

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**MISC. CIVIL APPLICATION NO. 418 OF 2023**

**(Arising from reference No. 09 of 2023)**

**DAR ES SALAAM WATER SUPPLY AND SANITATION**

**AUTHORITY(DAWASA) ..... 1<sup>ST</sup> APPLICANT**

**THE ATTORNEY GENERAL.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**RAYMOND MGONDA PAULA.....1<sup>ST</sup> RESPONDENT**

**VICENT BRUNO MINJA.....2<sup>ND</sup> RESPONDENT**

**THERESIA PAULA WILLIAM.....3<sup>RD</sup> RESPONDENT**

**SHAMIMU ABSHIRI MSANGI.....4<sup>TH</sup> RESPONDENT**

**BRUNO MTETA.....5<sup>TH</sup> RESPONDENT**

**GLADNESS PAULA.....6<sup>TH</sup> RESPONDENT.**

**RULING.**

*Date of last Order: 19/09/2023*

*Date of Ruling: 02/11/2023*

**I. ARUFANI, J**

Before me is an application for leave to appeal to the court of appeal. The application is made under section 5 (1) of the Appellate Jurisdiction Act Cap 141 [R.E 2019], Rules 45 (a) and 49 (3) of the Court of Appeal Rules 2009, G.N No 368 of 2009 as amended, and any other enabling provision of law. The applicants are seeking for leave to appeal

to the Court of Appeal of Tanzania against the Ruling and Drawn Order of the court delivered in Reference No. 09 of 2023 dated 13<sup>th</sup> June, 2023.

The application is supported by the affidavit sworn by Ms. Zakia Selemani Mroy, learned State Attorney for the applicants and it was opposed by the counter affidavit sworn by Mr. Thomas Eustace Rwebangira, learned advocate for the respondents. By consent of the counsel for the parties the application was argued by way of written submission. While the submission of the applicants was drawn and filed in the court by Mr. Edwin Joshua Webiro, learned State Attorney, the respondents' submission was drawn and filed in the court by Mr. Thomas Eustace Rwebangira, learned advocate.

The counsel for the applicants prayed to adopt his affidavit supporting the application as part of his submission. He went on submitting that, the impugned decision is only appealable with leave of the court if there is important issue of law and fact which need to be determined by the Court of Appeal. He stated the issues intended to be determined by the Court of Appeal if leave will be granted will be as follows: -

- 1. That, the Hon. Judge erred in law by improperly exercising her discretion and departing from taxation schedule contrary to the law.*
- 2. That the Hon. Judge erred in law by dismissing the applicant's application relying on the proviso of order 48 of the Advocate*

*Remuneration Order, GN No. 264/2015 while the same proviso is misinterpreted.*

*3. That, the Hon. Judge erred in law by not addressing each ground of reference raised in the applicant application and applicant submission.*

Submitting on the first ground the State Attorney argued that, the applicants are aware that Order 12 (1) of the Advocate Remuneration Order, 2015 gives mandate to the taxing officer to award taxation at his discretion. He however argued that, the stated discretionary power must be exercised judiciously and in accordance with the legal principles and rules. He submitted the factors to be considered in rejecting or reducing the amount of the award were stated in the case of **National Bank of Commerce Limited V. Mm Worldwide Trading Co. Ltd & Two Others**, Misc. Commercial Cause No. 217 of 2015, HC Com. Div. at DSM (unreported).

He went on arguing that, neither the taxing officer nor the Honourable judge of the High Court when determine Reference No. 09 of 2023 assigned reasons for exercising their discretionary power. He submitted that law requires reasons for applying discretionary powers to be stated. He argued that as the reasons for the decision were neither stated by the Taxing Officer nor the High Court Judge, then the application be granted so that the Court of Appeal can determine the point of law arising from the impugned decision.

He argued in relation to the second point of law that, the High Court Judge misinterpreted the proviso of Order 48 of the Advocate Remuneration Order which provides for an exception to the general rule. He argued the order stipulates that when more than one-sixth of the claimed amount in the bill of cost with exclusion of court fees is disallowed the party presenting the bill of costs shall not be entitled to the costs of such taxation. He submitted the stated proviso gives discretionary power to the Taxing Officer on how to apply the stated rule of one-sixth. He submitted that is a point law worth to be considered by the Court of Appeal.

