

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: NDIKA, J.A., FIKIRINI, J.A., And KIHWELO, J.A.)

CIVIL APPLICATION NO. 360/01 OF 2020

SHAMSA SALIM HAMDUNI APPLICANT

VERSUS

THE ADMINISTRATOR GENERAL FIRST RESPONDENT

HAMDUNI SALIM HAMDUNI SECOND RESPONDENT

**(Application for leave to appeal from the Ruling and Order of the High Court
of Tanzania, Dar es Salaam District Registry at Dar es Salaam)**

(Mgonya, J.)

Dated the 14th day of February, 2020

in

Miscellaneous Civil Application No. 506 of 2019

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RULING OF THE COURT

22nd August & 13th September, 2022

NDIKA, J.A.:

The applicant, Shamsa Salim Hamduni, is before us by way of a second bite seeking leave to appeal to this Court from the decision of the High Court of Tanzania at Dar es Salaam (Mgonya, J.) in Miscellaneous Civil Application No. 506 of 2019 dated 14th February, 2020. The High Court (Mgonya, J.) dismissed her initial application for leave, Miscellaneous Civil Application No. 91 of 2020, on 12th June, 2020. In support of the application, the applicant affirmed an affidavit. Resisting, Mr. Hang'i Changa, learned Principal State Attorney in the Office of the Solicitor General having the

conduct of the matter for the first respondent, swore an affidavit in reply. The second respondent did not file any affidavit in reply.

The background and the context in which this matter has arisen is as follows. On 16th September, 2014, the High Court of Tanzania at Dar es Salaam (Mwakipesile, J.) in Probate and Administration Cause No. 8 of 2010 appointed the applicant and the first respondent as co-administrators to join the second respondent to administer the estate of the late Salim Hamdun Said. Subsequently, the first respondent moved the High Court vide Miscellaneous Civil Application No. 671 of 2018 to revoke the appointment of the applicant and the second respondent as administrators of the deceased's estate so that the first respondent remained the sole administrator. Having heard the matter *ex parte*, Mgonya, J. handed down her ruling on 23rd August, 2019 granting the prayer sought. Being bemused by the said outcome, the applicant lodged Miscellaneous Civil Application No. 506 of 2019 praying for the ruling and order to be set aside. Mgonya, J. was unimpressed; she found the matter unmerited and dismissed it on 14th February, 2020 for want of merit.

Desirous of challenging the High Court's refusal to set aside the *ex parte* ruling and order, the applicant duly applied on 17th February, 2020 for a copy of the ruling, order and proceedings of the High Court and lodged a

notice of appeal on 26th February, 2020. As hinted earlier, she unsuccessfully applied to the High Court vide Miscellaneous Civil Application No. 91 of 2020 for leave to appeal, hence the instant application as another bite at the cherry.

According to paragraph 15 of the supporting affidavit, the applicant cites three grounds upon which she seeks to challenge the High Court's ruling in Miscellaneous Civil Application No. 506 of 2019 High Court in refusing to set aside the aforesaid *ex parte* ruling and order in Miscellaneous Civil Application No. 671 of 2018: **one**, whether she was properly served with Miscellaneous Civil Application No. 671 of 2018; **two**, whether it was correct for the High Court to hold that her counsel appeared in the proceedings in Miscellaneous Civil Application No. 671 of 2018; and **three**, whether it was correct for the High Court to ignore the legal requirement to notify the applicant of the date scheduled for the delivery of the *ex parte* ruling.

Mr. Lusiu Peter, learned counsel, appeared for the applicant at the hearing. His main argument, as presented in the written submissions in support of the application, is that the three grounds stated in paragraph 15 of the supporting affidavit constitute arguable factual and legal contentions fit for the attention of this Court bearing in mind that the intended appeal

will be a first appeal. Specifically elaborating on the proposed third ground of appeal, it is contended that the trial court breached its duty to notify the applicant of the date scheduled for the delivery of the *ex parte* ruling and that such failure was fatal to the trial proceedings. Reliance was placed on a decision of a single Judge of the Court in **Cosmas Construction Co. Ltd. v. Arrow Garments Ltd.** [1992] T.L.R. 127 as well as the decision of the High Court at Dar es Salaam (Oriyo, J., as she then was) in **Chausiku Athumani v. Atuganile Mwaitege**, Civil Appeal No. 122 of 2007 (unreported).

