

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS CIVIL APPLICATION NO 32. OF 2004

In the matter of the Advocates' Ordinance (Cap 341)

And

In the matter of an application

between

MHANGO AND COMPANY, ADVOCATE.....APPLICANT

And

HOTEL TRAVERTINE LIMITED..... RESPONDENT

RULING

BUKUKU, J.

This is an application for leave to appeal to the Court of Appeal of Tanzania. The application is made under Section 5 (1) (c) of the Appellate Jurisdiction Act, 1979 and Section 45 (a) of the Tanzania Court of Appeal Rules, 2009 and is supported by the affidavit of one, Nicholas Mwakasege. In a nutshell, the facts of the application are as follows: The applicant commenced taxation proceedings in this Court. On two diverse dates, the matter was called before the taxing master for purpose of fixing a date for

parties did not show up. The Taxing master dismissed the bill of costs for want of prosecution.

Having the matter being dismissed, Applicant filed an application for setting aside the dismissal order and restoration of the same, on the ground that his non appearance was caused by illness. The application did not sail through. The Taxing master dismissed it for want of sufficient reasons. Unquavering, applicant filed a reference to this Court, against the finding that, illness was not a sufficient ground for failing to appear in Court. Honorable Mruma, J, who heard the reference found that it was unmeritorious and dismissed it. It is this dismissal which is intended to be challenged in the event leave is granted.

The application was argued orally.

In support of the application, Mr. Mwakasege, learned Counsel adopted the contents of his affidavit. The main argument by the applicants' Counsel is that, there is no basis whatsoever, upon which the trial Judge dismissed the reference on 18th February, 2011 allegedly for lack of sufficient grounds and proceeding to dismiss the application for restoration of the suit. The other argument advanced by the Counsel for applicant is that, in arriving at his ruling, the Taxing Officer relied on Order XVII rule 1(2) of the Civil Procedure Code while in effect, such a provision did not exist in the laws of the United Republic of Tanzania. He further submitted that, in dismissing the reference, the Honorable Judge referred the misquotation of the law by the Taxing Master as a slip of a pen.

Essentially Mr. Mwakasege submitted that, it is intended on appeal if leave is granted, to ask the Court of Appeal to determine issues raised in his affidavit. The substance of the grounds which the applicant considers that they are meriting an appeal, are seen from the applicant's affidavit in paragraphs 13, 14, 15, 16, 17 and 18. It states in part the following:-

- Para 13.** *Whether in a case of reference from the decision of a Taxing master a Judge of the High Court is entitled to introduce issues which were not before the Taxing master in coming to his decision.*
- Para 14.** *Whether in an application for reference from the decision of the Taxing Officer a Judge is entitled to entertain doubts of matters which the Taxing Officer did not express an opinion on.*
- Para 15.** *Whether it is correct on an application supported by more than one affidavit for the Taxing Officer and the Judge to ignore the other affidavits filed in support of the application and only concentrate on one.*
- Para 16.** *Whether, where an advocate suddenly falls ill at 10pm on a Sunday and reports to his client who takes reasonable steps, albeit unsuccessful, to find another advocate to hold brief can be said to be negligent.*
- Para 17.** *Whether a Judge hearing an application for reference is entitled to misquote the Taxing Officer who specifically held that sickness is*

not a sufficient cause for failing to appear before the Taxing Officer.

Para 18. *Whether a sudden illness is not a sufficient cause for failing to appear before a Court simply because there are many lawyers in Dar Es Salaam or that I could have telephoned the Registrar to inform him of my sickness.*

He finally countered that, these are serious issues which needs Court of Appeal determination.

On being served with the chamber summons, the respondent challenged the same by filling a counter affidavit deponed by Thomas Joseph Massawe. He also adopted his counter affidavit and submitted that, it is not in dispute that, Counsel for applicant did not appear in Court when the application was dismissed. The issue is non appearance and contradictory sickness of the Counsel for applicant which this Court cannot rely on. In expounding this, Counsel for respondent submitted that, it is the counsel for applicant himself who caused the confusion by not knowing exactly what disease he was suffering from, whether it was malaria or stomach ache and this confusion made the Taxing Master and the Judge to decide that applicants' sickness was not a good cause for adjournment.

