

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

**MISCELLANEOUS CIVIL APPLICATION NO. 90 OF 2017
(Arising from the decision of the High Court of Tanzania at
Dar es Salaam District Registry in Civil Appeal No. 148 of
2016. Originating from the decision of the Kinondoni District
Court in Civil Case No. 5 of 2004)**

CHARLES KOMBE.....APPLICANT

Versus

KINONDONI MUNICIPAL COUNCIL.....RESPONDENT

RULING

B.R. MUTUNGI, J:

The applicant is dissatisfied with the decision of this court in Civil Appeal No. 148 of 2016 delivered by Hon. Feleshi, J on 14/2/2017. The same subsequently allowed the appeal filed by the respondent against the trial court's judgment (Civil Case No. 5 of 2004) which had originally awarded the applicant Tshs. 100,000,000/= as specific damages, 29% of the awarded Tshs. 100,000,000/= being

commercial interest per annum from the date of invasion to the date of payment of the amount.

The applicant has thus prayed to move the court under section 5 (1) (c) of the Appellate Jurisdiction Act [Cap. 141 R.E 2002] and section 45 (a) of the Court of Appeal Rules, 2009 seeking for the following reliefs;

1. *Leave be granted to the applicant to appeal to the Court of Appeal of Tanzania against the decision and orders of the Honourable Feleshi, J. entered on 14th February 2017 in Civil Appeal No. 148 of 2016.*
2. *Costs of the application be provided for.*

The application has been supported by a corresponding Affidavit dully sworn by the applicant. As per the said Affidavit, the stated reasons in support of the application are to the effect that, the intended appeal has overwhelming chances of success. This probability is due to

the fact that, this court had not properly analyzed the evidence on the record.

On the other side of the coin, the respondent through the counter affidavit sworn by Florah A. Luhala the respondent's Legal Officer, principally has opposed the application and supported the disputed decision. During the hearing of the application, Mr. Richard Madibe learned Advocate appeared for the applicant whereas Ms. Florah Luhala the respondent's Legal Officer appeared for the respondent.

Mr. Richard Madibe started off by pointing out the factors which the court must consider in determining an application for leave. He outlined that, there must be an arguable case on the side of the applicant; the sought decision to be challenged should involve a substantial question of law of general importance and lastly, whether

the intended appeal has overwhelming chances of success.

He argued the application at hand fits squarely within the above stated factors. He went further by insisting the court did not analyze and evaluate properly the evidence on the record. To the contrary the trial Court had properly analyzed the same and reached to a proper decision. The learned counsel referred the court to the cases of **ABUBAKARI ALI HIMID VERSUS EDWARD NYELUSYE, CIVIL APPLICATION NO. 51 OF 2007 (CAT-DSM) (UNREPORTED)** and **SANGO BAY LTD VERSUS DRESDNER LTD [1997] EA 17** to back up his position.

In the reply, from the outset Ms. Florah supported the decision of this court. She further argued, the court should disregard the applicant's reasons since there is nothing new to be considered. In her settled views, the judgment of this

court was well reasoned. In conclusion she prayed the same be rejected.

Basically, Mr. Richard Madibe in rejoinder maintained his position as stated in the submission in chief.

The issue here is whether the application at hand has merits or otherwise.

In determining whether the application at hand has merits or not, the court must confine itself to the test as was rightly submitted by Mr. Richard. I say so because, in the case of **Rutagatina C.L Versus Advocates Committee and Clavery Mtindo Ngalapa, Civil Application No. 98 of 2010 (CAT-DSM) (Unreported)** at page 6 and 7 the Court of Appeal cited with approval the case of **British Broadcasting Corporation Versus Eric Sikujua Ng'mao, Civil Application No. 133 of 2004 (Unreported)** where it was stated, and I quote;

Needless to say, **leave to appeal is not automatic. It is with the discretion of the court to grant or refuse.** The discretion must, however be judiciously exercised on the materials before the court. **Leave to appeal will be granted where grounds of appeal raises questions of general importance or a novel point of law or where the grounds show a prima facie or arguable appeal.** (See *Buckle Versus Holmes* (1926) ALL ER Rep. 90 at page 91) However, where the grounds of appeal are frivolous, vexatious or useless or hypothetical, no leave will be granted. [Emphasis is mine]

Turning to the application at hand, I have gone through the submissions from both camps as well as the court record specifically the decision of this court (Civil Appeal No. 148 of 2016), I am settled the application has no merits. The reasons being that, the applicant has failed to demonstrate and convince the court as to whether there is a novel point of law or a prima facie or arguable appeal. In my respectful finding, what the applicant has done is simply

to amplify his grievances. He did not highlight the disturbing features in the disputed judgment worth the intervention of the court of Appeal.

Having failed as above, the court is left with nothing to deliberate upon in the absence of the ingredients found in **Rutagatina's case (supra)**. The application is thus sanctioned to a dismissal with costs.

It is so ordered.


B.R. MUTUNGI

JUDGE

10/5/2017

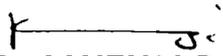
Right of Appeal Explained.


B.R. MUTUNGI

JUDGE

10/5/2017

Read this day of 10/5/2018 in presence of Richard Magibi
for the applicant and Mr. Julius Josiah for the respondent.


B.R. MUTUNGI

JUDGE

10/5/2017