

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(COMMERCIAL DIVISION)**

AT DAR ES SALAAM

MISC.COMMERCIAL APPLICATION NO. 76 OF 2021

(Arising from Commercial Appeal No.2 of 2020)

ULTIMATE SECURITY TANZANIA LTD.....APPLICANT

VERSUS

MAXINSURE (TANZANIA) LIMITED.....RESPONDENT

RULING

Date of last order: 15/11/2022

Date of ruling: 21/12/2022

A. A. MBAGWA, J

This is an application for leave to appeal to the Court of Appeal. It is by way of chamber summons made under section 5(1)(c) of the Appellate Jurisdiction Act and rules 45(a) and 46(1) of the Tanzania Court of Appeal Rules 2009 as amended and it is backed up by an affidavit sworn by Tatu Elias, a principal officer of the applicant company, on the one hand. On the other hand, the application is contested by the respondent through an affidavit sworn by Jovinson Kagirwa, learned counsel for the respondent.

The factual background of the matter is that the respondent **Maxinsure (Tanzania) Limited** successfully sued the applicant for payment of USD 50,587.00 being indemnification of the loss suffered by insured person one



Excel Group Care (Africa Limited) in the Court of the Resident Magistrate of Dar es Salaam at Kisutu via Civil Case No. 306 of 2014. The respondent's claims were predicated on the insurance principle of subrogation. In the end, the applicant was not amused by the verdict of the trial court which decided in favour of the respondent. The applicant thus appealed to this court via Commercial Appeal No. 2 of 2020. As bad luck would have it, the applicant's efforts to overturn the trial court decision hit the rock as this court dismissed the applicant's appeal. Still undaunted, the applicant is determined to challenge the decision of this court in the Court of Appeal. However, since the appeal to the Court of Appeal is not automatic in this case, the applicant has brought this application to seek leave to appeal.

The applicant has advanced five grounds which she seeks this court to consider and consequently grant her leave to appeal namely;

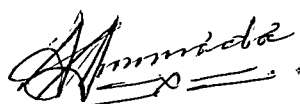
1. That the judgement and decree of the High Court (Commercial Division) delivered on 22nd April, 2022 offend the legal principle that subrogation rights cannot be exercised when the insured person is not privy to the contract.
2. That the judgment and decree of the High Court (Commercial Division) delivered on 22nd April, 2022 erred by deciding on the tort of negligence while the same was not pleaded nor was it framed as one of the issues.
3. That High Court (Commercial Division) in its judgement and decree dated 22nd April 2022 did not determine all grounds of appeal raised before it.



4. That the judgement and decree of the High Court (Commercial Division) delivered on 22nd April 2022 erred in law to hold the applicant liable to pay economic loss to the respondent while the applicant has no duty of care to the respondent.
5. That judgement and decree of the Commercial Court delivered on 22nd April 2022 failed to analyse properly the evidence on record in determining the ground of appeal raised by the applicant.

When the matter was called on for hearing, Mr. Sabasi Shayo, learned advocate appeared for the applicant whilst the respondent was represented by Mboransia John, learned advocate as well. On the hearing date, both counsel had little to submit in addition to their skeleton arguments. They adopted their skeleton arguments which they filed in court earlier on as well as their respective depositions and prayed the court the same to form part of their submissions.

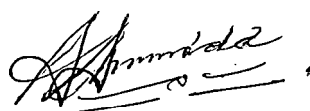
Submitting in support of the application, the applicant's counsel told the court that all the five grounds above are based on the points of law as such, he prayed the court to grant leave to appeal in order to afford the applicant an opportunity to present her intended appeal to the Court of Appeal. The counsel continued that the duty of the applicant in this application is to demonstrate the legal points or grounds upon which the intended appeal is based and not to establish whether the grounds have merit or not. To bolster his argument, the applicant's counsel cited the case of **Fred Kweka and Two Others vs Zamada Abdillah Njema and Another**, Misc. Land Application No. 449 of 2020 wherein it was held that in determining whether to grant leave or not, this court should not assume



the power of appellate court as this court is not vested with power to adjudicate on the merits of the intended appeal. In addition, the applicant's counsel cited the case of **Grupp vs. Jangwani Sea Breeze Lodge Limited, Commercial Case No.93 of 2002** (unreported).

