

**IN THE HIGH COURT OF UNITED REPUBLIC OF THE
TANZANIA
(COMMERCIAL DIVISION)
AT DAR-ES-SALAAM
MISC.COMMERCIAL APPL. NO.197 OF 2019**

FES ENTERPRISES COMPANY LTD.....APPLICANT

VERSUS

SERENGETI BREWERIES LTD.....RESPONDENT

Last Order: 22/03/2022
Ruling: 29/04/2022

RULING

NANGELA, J.:

This ruling is in respect of an application preferred by the Applicant under section 5(c) of the Appellate Jurisdiction Act and Rule 45 (a) of the Court of Appeal Rules, 2009 (as amended). It has been filed by way of a chamber summons supported by an affidavit of Samson Edward Mbamba.

The Applicant has prayed for the following prayers:

1. This Honourable Court be pleased to grant leave to appeal against the decision of this Honourable Court (Hon. Magoiga, J.) made on the 19th November 2021, in Misc. Commercial Case No.186 of 2020.
2. Costs of the Suit be provided for.
3. Any other orders as the Hon. Court may deem fit to issue.

When the parties appeared before me on the 22nd February 2022, they agreed to have this matter disposed of by way of written submissions. A schedule of filing was given and they have duly complied with it.

In his submission, Mr Mbamba submitted that, in an application for leave to appeal the Applicant has to demonstrate that s/he has an arguable appeal. To do so, he contended, one must establish points that are worth to be considered in the intended appeal.

He submitted that, in the present application, the points the Applicant seeks to be determined by the Court of Appeal, should this application be allowed, are set out in paragraph 8 (i) to (iv) of the supporting affidavit. The grounds are as follows:

- (i) Whether, in an application to set aside a default judgement after substituted service, the applicant must challenge the affidavit of the process server and assail the findings of the Court that the applicant avoided service; and also assail the resultant order of the Court ordering substituted service, instead of not only giving an explanation of the incapacitation to file the defaulted defence.

- (ii) Whether, in a case of substituted service by publication in two newspapers of similar mild circulation, and where, like in the present case, there is an explanation of one of them on the incapacity of wide circulation, the Court can, isolatively, rule on the one newspaper only, with condemnation for failure of explanation on the other though both are of mild circulation.
- (iii) Whether the Hon. Judge issuing a default judgement can issue a conclusive finding of fact on the width of circulation of a newspaper in a township located outside the geographical location of the Court in which he presides.
- (iv) Whether the trial judge has jurisdiction to proceed with the suit before him after being made aware of the existence of Appeal matter resultant from his own original ruling involving the same case.

Having elaborated each of these points in his submission, Mr Mbamba submitted that, the four points here above, constitute points of sufficient importance for consideration by the Court of Appeal.

To support his submission, he relied on the case of **Group vs. Jagwani Breeze Lodge Ltd, Commercial Case No.93 of 2002** (unreported) as well as **Alisum Properties Ltd vs. Selenda Msangi**, Misc. Land Appl.No.20 of 2016; **Sylvester Lwegira Bandio & Another vs. The Tanzania Bank of Commerce Ltd**, Consolidated Civil Appeal No.95 of 2009 and Civil Appeal No.29 of 2010 (unreported) and **Aloyce Micheni Michapo vs. The Republic**, Crim. Application No.12 of 2014. He urged this Court, therefore, to grant the application.

In response to the Mr Mbamba's submissions, it was the submissions of Mr Nuhu Mkumbukwa, the learned counsel who appeared for the Respondent, that, granting leave is not automatic but always leave is granted at the discretion of the Court.

He contended that, if the grounds of appeal seem to be frivolous, vexatious, useless or hypothetical no leave will be granted. He relied on the case of **BBC vs. Eric Sikujua Ng'imaryo**, Civil Appl. No.133 of 2004, and **Rutagatina vs. Advocate Committee**, Civil Appl. No.89 of 2010, to support his submission.

Mr Mkumbukwa submitted that, the first ground for leave is unmeritorious and not worth of consideration by the Court of Appeal as it falls short of being a good reason on point of law calling for the intervention of the Court of Appeal. Mr Mkumbukwa has relied on Rule 23 (1) and (2)

(b) of the High Court (Commercial Division) Rules of Procedure, 2012, (as amended), and submitted that, in an application for setting aside a default judgment, an applicant must adduce sufficient reasons for the trial Court to exercise its discretion to set aside the default judgement.

According to Mr Mkumbukwa, since what amounts to "sufficient reasons" is not defined, one of the reasons for the applicant praying to set aside default judgement may be that, the service of the Plaint and summons to file written statement of defence was not effective, be it by Court process server or any substituted service, as the case may be.

In view of the above, he submitted that, the first ground submitted by Mr Mbamba is unmeritorious and one which, in light of the **BBC's case** (supra), is said to be frivolous, vexatious, and hypothetical, and, hence, this Court should decline to be persuaded.

