

**IN THE HIGH COURT OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**MISCELLANEOUS COMMERCIAL APPLICATION NO 66 OF 2020**

*(Arising from Miscellaneous Commercial Application No 43 of 2018 and Miscellaneous Commercial Application No.129 of 2019)*

**BETWEEN**

**NAVNIT GORDHANDS DAVDA .....APPLICANT**

**Versus**

**NEXT TELECOM INT (T) LIMITED.....1<sup>st</sup> RESPONDENT**

**NISHIT RATILAL PATTANI.....2<sup>nd</sup> RESPONDENT**

**NITEN RATILAL PATTAN.....3<sup>rd</sup> RESPONDENT**

**BHARAT BADIAN.....4<sup>th</sup> RESPONDENT**

Last Order: 8<sup>th</sup> June, 2020

Date of Ruling: 21<sup>st</sup> July, 2020

**RULING**

**FIKIRINI, J.**

Through chamber summons made under section 5 (1) (c) of the Appellate Jurisdiction Act, Cap. 141 R.E 2002 (the AJA) and Rule 45(a) of the Court of Appeal Rules 2009 (the Rules), the applicant, Navnit Gordhands Davda filed this application seeking leave to appeal to the Court of Appeal against the whole ruling of this Court dated 28<sup>th</sup> April, 2020, vide Miscellaneous Commercial Application No. 129 of 2019.

The affidavit of Ms. Ernestilla John Bahati, learned counsel featuring for the applicant, supported the application and the counter-affidavits of Mr. George Nyangusu and Mr. Jerome Joseph Msemwa, the respondents' learned counsels opposed the application.

The application was argued by way of written submissions under the following filing schedule: that the applicant to file their written submissions by or on 15<sup>th</sup> June, 2020; reply written submissions by or on 22<sup>nd</sup> June, 2020 and rejoinder if any by or on 29<sup>th</sup> June, 2020. This was to be followed by ruling scheduled for 21<sup>st</sup> July 2020.

In her submission, Ms. Bahati had the following grounds of appeal upon which the applicant seeks leave of this Honourable Court to appeal to the Court of Appeal: *one*, this Court erred in law and in fact by holding that the applicant has failed to adduce sufficient reasons to warrant setting aside of the order dismissing the petition. *Two*, this Court erred in law and fact by failing to hold that the applicant had deposited security within time. *Three*, that this Court erred in law and fact by failing to hold that the security deposited by Tradexim Limited on behalf of the applicant satisfied the Court order of depositing security.

Submitting in support of the application she cited the case of **TanzCol Coal East Africa v Minister of Energy and Minerals, Miscellaneous Commercial Application No. 331 of 2015** which it was held that:

*“There is no scope of granting leave to appeal to the court of appeal unless the conditions are satisfied, the case should involve a substantial question of law worth the consideration of the court of appeal and the grounds raised must be issues of general importance or novel points of law or prima facie case necessitating the intervention of the court of appeal. “*

Ms. Bahati also cited the case of **Mbogo v Shah (1968) E.A 93** which was referred to in **Tanzania Ports Authority v M/S Pembe Flour Mills Limited, Civil Application No. 49 of 2009**, whereby the Court of Appeal directed that:

*“For the leave to appeal to be granted on the grounds where the Judge misdirected himself and in doing so, arrived in a wrong conclusion.”*

Extending her submission, she submitted that, the issue to be determined by the Court of Appeal was pure point of law. The Court of Appeal will be invited to determine the issue of whether a third party to the proceedings in Court can furnish security of cost on behalf of the plaintiff or petitioner in the suit as it was stated

under paragraph 10,11 and 12 of the applicant's affidavit. To cement her position, she cited the case of **Elias Nasija Nangolo and Others v Mwananchi Insurance Company, Miscellaneous Commercial Application No 343 of 2017** referred to in **Chobo Investment Ltd v MTI Investment Ltd, Miscellaneous Commercial Application No. 70 of 2019**, which it was held that sufficient cause must be shown for leave to appeal to be granted.

