

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

**AT DAR ES SALAAM**

**MISC. COMMERCIAL APPLICATION NO. 18 OF 2023**

***(Arising from Misc. Application No. 188 of 2021)***

**M/S MSAFIRI PHARMACEUTICAL &**

**ASSOCIATES LTD.....APPLICANT**

**VERSUS**

**M/S SHELY PHARMACEUTICALS LIMITED .....RESPONDENT**

***Date of last order: 06/06/2023***

***Date of ruling: 21/07/2023***

**RULING**

**A. A. MBAGWA, J**

This is an application for leave to appeal to the Court of Appeal against the ruling and order of this Court (Mkeha J) delivered on 31<sup>st</sup> January, 2023 in Misc. Application No. 188 of 2021. The application has been brought by way of chamber summons made under section 5(1)(c) of the Appellate Jurisdiction Act and rule 45(a) of the Tanzania Court of Appeal Rules 2009 as amended. To be specific, the chamber summons contains the following prayers;

- i) That, this Honourable Court be pleased to grant leave to the applicant to appeal to the Court of Appeal against its ruling and



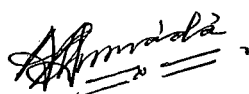
drawn order in Misc. Application No. 188 of 2021 delivered by his Lordship Mkeha J. on the 31<sup>st</sup> January, 2023.

- ii) Costs of this application be borne by the respondent; and
- iii) Any other orders that this Honourable Court deems fit and just to grant.

The application is supported by an affidavit sworn by one Sylvanus P. Maleto who introduced himself as principal officer of the applicant, on the one hand. On the other hand, the application is contested by the respondent through an affidavit sworn by Dr. Onesmo Kyauke, learned counsel for the respondent.

Given the chequered history of this matter, I find it apposite to narrate the factual background of this application as gleaned from the parties' depositions albeit, briefly. It is also important to mention that although the application documents indicate that the instant application arises from Misc. Application No. 188 of 2021, its root cause originates from Commercial Case No. 96 of 2009 which on 29<sup>th</sup> day of July, 2011 ended in favour of the respondent before Hon. Makaramba J as he then was.

In brief, the respondent, M/S SHELY PHARMACEUTICALS LIMITED instituted Commercial Case No. 96 of 2009 against the applicant, M/S MSAFIRI PHARMACEUTICAL & ASSOCIATES LTD who stood as the



defendant. In the end, the trial Court adjudged in favour of the respondent and decreed the applicant to pay a sum of TZS 518, 548, 368.77 among other orders.

The applicant was not satisfied with the judgment and decree in Commercial Case No. 96 of 2009 as such, she appealed to the Court of Appeal. However, the said appeal whose registry number is not disclosed in the applicant's affidavit was dismissed on 14<sup>th</sup> March, 2017 following the preliminary objection which was raised by the respondent. Thereafter, the respondent filed an application for execution of its decree in Commercial Case No. 96 of 2009.

On being served with application for execution, the applicant filed Misc. Application No. 188 of 2021 under the provisions of Order XXI rule 2(2) and section 95 of the Civil Procedure Code seeking the Court to issue summons to the respondent to show cause as to why the payment/adjustment allegedly made in respect of decree in Commercial Case No. 96 of 2009 should not be recorded as certified. The applicant contended that she entered into agreement with the respondent to settle the court decree. The applicant produced the purported deed of settlement titled "Contract for Goods Returned" dated 18<sup>th</sup> day of July, 2012. The alleged deed of settlement was vehemently denied by the respondent. Upon hearing of both parties, this Court (Hon. Mkeha J) on

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31<sup>st</sup> day of January, 2023 dismissed the application for want of merits. It is against this background, the applicant has brought the instant application seeking the leave to appeal to the Court of Appeal.