Commenting on the issue as to whether a Judge can introduce new issues, counsel for respondent said that, nothing new was introduced at that reference stage. On whether the affidavits were ignored, he said that, this was counsels' own opinion. There was lack of proof. What the Judge did was to go through the affidavits and weighted its evidence before reaching the decision.

The applicant cannot prove on which affidavit was ignored by the Court. All in all, Counsel for respondent surmised that, Counsel for applicant has shown lack of commitment in following the matter in Court, and it is obvious that there is no arguable issues involved to be considered by the Court of Appeal and therefore, he prayed for dismissal of the application with costs.

In rejoinder, counsel for applicant did not have much to add. He averred that, as to the question of illness, it is true that counsel for applicant suffered from stomach ache, but when diagnosed, he was found with Malaria. He lamented that, both rulings of the Taxing Master and the Judge had a blanket decision that illness was not a sufficient cause. Apart from that, Counsel for applicant maintained that, the Honorable Judge went and discussed new issues e.g. the history of the case which was not necessary to do so. He maintained that, he still believes that, leave may be granted because if the Taxing Master decided on a law that did not exist, and the Judge said it was a slip of a pen, then, it is important to seek the Court of Appeal guidance on this. Counsel for applicants' analysis of the facts brought him to the conclusion that, the six points raised in the application are very important legal issues to be decided for future cases. More important, he wants to know and have a decision if sickness is a sufficient reason for advocates' absence. With those, he therefore prayed this Honorable Court to use its wisdom and grant leave so that the issues raised and more so that of illness, be put to rest.

In this present application, the appellant is seeking leave to appeal to the Court of appeal against the decision of this Court (Hon. Mruma, J.) dated 18/2/2011, refusing to restore the dismissed suit for lack of sufficient grounds.

The gist of the intended appeal in the event leave is granted by this Court is that the applicant is seeking to contest the failure of the learned Judge to exercise his discretion to restore the dismissed suit. The main contention being that, having fallen sick, he requested the applicant himself (who is also an advocate) to appear in Court on that day. However, due to reasons beyond his control, the applicant was unable to attend in this Court since on that same morning he was appearing before Ngwala, J at the Lands Division in Land Case No. 20 of 2010, then the Trial Judge could have agreed to order revision of the suit based on the affidavit sworn by the applicant.

I shall start by clearly stating that, my duty here is not to stand in the shoes of the Appellate Court and decide whether the decision of the trial Judge was wrong or right, but rather, to consider whether there are grounds raised which qualify to be determined by the Court of Appeal. I should confess that, to me, this is one of the grey areas where the law does not provide to the High Court a clear dissecting tool in making its determination. In the case **Wambele Chamte V. Asha Juma, Civil Application No.45 of 1999 (Unreported)** the Court conceded as much, 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 no intended appeal has some merits whether factual or legal”

and these guiding principles were reiterated in **Gaudencia Mzungu V. The IDM Mzumbe, Civil Application No. 94 of 1999**, Court of Appeal of Tanzania, (unreported) in the following wording:

“Again, leave is not granted because there is an arguable appeal. There is always an arguable appeal. What is crucially important is whether there are prima facie, grounds meriting an appeal to this Court”.

The echo stands as guidance both of the High Court and Court of Appeal. That is the position.

It is settled that, in any appeal with leave of the High Court, all that an applicant has to show is that, there is an arguable case. This position has been held by the East African Court of Appeal in the case of **SANGO BAY ESTATES LTD. & OTHERS v. DRESDNER BANK** (1971)E.A 17 where **SPRY V.P** on. Pg. 20-21 said:

“As I understand it, leave to appeal from an Order in civil proceedings will normally be granted where prima facie it appears that there are grounds of appeal which merit serious judicial consideration. But where in the present case, the order from which it is sought to appeal was made in the exercise of a judicial discretion a rather stronger case will have to be made out”.