Ms. Bahati further submitted that, she filed this application on several conditions that the appeal poses a reasonable prospect of success. And also the case law established that where the proceedings involved has such disturbing features which require the guidance of the Court of Appeal, then, leave may be granted. The said principles were established in the case of **Aboubakar aly Hamaid v Edward Munyelusye, Application No. 51 of 2007**. On the submission filed the applicant counsel invited this Court to grant leave to appeal to the Court of Appeal.

Mr. Nyangusu for the 1<sup>st</sup> and 3<sup>rd</sup> respondents opposed the application based on the ground that application does not only lack merits but also has been seriously misconceived. He supported the argument with the following that the ruling delivered by this Court on 28<sup>th</sup> April 2020, which the applicant seek leave to appeal against in the Court of Appeal does not fall within categories of the decision envisaged by the provision of Rule 45(a) of the Rules.

Expanding this submission, he submitted that it was trite law that leave to appeal was only required to be sought and obtained on matters which the High Court had no original jurisdiction to adjudicate. In other words, Rule 45 (a) applies only for those matters which the High Court was exercising appellate jurisdiction. This meant no leave was required to appeal against the decision of the High court where the Court was exercising its original jurisdiction over the matter.

Turning back to this application for leave which originated from Miscellaneous Commercial Application No. 129 of 2019, which also had its root from Miscellaneous Application No. 43 of 2018, in which this Court was exercising its original jurisdiction, therefore, that being the case then the application for leave was superfluous. And the misconception of the applicability of the law amounted to abuse of the court process, argued the Counsel.

In alternative, Mr. Nyangusu submitted that, while they concede to the legal position set out in the cited case of **TanzCol** (supra) but submitted that no ground has been advanced by the applicant which raised substantial question of law worth consideration of the Court of Appeal. Stressing on his position, he contended that all the applicant's purported grounds of appeal referred above cannot pass the test established in the above mentioned case.

Thus disputing the grounds of intended appeal that it constituted pure points of law, but rather a combination of both points of law and facts which this Honourable Court had already extensively dealt with in its previous decisions in Miscellaneous Commercial Application No. 43 of 2018 and Miscellaneous Commercial Application No. 129 of 2019.

Submitting on the issue of sufficient cause, Mr. Nyangusu submitted that the applicant's 1<sup>st</sup> ground of appeal revealed no any issue of general importance or point of law which called for intervention of the Court of Appeal. It was further submitted that the applicant has failed to adduce sufficient cause. The applicant cannot challenge the said decision purely on the basis of the finding as it was stated in the cited case of **Mbogo** (supra). It was Mr. Nyangusu's submission that when the Court was exercising its discretion based on the facts as presented to it, its decision was based on such facts, cannot be taken as point of law or ground of an appeal unless in arriving into that decision the said Court applied wrong principles of the law. Therefore, granting or not granting an order for setting aside dismissal order issued by this Court was a matter of direction of the Court that had to be determined based on the fact adduced and refusal by the Court to grant such order cannot in anyway constitute a point of law or ground of an appeal.

On the second ground of appeal, that *the applicant had deposited the security for cost within time*, he submitted that it was a pure point of fact which this Court at

page 8 and 9 observed that if security was indeed deposited timely then it means the Court wrongly dismissed the applicant's application in Miscellaneous Application No. 43 of 2018, then the remedy should not have been an application to set aside the dismissal order but review.

Finalizing his submission, Mr. Nyangusu submitted that the third ground of appeal that the security deposited by Tradexim Limited on behalf of applicant satisfied the Court order of depositing security did not constitute an issue of general importance or a point of law. The Court in arriving into its decision noted that:

*“The so called Tradexim limited was not party to the proceedings that were before the court, further, there was no any prior application to allow that third party, who was total stranger to the court proceedings, to deposit security ordered for and on behalf of the applicant.”*

The matter would have been different if the applicant was alleging that the Court wrongful refused to allow the application to have the security deposited by Tradexim Limited. Otherwise Tradexim Limited being a third part and stranger to the proceedings which were before the Court had no any legal justification to deposit the security for cost on behalf of the applicant without first of all, seeking

and obtaining permission of the Court to do so. In that regard Mr. Nyangusu invited this Court to dismiss the application with costs for lack of merit.

