

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

AT DAR ES SALAAM

MISC. COMMERCIAL APPLICATION NO. 112 OF 2023

(Arising from Misc. Application No. 61 of 2023)

**BESTWAYS CAPITAL MANAGEMENT LIMITED
(BCM).....APPLICANT**

VERSUS

CHARLES CORNEL TARIMORESPONDENT

Date of last order: 19/09/2023

Date of ruling: 29/09/2023

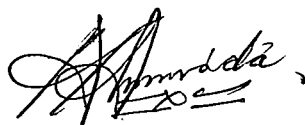
RULING

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 before (Hon. Mkeha J) delivered on 21st June, 2023 in Misc. Commercial Application No. 61 of 2023. The application is made by way of chamber summons in terms of rule 45(a) of the Tanzania Court of Appeal Rules 2009 as amended. However, before further ado, I wish to make it clear that the applicant erroneously cited the enabling law. The chamber summons reads;

'(Made under Rule 45 (a) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019; and any other enabling provisions of the law)'

It is common cause that the cited rule 45 (a) is not provided under the Appellate Jurisdiction Act as indicated by the applicant in the chamber

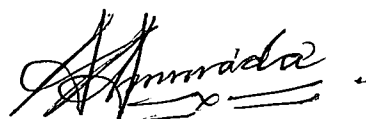


summons rather, it is under the Tanzania Court of Appeal Rules 2009. Nonetheless, alive to the overriding objective principle, I am opined that the error is curable and inconsequential. As such, I proceed to determine the application on merits.

To be specific, the chamber summons contains the following prayers;

1. That, this Honourable Court be pleased to grant leave to the applicant to file an appeal against the ruling of this Court in Misc. Commercial Application No. 61 of 2023 before His Lordship Mkeha, J dated 21st day of June, 2023.
2. That, any other orders that this Honourable Court deems proper to grant in the circumstances of the application.

The application is supported by an affidavit affirmed by Ahmed Mkwawa, the applicant's principal officer. In essence, the applicant seeks to impugn the ruling of this Court which lifted the incorporation veil of the applicant company, and allowed arrest and detention of the applicant's directors namely, Messrs Steven Cyliacus Ndaula, Ahmed Adam Mkwawa and Sylvanus Clemence Ndaula. Under paragraphs 5 and 6 of the applicant's affidavit, the applicant contends that the trial Judge was biased in that he lifted veil of incorporation without sufficient evidence. According to the applicant, the incorporation veil was lifted illegally and without lawful merits.



In contrast, the respondent vehemently contested the application through a counter affidavit sworn by Charles Cornel Tarimo. The respondent stated that the lifting of incorporation veil was justified and the ruling was well reasoned.

When the matter was called on for hearing on 15th August, 2023, the applicant appeared through Mr. Temistocles Rwegasira, learned advocate whereas the respondent was represented by Mr. Clavery Oswald Mlowe, learned advocate as well. Both counsel agreed to dispose of the matter by written submissions. I am grateful to their insightful submissions but I will not reproduce them verbatim. It is sufficient to state that I have taken them into account in my deliberations.

Having gone through the rival submissions and the depositions, the question for determination of this matter is whether the applicant has demonstrated sufficient grounds to warrant grant of leave to appeal to the Court of Appeal in accordance with the established principles. It is a trite law that 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, Civil
Application No. 138 of 2004, CAT at Dar es Salaam.

Further, it is worthwhile to note that the requirement for leave to appeal is intended, among other things, to filter matters which go to the Court of Appeal. In the case of **Kadili Zahoro and Another vs. Mwanahawa Selemani**, Civil Application No. 137/01 of 2019, the 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 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”.

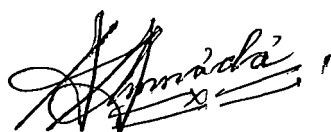
From the foregoing, it is undeniably clear that only matters of great public importance or novel point of law should be allowed to land in the attention of the Court of Appeal.

Now, the pertinent issue for consideration is whether the grounds advanced by the applicant meet the threshold i.e., they raise issues of

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general importance or novel point of law. As hinted above, the applicant's main complaint is anchored on the insufficiency of evidence to warrant lifting of incorporation veil. It is from this alleged error, the applicant is accusing the trial Judge for being biased. I have keenly gone through the parties' deposition and the impugned ruling which is attached to the applicant's affidavit (annexure EA-1). At page 5 through 7 of the impugned ruling, the trial Judge is very clear that he mainly took into account the terms of the deed of compromise dated 3rd April, 2023 in which the applicant freely undertook to face the consequences of the execution process. I have strenuously scanned the rival submissions, depositions and the impugned ruling. I have also taken into account the fact that the matter from which this application arises is at execution stage and more so, the applicant through a deed of compromise, had committed to execute the decree or else to face the consequences of execution. It is common cause that one mode of execution is by arrest and detention. Guided by the underlying objective for the requirement of leave to appeal that is to *spare the court from the spectra of unmeriting matters and to enable it to give adequate attention to cases of true public importance*, I do not see any novel issue worth consideration by the Court of Appeal. It is also in the interest of justice that litigation should come to an end. See the case of



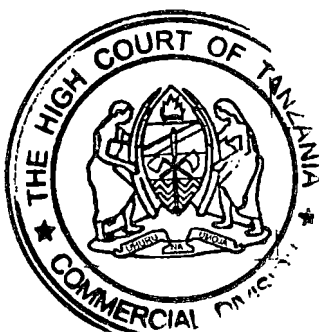
Anyambilile Mwakisale vs Abdallah Katoto, Civil Application No. 553/01 of 2017, CAT at Dar es Salaam.


The applicant's counsel contended that the trial Judge ought to ignore the applicant's affidavit in Misc. Commercial Application No. 61 of 2023 on the ground that her counsel did not adopt it on the hearing date. However, the learned counsel was unable to cite any decision or provision of law in support of his argument. It is trite law that affidavit is a substitute of oral evidence and it is distinct from submission. It is further a trite law that in our jurisdiction applications are supported by affidavits as such, the court is enjoined to consider the affidavit filed unless there are exceptional circumstances. Since the applicant's counsel failed to refer to any law, I find his complaint unmerited.

In a nutshell, it is my considered findings that the application falls short of the requisite criteria for grant of leave to appeal. I consequently dismiss it. However, I make no order as to costs in order to bring the matter to an end.

It is so ordered.

The right to challenge the decision is explained.




A.A. Mbagwa
JUDGE
29/09/2023