The applicant's counsel concluded that the application is meritorious *for the* intended grounds of appeal raise arguable points of law worth consideration by the Court of Appeal.

In reply, the respondent contested the application stating that the grounds advanced do not raise arguable issues of law or facts worth consideration by the Court of Appeal. The respondent's counsel argued that at page 16 to 21 of the impugned judgement this court clearly articulated the applicability of the doctrine of subrogation in insurance contract vis a vis the principle of privity to contract. The learned counsel stressed that the judgement speaks very clearly on the general rules and the extent to which the principle of subrogation applies where the insured person was not privy to contract. While referring to page 10 and 13 of the impugned judgement, the respondent's counsel stated that the applicant had a duty of care to the respondent and that the evidence adduced before the trial court pointed that such a duty of care was directly related to losses which the respondent suffered after having indemnified the insured person. To support his argument, the respondent's counsel cited the case of **Fraser River Pile and Dredge Ltd vs. Can-Dive Service Limited** [2000] wherein it was held that there exists an exception to the principle of privity of contract.

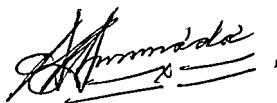


With regard to the complaint that this court decided the case based on the tort of negligence while the same was neither pleaded nor framed as one of the issues, the respondent's counsel submitted that this is a new ground because it was not raised and deliberated before this court.

Regarding the complaints that this court did not determine all grounds of appeal raised before it, the respondent's counsel submitted that grounds 1 and 2, 6 and 7 were consolidated and jointly determined from page number 21 to 25 of the judgment. The respondent's counsel cited the case **Kadili Zahoro and Another vs. Mwanahawa Selemani, Civil Application 137/01 of 2019 Court of Appeal of Tanzania (unreported)** wherein Hon. Wambali J. A at page 6 of the ruling quoted with approval the holding in **Harban Haji Mosi and Another vs. Omari Hilal Seif and Another**, Civil Reference No.19 of 1997 (unreported) to the following effect;

"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 spectra of unmeriting matters and to enable it to give adequate attention to cases of true public importance".

The respondent's counsel concluded his submission by beseeching this court to dismiss the application with costs.



I have had an occasion to navigate through the parties' affidavital evidence, skeleton arguments and the record of application.

Generally, leave to appeal is granted where the grounds of intended appeal raise issues of general importance or novel point of law or where the grounds show a prima facie or arguable appeal. See **Bulyanhulu Mine Limited and 2 Others vs Petrolube (T) Limited and Another**, Civil Appeal No.364/16 of 2017, CAT at Dar es Salaam and **British Broadcasting Corporation vs Eric Sikujua Ng'maryo (supra)**.

The central issue therefore for determination in this application is whether the applicant has raised arguable issues of facts and or law worth consideration by the Court of Appeal. It is also a clear position of law that the function of the court in the application for leave to appeal is not to determine the merits or otherwise of the intended appeal for the same is an exclusive domain of the Court of Appeal. See **Jireys Nestory Mutalemwa vs Ngorongoro Conservation Area Authority**, Civil Application No. 154 of 2016, CAT at Arusha

The applicant has advanced several issues which she believes that are of general importance to be considered by the Court of Appeal. The issues raised include whether the legal principle that subrogation rights cannot be exercised when the insured person is not privy to the contract and whether the judge erred by deciding the case based on the tort of negligence while the same was neither pleaded nor framed as one of the issues.

In opposing the application, the respondent's counsel spent a substantial part of his submission in attacking the merits of the grounds raised instead of addressing the court on how the grounds are devoid of arguable issues.

Amrda

With due respect to the learned counsel for the respondent, this court is not enjoined to determine the merits of the intended appeal. See the case of **Jireys Nestory Mutalemwa vs Ngorongoro Conservation Area Authority** (supra) where the Court held as follows;

'In applications of this nature it matters nothing whether the complaints are genuine or not. As alluded to above, that is a matter to be determined by the Court in the appeal'

Having dispassionately considered the grounds advanced by the applicant, I am persuaded that the applicant's intended appeal raises arguable issues of law and facts worth determination by the Court of Appeal. In the circumstances, I find the application with merits and consequently I grant leave to the applicant to appeal to the Court of Appeal. I order no costs.

Dated at Dar es Salaam this 21st December, 2022.



A. A. Mbagwa

JUDGE

21/12/2022

