendments of section 5(1) of AJA as mended it confines the decisions and orders of the High Court while exercising its original, appellate or revisional jurisdiction. It is his view that, provision does not cover the situation when the High Court exercising powers of reference.

Mr. Mbwilo added that the application against reference after the amendment is not excluded. He added that it is a substitution of the provisions which cover his application under section 5 (2) (iii) of the AJA as amended. That section 5(2)(iii) of AJA states that any other decision or order of the High Court other than those specified under subsection (1). Mr. Mbwilo argued that the words of paragraph (iii) with the words of subsection (2) (a) of the same section which states, except with the leave of the High Court are linked together. He submitted that since, the decision of the High Court which the applicant intends to appeal to the Court of

Appeal is not specified under section 5 (1) of the AJA as amended in 2023, it is his view that the application requires leave.

Mr. Mbwilo distinguished the case of **Petro Robert Myavilwa** (supra) and **Modestus** (supra) required leave against the decision of the High Court when the Judge was exercising appellate jurisdiction, while the application at hand concerns reference. He finally challenged the case of **Dominic Ishengoma** (supra) where the applicant applied for leave against the decision of the High Court exercising revisional powers. He stressed that, the procedure to seek for leave is intact. He hinted that until now, he has not seen any decision of the Court of Appeal which interprets section 5 (1) of the AJA as amended in 2023 to cover the decision of the High Court when exercising reference powers. He concluded that, the application is competent before this court, and that the objection by the counsel for the respondent was raised without analyzing section 5 (1) of AJA properly. He prayed for the application to be heard on merits and the court decide the rights of the parties. He also prayed for the costs of the application.

In her rejoinder Ms. Gatuna, learned counsel for the respondent reiterated her submission in chief and held that, the learned counsel for the

applicant cited repealed sections. That the cases she cited are relevant hence, the court has to disregard the application and struck it out with costs.

I have intensely followed the antagonistic submissions from the counsel for the parties. From their submissions, I find out that the main question to be answered is whether ruling from reference needs a leave of the High Court to appeal to the Court of Appeal.

In responding to this question, I will look at the intention of the parliament when amended the AJA and the origin of a reference.

Starting with the first limb which is the intention of the parliament in amending AJA and do away with leave to appeal to Court of Appeal as stated in the amended section 5(1) which is reproduced hereunder:

*"(1) In civil proceedings, except where any other written law provides otherwise, an appeal shall lie to the Court of Appeal against every order or decree, including an ex-parte or preliminary decree made by the High Court, in the exercise of its original, appellate or revisional jurisdiction."*

The intention of the parliament is to improve the conditions to appeal to the Court of Appeal in civil suits. The amendments are intended to set procedures which will enhance expeditious determination of civil suits. The

wisdom of the parliament in amending the said section can be interpreted to have meant to exterminate unnecessary hurdles to litigants who would take very cumbersome procedures to access the Court of Appeal.

The second limb in answering the question, is where the reference originates. As per the records available, this application emanates from a Ruling and Order in Reference No. 02 of 2023 arising from Taxation Cause No. 35 of 2021 originating from Land Case No. 8 of 2021, High Court of Tanzania at Mbeya. It is clear that, the reference was from the decision of the High Court while exercising its original jurisdiction the aforementioned land case. Having traced the origin of the reference, it is prudent to revert to the provisions of section 5(1) of AJA. The respondent's learned counsel argued that, the application is improper before this court since it does not need leave of this court. She cited various cases which the applicant's learned counsel distinguished them from the application at hand on account that they are not on reference. However, as stated earlier the counsel for the parties do not dispute the statutory waiver of the leave requirement to appeal to the Court of Appeal. They differed at the type of decisions which requires leave of the High Court in order to be placed before the Court of Appeal. Mr. Mbwilo claimed that reference requires a

leave as it is not listed under section 5(1) as amended, that section 5(2) of AJA covers his application (reference) thus, should be entertained before this court.

As I stated earlier the intention of the parliament is to fast-track determination of civil suits by alleviating hurdles. The reference under the present application traces its origin to the decision of the High Court while exercising its original jurisdiction in Land Case No. 8 of 2021. Having discussed the matter to that extent, the issue raised is answered in the affirmative. That being the case, the interpretation given to the section in the case of **Petro Robert Myavilwa vs. Zera Myavilwa & Another** (supra) is very relevant to this application. See the case of **Modestus Daudi Kangalawe vs. Dominicus Utenga** (Civil Reference No. 1 of 2022) [2023] TZCA 17935 (11 December 2023) at page 7 where the Court held:

*"Before dealing with the matter before us, we have deemed it crucial to point out that subsection (1) of section 5 of the Appellate Jurisdiction Act, Cap. 141 has been amended vide Written Laws (Miscellaneous Amendment) Act No.11 of 2023. **Currently, the application for leave to appeal is no longer a legal requirement.**" [emphasis added].*



As indicated in the submissions, the present application seeks a leave to appeal to the Court of Appeal against the Ruling and Order of the High Court in Reference No. 02 of 2023 originating from Land Case No. 08 of 2021 of the High Court when exercising its original jurisdiction. The application at hand was filed and admitted in the High Court on 5<sup>th</sup> December, 2023 after the amendments to the AJA. From the cases cited as far as the amended section is concerned, it is my considered view that, this application which traces its origin from a decision, ruling and order of the High Court while exercising its original jurisdiction does not require a leave.

In the upshot, this application is improperly filed before this court hence, lacks merit and consequently, it is hereby struck out with costs.

It is so ordered.

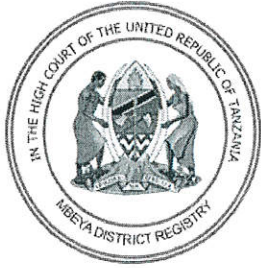
Dated and Delivered at **MBEYA** this 10<sup>th</sup> day of May, 2024.



**E. L. KAWISHE**

**JUDGE**

Ruling delivered in the presence of the Mr. Ezekia Ndambasya, learned counsel for the applicant and in the presence of Ms. Mary Gatuna, learned counsel for the respondent



**E. L. KAWISHE**

**JUDGE**

**10/5/2024**