

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

**ARUSHA-SUB REGISTRY
AT ARUSHA**

MISC. CIVIL APPLICATION NO. 01 OF 2023

(C/f High Court of Tanzania at Arusha, Civil Appeal No 31 of 2021, originating from Civil Case No. 09 RM Court of Manyara at Babati (S. Kobero RM dated 19 April 2021))

NATIONAL INSURANCE CORPORATION _____ APPLICANT

VERSUS

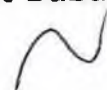
**OTENYO MICHAEL OLIECH _____ 1ST RESPONDENT
& ANOTHER**

RULING

26/03/2024 & 26/03/2024

BADE, J.


When this matter was called for hearing the counsel for the Applicant intimated that the matter before the court was an application for leave to appeal to the Court of Appeal of Tanzania as per the law as it was before December 1, 2023. It was made under section 5(1) c of the Appellate Jurisdiction Act Cap 141, RE 2019. The impugned decision was delivered by my sister Phillip, J. which is dated December 5, 2022, on Civil Appeal No. 31 of 2021, which also originated from the RM Court of Manyara at Babati (as



per S. Kobello, RM dated 19 April 2021). Both parties were represented by learned counsel with the Applicant enjoying the services of Mr. Abeid Buzohela and the Respondents by Mr. Jonathan Mndeme who was also holding brief for Advocate Kuwengwa Ndonjekwa, with instructions to proceed.

Counsel for the Applicant submits that it was previously mandatory to apply for leave to appeal to the Court of Appeal, except in 2023, the Appellate Jurisdiction Act (AJA) was amended via Legal Setor Law Reforms Misc Amendment Act no 11 of 2023. Section 10 of the said amendment deleted section 5(1) of the AJA. This he maintains has an implication that leave to appeal to the court of appeal is no longer a requirement.

In a further submission, he exposes that the issue is that by the time the amendment came into force, his client's application had already been filed in court, but had not yet been heard, adding that the said amendment was interpreted through the Court of Appeal in **Robert Myavilwa vs Zera Myavilwa**, Civil Application no 117/06 of 2022 unreported, CAT Mbeya holding that leave has ceased to be a requirement effective Dec 1, 2023, with a retrospective effect. He also referred to the case of **Joseph Khenani vs Nkasi District Court**, Civil Appeal No 126 of 2019, where the Court




guided on when the law would act retrospectively. In addition, he cites the case **Athumani Mdilya vs Gerald Singano**, as this court held that since leave is no longer a requirement, the same will apply retrospectively, and there is no need to hear the application before it on merits.

In conclusion, the counsel submitted that their application for leave should not affect their substantive right to appeal. He insists that the leave requirement was a procedural matter, and since the amendment happened when the application was already pending in court, the amendment has affected their application retrospectively, praying that the court gives directions on the matter.

When the Counsel for the Respondent was called to respond, he readily conceded to the submission by his learned friend, with an exception that the prayer to the court's direction should be that the matter be struck out. He also prayed to have their costs.

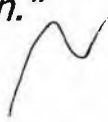
Rejoining, the counsel for the Applicant retorted that since the state of affairs presented was all out of procedural issues, they should not affect the intention of the Applicant, as they still intend to move forward with the Appeal, arguing that it is the legislation that has affected and determined



the outcome of the Application, urging that the result should not be let to affect the Applicant negatively.


Having heard the counsel for both parties, I wish to point out right at the outset that obtaining leave of the High Court to appeal to the Court of Appeal against the decision made by the High Court while exercising its revisional or appellate jurisdiction over civil matters, is not a requisite requirement. This is the position as sanctified by the current amendment of the provisions of section 5 of the Appellate Jurisdiction Act, by section 10 of the Legal Sector Laws (Miscellaneous Amendments) Act No. 11 of 2023 that came into effect on the 1st day of December 2023. The same provides:

"10. The principal Act is amended in section 5- (a) by deleting subsection (1) and substituting for it the following: (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."



From the above provisions of the law, it is quite clear that obtaining leave to appeal 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, is no longer existing. Also in agreement with counsel for the Applicant as per the authorities he cited, under the circumstances it is a fact that procedural laws are retrospective unless the legislature expressly says they are not, it is thus my settled view that the present application is untenable due to the reasons stated.

Now the issue of whether the Application should be struck out or withdrawn should not detain me at all. As I have explained above, GN No 48 which came into force on 1st December 2023, of the Legal Sector Laws (Miscellaneous Amendments) Act No. 11 of 2023 is prescriptive. Through it, leave became no longer a requirement for one to appeal to the Court of Appeal of Tanzania. Meanwhile, the Court of Appeal sitting in Mbeya in the **Myavilwa case**, (which was also cited by the Applicant) struck out an Application for Leave as it ruled that the law is effected retrospectively, it being a procedural law. As urged by the counsel for the Respondent, I will follow suit and order this Application be struck out as it is now ineptly incompetent and it is thus the right thing to do.



Regarding costs, the power to grant costs finds favor under Section 30 (1) and (2) of the Civil Procedure Code, Cap 33 R.E. 2022 which states:

30 (1) Subject to such conditions and limitations as may be described and to the provisions of any law from the time being in force, the costs of, and incidental to, all suits shall be at the discretion of the court and the court shall have full power to determine by whom or out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court has no jurisdiction to try the suit shall be no bar to the exercise of such powers.

(2) Where the court directs that any costs shall not follow the event the court shall state its reasons in writing.

The above provision has also been interpreted in **Mohamed Salimin vs Jumanne Omar Mapesa**, Civil Application No. 4 of 2014, where it was held by the Court of Appeal that as a general rule, costs are awarded at the discretion of the court but the discretion is judicial and has to be exercised upon established principles, not arbitrarily or capriciously. Similarly, in **Geofields Tanzania Limited vs Maliasili Resources Limited and**

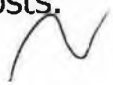
Others (Misc. Commercial Cause No 323 of 2015) [2016] TZHC Commercial Division, this court dealt with this provision as it stated:

"Generally costs are awarded not as a punishment of the defeated party but as a recompense to the successful party for the expenses to which he had been subjected or for whatever appears to the court to be the legal expenses incurred by the party in prosecuting his suit or his defense. Costs are thus in the nature of incidental damages allowed to indemnify a party against the expense of successfully vindicating its rights in court, and consequently, the party to blame pays the cost to the party without fault."

But then again, in **Mwakajinga vs Mwaikambo** (1967) HCD 281 this court had taken time to clarify the position on costs to the effect that:

"... where neither party was responsible for the loss sued upon, then each party will bear his/her own costs."

In that regard, I order that the Applicant not be condemned to costs as the matter is struck out due to the operation of the law. The Applicants were not responsible for the fate that the Application has encountered. Each party should bear its own costs.



It is so ordered.

DATED at ARUSHA this 26th day of March 2024



A. Z. Bade
Judge
26/03/2024

Ruling delivered in the presence of the Parties' representatives in chambers
on the **26th** day of **March 2024**



A. Z. BADE
JUDGE
26/03/2024