Not only that, in the case of **Pravinchandra Mohanlal Mevada & 2 others V. Muhimbili Medicval Centre** (CAT Civil Application No. 106 of 2001(unreported) Lubuva, J.A (as he then was), held that, an arguable issue fit for consideration by the Court of Appeal must be shown in an application for leave. Again, in the case of **Harban Haji Mosi & Shauri Haji Mosi V. Omar Hilal Seif & Seif Omar** (CAT Civil Reference No. 19 of 1997 (unreported), the Court impliedly held that in such an application, leave may be granted if

the intended appeal has reasonable prospects of success. My understanding is that, the contentious points worth taking to the Court of Appeal may either be on facts or law or both.

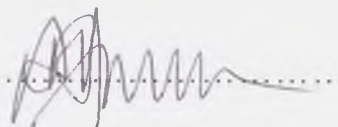
In the present application, the issue to be determined is whether the applicant has succeeded in making a stronger case for this Court to exercise its discretion to grant leave to appeal to the Court of Appeal. In the case of **Shengena Limited V. National Insurance Corporation and PSRC, commercial case No. 75 of 2005**, it was held that, in determining this question, the applicant should establish by affidavit facts showing that the discretion was improperly exercised by the Judge and in the light of the available facts, the Judge did not exercise his discretion. The exercise of such discretionary powers is predicated upon sufficient cause shown. The question this Court has to ask itself is whether the reasons advanced by the applicant explaining his failure to appear on the date set for hearing of the matter are sufficient cause to enable the Judge to exercise his discretion.

Having said so, the issue is whether the present case is one which is fit to be taken to the Court of Appeal. In my mind, the answer to this question is in the positive, for the simple reason that, much as the decision of Honorable Mruma, J dismissing the revision to set aside the default ruling of the Taxing Master was made in the exercise of his judicial discretion, the applicant has shown a stronger case, according to the test in **Sango Bay's** case (supra). The Counsel for applicant not only did he file his affidavit in support of his application, but also went a mile further and attached the affidavits of Mwezi Mhango, the officer of the applicant and the affidavit of Yusuf Salum Chum, the office attendant of the firm of Advocates known as Mgongo Fimbo & Company Advocates of Dar Es Salaam, which supported his reasons for non

appearance on that fateful day when the matter for bill of costs was set for hearing.

From the explanation and the affidavits filed in Court supporting the reasons given by the applicant for his failure to attend to court and what measures he undertook thereafter, I am of the considered opinion that, he was vigilant in following up his case. As for the issues raised for appeal, I am of the considered opinion that, if leave to appeal is granted, there exist some legal issues which require attention of and consideration by the Court of Appeal especially taking into consideration that, there still exists dissenting opinion with regard to the issue whether sickness is sufficient cause for non appearance or no. In some cases sickness has been considered as a good and sufficient cause for which a Court of law can take into consideration once it has been advanced by a party to a suit as defence, and proved in order to persuade the Court to exercise its discretion in setting aside orders. See: **P.B Patel V. The Star Mineral Water and Ice Factory (Uganda) Ltd. 1961 E.A 454.** In other instances, it has been regarded as not a sufficient cause.

Having said so, I am settled in my mind that, the applicant has shown that there are stronger grounds of appeal which merit serious judicial consideration by the Court of Appeal. In the final analysis, I grant the application for leave to appeal as prayed. I order that, costs in this application shall be costs in the cause. It is ordered accordingly.



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A.E BUKUKU

JUDGE

04 August, 2011

Ruling read this 04th day of August, 2011, in the presence of M/S Mwakasege, Advocate for Applicant and M/S Mwakasege for Mr. Massawe, Advocate for Respondent.



A.E BUKUKU

JUDGE

04 AUGUST, 2011

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