He argued in relation to the last ground of appeal that Hon. Judge erred in law by not addressing each ground of reference raised in the application as required by Order XX rules 4 and 5 of the Civil Procedure Code which provides for what should be contained in a judgment. He submitted that the Hon. Judge in the case at hand did not address each ground raised in the reference and thus raised an important point of law worth to be addressed by the Court of Appeal. At the end he prayed the applicants be granted leave to appeal to the Court of Appeal.

In reply the counsel for the respondents stated that, an application for leave to appeal is not granted as an automatic right. He stated there are several conditions which are supposed to be considered before

granting or refusing leave to appeal to the Court of Appeal. He argued the stated conditions have been stated in various decided cases including the cases of **Ally Bakari Muki v Mohamedi Idd Kiburuma** Misc, Land Case No.895 of 2016 HC Land Division, **Walhadi Ngoli & Others v Aida Adamson Kalinga** Misc. Land Application No.31 of 2020, HC DSM. **Godwin Lyaki & Boniface Augustine V Ardhi University**, Civil Application No.491/01 of 2021 CAT (unreported). The Court of Appeal listed in the latter case five conditions upon which leave to appeal may be granted or refused to be as follows: -

- (a) The affidavit in support of the application should be subjected to analysis to see if they merit consideration by the court of appeal.*
- (b) Leave to appeal was not automatic as it is within the discretionary of the court, discretion of which must be exercise judiciously based on material facts before the court.*
- (c) Leave to appeal will be granted where the grounds of appeal raise issues of general importance or a novel point of law or where the ground show a prima facie or arguable appeal.*
- (d) Leave should not be granted where the ground of appeal is frivolous, vexatious, useless or hypothetical.*
- (e) The fact that the party is not satisfied by the decision of the court is not sufficient to constitute a point of law or fact of importance for consideration by the court of appeal.*

He further submits that, as the application is seeking for leave to appeal against the decision of this court the affidavit and submission of the applicants is required to be confined to the decision intended to be challenged and not to the decision of the Taxing Officer. He stated in relation to the first ground that, the applicants' State Attorney submitted that the Hon. Judge erred in law by exercising her discretionary power improperly and departing from taxation schedule contrary to law.

The counsel for the respondents submitted further that, the Hon. Judge was not a Taxing Officer and she could not have exercised discretionary powers vested exclusively to the Taxing Officer by Order 12 (1) of the Advocate Remuneration Order. He submitted that to state neither the Hon. Judge nor the taxing master assigned reasons for exercise their discretionary powers is misdirection and that is not an issue worth to be taken to the CAT.

He submitted in relation to the second ground which states the Hon. Judge misinterpreted the proviso under order 48. He stated the Hon. Judge accepted the decision of the taxing officer in which instruction fees was excluded in the computation of one-sixth of the total amount claimed in the bill of costs. He stated the amount claimed as an instruction fee was Tshs. 250,000,000/= and the total bill of cost had a claim of Tshs. 302,245,200/=. He argued that, if the amount claimed as an instruction

fee is excluded as provided under order 48, then the amount subject to computation of the one-sixth is Tshs. 52,245,200/=. He submitted that, since the amount awarded was Tshs. 50,940,000/=, it cannot be said it was below one-sixth as alleged by the counsel for the applicants.

He went on submitting that, there is no novel point of law in the second ground worth consideration by the Court of Appeal. He submitted that, the applicants' dissatisfaction by the decision of the taxing officer and Hon. Judge in the reference is not a ground for granting leave to appeal to the Court of Appeal. To support his submission, he referred the court to the case of **GODWIN LYAKI** (supra) where it was stated that, a fact that a party is dissatisfied by the decision of the court is not sufficient to constitute a point of law or fact of public importance for consideration by the Court of Appeal.