He also relied on the case of **Amos Shani & Peter Kirua vs. Jumanne Juma**, Crim. Appeal No.168 of 2013 where the Court of Appeal of Tanzania had the following to say:

"However, we have noted that, the order of substituted service by way of publication issued by this Court on 18th September 2013 was complied with by publishing in the "Mwananchi" newspaper dated 18th

May 2015 by notice which informed the parties to enter appearance on 10th June 2015. We are of the opinion that, such a notice suffices to make the parties to appear in the hearing..."

In view of the above quoted portion of the decision by the Court of Appeal, it was Mr. Mkumbukwa's submission that, once a party complies with the Court's order for substituted service by way of publication in the identified newspapers, he is "home and dry."

As regards the 3rd and 4th grounds for leave, Mr Mkumbukwa disagreed with them as well. He contended that, the issue of whether a particular newspaper is of wider circulation in a certain area does not depend on the judge being present in that particular area. He contended that, the Applicant's argument was unsubstantiated. He held a view that, the only determining factor is the fact the particular newspapers have wide circulation in the country and are neutral.

As for the fourth point, he discounted it as a mere submission by the learned counsel from the bar because the Affidavit supporting the Application has nothing of the sort in all its 9 paragraphs. He relied on the case of **Rosemary Stella vs. David Kitundu**, Civil Ref. No.06 of 2018, CAT (unreported) and **The Registered Trustees of the Archdiocese of Dar –es-Salaam vs. The Chairman of**

Bunju Village Government & 4 Others, Civil Appeal No.147 of 2006 (unreported).

Mr Mkumbukwa submitted that, there was no pending appeal in the Court of Appeal as alleged but that, what was pending in the Court of Appeal is Revision filed in relation to Commercial Case No.76 of 2019 as Civil Application No. 364/16 of 2020 and the Court could just take judicial notice of.

For those reasons, he distinguished the cases of **Alyoce Micheni Michapo vs. Republic** (supra) and the case of **Bandio** (supra). Relying on the case of **Puma Energy (T) Ltd vs. Diamond Trust Bank (T) Ltd**, Misc. Commercial Appl. No 74 of 2021, he called upon this Court to take a stance and hold that the fourth point does not raise an arguable point of law.

I have carefully considered the rival submissions by the learned counsel for the parties. As correctly stated by both learned counsels for the Parties herein, an application of this kind is granted at the discretion of the Court. The Court has to be convinced that, the proposed grounds of appeal raise novel issues of law or a point of a law worth engaging the minds of the Court of Appeal.

In the **BBC's case (supra)**, the Court of Appeal, was of the view that:

"As a matter of general principle,
leave to appeal will be granted
where grounds of appeal raise

issues of general importance or novel point of law or where the grounds show a prima-facie or arguable appeal. (*See Buckle v Holmes (1926) All ER 90* at page 91). However, where the grounds of appeal are frivolous or useless or hypothetical, no leave will be granted."

The same point was reiterated in the case of **Rutagatina (supra)**. In that case, the Court of Appeal was of the views that:

"An application for leave is usually granted if there is good reason, normally a point of law or point of public importance that calls for this Court's intervention. Indeed, on the aspect of leave to appeal, the underlying principle was well stated by this Court in *Harban Haji Mosi and Another v Omar Hilal Seif and Another, Civil Ref.No.19 of 1997* (unreported) thus: 'Leave is grantable where the proposed appeal stands reasonable chances of success or where, but not necessarily, the proceedings as a whole, reveal such disturbing features as to require the guidance of the Court

of Appeal. The purpose of the provision is, therefore, to spare the Court the spectre of unmeriting matters and to enable it to give adequate attention to cases of true public importance."

With that in mind, the issue to resolve is whether the application at hand has exhibited such features pointed out in the **BBC's** case (supra) or **Rutagatina's** case (supra). I have carefully read the submissions of Mr Mkumbukwa and I am fully convinced that, the grounds are not befitting the grant of leave to appeal to the Court of Appeal.

I hold so, **firstly**, because, I am not persuaded that the first and the third grounds constitute points of law of such legal significance to warrant bringing it to the attention of the Court of Appeal. **Secondly**, and in respect of the second ground for leave, I am also of the view, and as correctly pointed out by Mr Mkumbukwa and, as per the decision of the Court of Appeal in **Amos Shani & Peter Kirua (supra)**, that, once compliance with the order of substituted service by publication is achieved, the notified parties are presumed to have the notice of the pending matters in Court.

It follows, consequently, that, since the Court of Appeal has already decided on such a point, there is nothing novel that will again warrant the attention of the

Court of Appeal on a similar point, as ground number one of the grounds raised by the Applicant seems to suggest.

Finally, and in respect of the forth ground for leave, I am in agreement with Mr Mkumbukwa that, throughout the entire affidavit in support of the Application, there is nowhere has it been disclosed that there is a pending appeal in the Court of Appeal. So the point raised has no legs upon which to stand.

In view of the above, this Court settled for the following orders:

1. That, leave to appeal to the Court of Appeal is not granted and the instant application must be and is hereby dismissed.
2. That, taking into account the underlying circumstances in this application, I grant no orders as to costs.

It is so ordered

DATED AT DAR-ES-SALAAM THIS 29TH APRIL, 2022.



A handwritten signature in blue ink, appearing to read "Deo John Nangela".

.....
DEO JOHN NANGELA
JUDGE,