Mr. Msemwa for the 2<sup>nd</sup> and 4<sup>th</sup> respondents submitted that the application was misplaced and thus be dismissed. He started his submission by quoting the provision of Rule 45(a) of the Rules, which stated that:

*“Where an appeal laws with the leave of the High court, application for leave may be made informally, when the decision against which it is desired to appeal is given or by chamber summons according to the practice of the High Court, within fourteen days of the decision.”*

It was Mr. Msemwa’s submission that the applicant has not shown any point of law fit to be determined in the Court of Appeal rather it was point of facts which were raised. Submitting on the 1<sup>st</sup> ground of appeal that: *this Court erred in law and in fact by holding that the applicant has failed to adduce sufficient reasons to warrant setting aside of the order dismissing petition*, it was his submission that, sufficient reason was not a point of law, this was a question of facts like sickness.

Mr. Msemwa further submitted that, the 2<sup>nd</sup> ground of appeal was also question of facts and no point of law involved to fit to be determined in the Court of Appeal.



From the decision of this Court, it was clear that the applicant did not deposit any security for costs within or out of time.

Contesting the 3<sup>rd</sup> ground of appeal, Mr. Msemwa submitted that, security deposited by Tradexim Limited was deposited not in conformity with the decision of this Court which required the applicant to deposit the security for costs. The applicant ought to have sought leave in order to depart from its earlier decision and allow Tradexim Limited to deposit security for costs on behalf of the applicant. The third party from nowhere and stranger to the proceedings of the case without permission of the Court decided to deposit the security for costs purporting to be on behalf of the applicant, was tricky.

Concluding his submission, he submitted that it was trite law that for an application for leave to appeal to be granted, the case should involve substantial question of law worth the consideration of the Court of Appeal. In this instant application the applicant has no issues of general importance or novel points of law or *prima facie* case necessitating the intervention of the Court of Appeal.

I, have carefully examined the rivalry submissions, and the most important issue to be taken into consideration is **whether the application of leave to appeal deserves granting or not.**

It is without a doubt that, the power to grant leave is discretionary on part of the Court, however, in doing so the Court has to act judiciously and in accordance with the circumstances of each particular case. The leave to appeal is generally grantable where there is/are a number of factors such as: an intended appeal stands reasonable chances of success; where the proceedings in question as whole reveals disturbing features as to require the Court of Appeal to go into them for guidance and/or there is a point of law. **See Harban Haji Mosi and Another v Omar Hilal Seif and another, Civil Reference No. 19 of 1997**, which the Court held that:

*“Appeal is a right of an individual but although it is matter of right the same should be exercised judiciously, that is why the court is tasked to look at the questions or grounds raised and usually it has to be on point of law or public importance that may be discerned in the proceedings or decision sought to be appealed by the applicant and see whether they warrant the grant of the leave for consideration by the higher court of the land.”*

Another purpose of having yardstick in granting or not granting the application for leave, is to spare the precious time of the Court from dealing with frivolous, vexatious, useless or hypothetical appeals as it was decided in the above cited case of **Haji Musa** (supra). Nonetheless, close scrutiny of the records of the

proceedings, has jogged my mind and I am persuaded that the third ground of the purported appeal that “*the Court erred in law and fact by failing to hold that the security deposited by Tradexim Limited on behalf of the applicant satisfied the Court order of depositing security*”, might be of substance as the Court of Appeal guidance on the following will be useful; that the law does not state who should deposit the security for costs and whether the third party who is neither a necessary party nor proper party is allowed to deposit the security with or without the Court leave or order. The law is silent, on which procedure should be followed, if a third party wants to pay for security of costs on behalf of the other person or party. Should that be by way of a normal civil procedure or third party procedure.

Therefore, for the interest of justice, let the leave sought be granted, and the Court of Appeal intervene for directions and guidance. To this end, I proceed to grant leave to appeal to the Court of Appeal, under section 5(1) (c) of the Appellate Jurisdiction Act, Cap 141. It is so ordered.



**P. S. FIKIRINI**

**JUDGE**

**21<sup>st</sup> JULY, 2020**