He stated in relation to the third ground which states the impugned decision of the court failed to address each ground of reference as required by the law that, the ground alleges to be not addressed are not mentioned in the affidavit. He submission that the grounds alleged were not addressed ought to be mentioned in the application. Since they are not mentioned it makes the stated ground frivolous, vexatious, useless or hypothetical. He argued it is not a point worth to be taken to the Court of Appeal for determination. He finalised his submission by praying the court

to refuse to grant the application as the applicant has failed to demonstrate point of law or fact worth to be considered and determined by the Court of Appeal.

Having carefully considered the rival submissions from the counsel for the parties and after going through the affidavit and counter affidavit filed in the court by the parties the court has found the issue to determine in this application is whether the applicants have managed to satisfy the court, they deserve to be granted leave to appeal to the Court of Appeal.

The court has found it has been stated in numerous cases decided by this court and the Court of Appeal of Tanzania that, in an application for leave to appeal to the Court of Appeal the court is required to be satisfied the grounds of appeal intended to be taken to the Court of Appeal shows prima facie case or arguable appeal before granting the application. The above stated position of the law can be seeing in the case of **British Broadcasting Corporation V. Eric Sikujua Ngyimaryo**, Civil 7 Application No. 138 of 2004, CAT at DSM (unreported) where the Court of Appeal stated that: -

*"As a matter of general principle, leave to appeal will be granted where the grounds of appeal raise issues of general importance or a novel point of law or where the grounds show a prima facie case or arguable appeal."*



The similar view was also stated in the case of **Grupp V. Jangwani Sea Breeze Lodge Ltd**, Commercial Case No. 93 of 2002 cited with approval in the case of **Fortunatus Lwanyantika Mosha V. Icea Lion Insurance Co. Ltd & Another**, Misc. Civil Application No. 143 of 2020 HC at Mwanza (unreported) where it was stated that, this court has no jurisdiction to go into merits or deficiencies of the impugned decision of the court but only to determine whether there is arguable issues fit for consideration by the Court of Appeal.

While being guided by the position of the law stated in the above cited cases the court has found that, as alluded earlier in this ruling the applicants listed under paragraph 15 of the affidavit supporting the application the three points, they said they have raised important issues of law and fact which need to be determined by the court of appeal. After going through the stated points of law the court has found they have raised important points of law which are arguable grounds and worth to be considered and determined by the Court of Appeal.

The court has considered the submission by the counsel for the respondents together with the conditions stated in the case of **Godwin Lyaki** (supra) and find that, the grounds raised by the applicants are not frivolous, vexatious, useless or hypothetical as argued by the counsel for the respondents. They are grounds which raises issues of general importance of law and they can be argued and determined by the Court

of Appeal. Since the duty of the court is not to determine the merit of the raised grounds, the court has found it is not required to go into details of the merit of the raised grounds.

Consequently, the court has found the applicants deserve to be granted leave to appeal to the Court of Appeal against the ruling of the court delivered in Reference No. 09 of 2023 so that the grounds raised in the affidavit of the applicants can be considered and determined by the Court of Appeal. In the upshot the application is granted with no order as to costs. It is so ordered.

Dated at Dar es Salaam this 02<sup>nd</sup> day of November, 2023

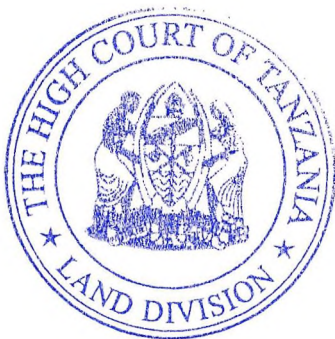


**Court:**

A handwritten signature in blue ink, appearing to read "I. Arufani".

I. Arufani  
**Judge**  
02/11/2023

Ruling delivered today 02<sup>nd</sup> day of November, 2023 in the presence of Mr. Enock Masara, learned State Attorney for the applicants and in the presence of Ms. Joyce Magubu, learned advocate representing all the respondents. Right of appeal to the Court of Appeal is fully explained.



A handwritten signature in blue ink, appearing to read "I. Arufani".

I. Arufani  
**Judge**  
02/11/2023