The applicant has attached a draft memorandum of appeal containing the following four grounds;

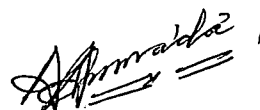
1. That the trial court erred in fact and law in holding that the appellant has failed to establish her case to warrant issuance of the notice.
2. That the trial court erred in fact and law in holding that the appellant would not have proceeded with appeal on 14<sup>th</sup> March 2017 while the matter was settled on 18<sup>th</sup> July 2012 without considering that the notice of appeal was filed on the 4<sup>th</sup> August 2011 and the appeal being filed before the settlement was entered.
3. That the trial court erred in fact and law in holding that the appellant would not have proceeded with appeal on the 14<sup>th</sup> March 2017 while the matter was settled by 18<sup>th</sup> July 2012 without considering the fact that, the said appeal was not heard on merit as it was faced by preliminary objections and dismissed thereon.
4. That the trial court erred in fact and law by dismissing the applicant's case without considering respondent's obligation to

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inform the court on the agreed settlement as stated in the contract for Goods Returned dated 18<sup>th</sup> July 2012.

The applicant states that the intended appeal is crucial in that it seeks to obtain the position of the Court of Appeal in interpreting the provision of the Civil Procedure Code regarding the certification of the settlement effected out of the court. In contrast, the respondent strongly avers that there is no clear point of law under the Civil Procedure Code which is to be interpreted by the Court of Appeal. Further, Dr. Onesmo Kyauke laments that the intended appeal is designed to delay the execution process.

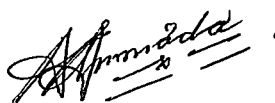
The hearing of this application was by way of written submission. I commend counsel for both sides for their timely filing of their written submissions. As alluded to, I have carefully gone through the depositions and written submissions filed by the parties. In his written submission, the applicant's counsel recapitulated the principles governing determination of application for leave to appeal. He stressed that leave to appeal is granted where the grounds of appeal raise issues of general importance or novel points of law or where the grounds show prima facie arguable appeal. He also emphasized that this Court's duty is not to determine the merits or otherwise of the intended appeal for that function is within the exclusive domain of the Court of Appeal. In



support of his arguments, the applicant's counsel cited the cases of **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, Civil Application No. 138 of 2004**. In rebuttal, the respondent's counsel acknowledged the principles and case law cited by the applicant's counsel but remarked that the application falls short of the established threshold.

The pertinent issue for consideration in determination of this application is whether the applicant's intended grounds of appeal raise arguable issues of facts or law with sufficient importance worth consideration by the Court of Appeal. It is noteworthy that leave to appeal is not an automatic right of the parties rather it is dependent on whether the issues involved in the intended appeal carry any sufficient importance as to require the indulgence of the Court of Appeal. The requirement for leave to appeal is intended, among other things, to spare the Court of Appeal from dealing with trivial and unmerited matters.

In the case of **Kadili Zahoro and Another vs. Mwanahawa Selemani, Civil Application 137/01 of 2019, Court of Appeal of Tanzania**, Hon. Wambali J.A. at page 6 of the ruling quoted with approval the holding in **Harban Haji Mosi and Another vs. Omari**

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**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".*

In the instant application, the applicant contends that the intended appeal raises novel issues of law as it seeks the Court of Appeal to set precedence on the certification of settlement out of court. On the adversary, Dr. Onesmo Kyauke strongly argued that there is no clear provision of Civil Procedure Code which the Court of Appeal has to interpret.

I have given due consideration to the applicant's intended grounds of appeal and arguments in support of the application. I also took trouble to go through the ruling dated 31<sup>st</sup> day of January, 2023 which is sought to be impugned. In the ruling, it is clear that the application was dismissed because the Hon. Judge was satisfied that no agreement was between the parties to settle the decree as alleged by the applicant. Admittedly, there is no point of law involved in dismissing the said



application No. 188 of 2021. The reasons for dismissal were purely factual as such, one cannot fault the decision on point of law.

Mindful of the rationale for the requirement of leave to appeal and guided by the threshold set by the court as indicated in the above case law. I have failed to find any issue of sufficient importance or novel point as to require the consideration of the Court of Appeal. In the event, I hold that this application is without merits hence I proceed to dismiss it. The applicant should bear the costs.

It is so ordered.

The right to challenge the decision is explained.



  
**A.A. Mbagwa**

**JUDGE**

**21/07/2023**