Mr. Gallus Lupogo, learned State Attorney, who, along with Mr. Samuel Mutabazi, also learned State Attorney, appeared for the first respondent, argued that the first and second proposed grounds are patently baseless because they raise evidential issues. Citing **Bulyanhulu Gold Mine Limited and Two Others v. Petrolube (T) Limited**, Civil Application No. 364/16 of 2017 (unreported), he submitted that leave cannot be granted for an appeal intended to question legal sufficiency of the evidence on record. Coming to the third proposed ground, Mr. Lupogo contended that the said complaint is equally unfounded and misconceived because the alleged failure to notify the applicant of the date for delivery of the *ex parte* ruling had no bearing on the application for setting aside such a ruling but that it could be

decisive in an application for extension of time for setting aside or appealing against such *ex parte* ruling.

For the second respondent, Mr. Ahmed El-Maamry, learned counsel, associated himself with Mr. Lupogo's submissions and urged us to dismiss the application.

Rejoining, Mr. Peter contends that **Bulyanhulu Gold Mine Limited** (*supra*) is distinguishable from the instant matter, which raises factual and legal contentions of sufficient importance for this Court's attention.

We have examined the application and taken account of the contending submissions of the parties.

At the outset, it bears reaffirming that our settled jurisprudence instructs that leave to appeal is not granted automatically but only for deserving matters. In **British Broadcasting Corporation v. Eric Sikujua Ng'maryo**, Civil Application No. 138 of 2004 (unreported), it was held 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 or arguable appeal."

Earlier in **Harban Haji Moshi and Another v. Omari Hilal Seif and Another** [2001] TLR 409, the Court had emphasized, at page 414 and 415, thus:

"Leave is grantable where the proposed appeal stands reasonable chances of success or where, but not necessarily, the proceeding as a whole reveals 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 spectre of unmeriting matters and to enable it to give adequate attention to cases of true public importance."

Guided by the above settled position of the law, we have examined the proceedings of the High Court along with the impugned ruling in view of the competing submissions of the learned counsel for the parties. The crisp issue is whether the intended appeal deserves the attention of this Court.

As hinted earlier, the applicant seeks leave to appeal so as to challenge the decision of the High Court dated 14th February, 2020 in Miscellaneous Civil Application No. 506 of 2019 dismissing her quest for setting aside the *ex parte* ruling and order dated 23rd August, 2019 that the court had rendered against her in Miscellaneous Civil Application No. 671 of 2018. Based on the first and second proposed grounds of appeal, the applicant essentially assails the correctness of the dismissal in Miscellaneous Civil

Application No. 506 of 2019. We understood her to mean that the High Court erred in refusing to set aside its *ex parte* ruling and order because the said court was not justified in the first place to proceed *ex parte* against her in Miscellaneous Civil Application No. 671 of 2018 without any proof that she was properly served with the application. The other limb of her argument is that she never appeared or submitted herself to the jurisdiction of the court in the matter. Whether this argument is correct or not is beyond our consideration at this stage. What we are enjoined to do at present is to determine whether the proposed grounds of appeal *prima facie* raise issues of general importance or show an arguable appeal. Bearing in mind that the proposed appeal will be a first appeal, it could be predicated on issues of fact or law or both law and fact.

Given that the applicant's argument set out above is to the effect that the High Court's decision was grounded on an erroneous finding as regards service of the application on her as well as her appearance before that court in Miscellaneous Civil Application No. 671 of 2018, we are decidedly of the view that the said claim raises a factual contention deserving the attention of this Court. Truly, in the instant matter we are not traversing an uncharted territory. We trod the same path quite recently in **Benezeth Rweyemamu**

v. Cyprian Alexander Mlay and Two Others, Civil Application No. 247/01 of 2021 (unreported) where we granted leave on a similar factual contention.

Having so held, we find no need to determine the tenability of the third proposed ground of ground of appeal.

In conclusion, we find merit in the application. Accordingly, we grant leave to the applicant to appeal to this Court against the decision of the High Court at Dar es Salaam in Miscellaneous Civil Application No. 506 of 2019 in terms of section 5 (1) (c) of the Appellate Jurisdiction Act, Cap. 141, R.E. 2022. Costs shall be in the intended appeal.

It is so ordered.


DATED at DAR ES SALAAM this 12th day of September, 2022.

G. A. M. NDIKA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The Ruling delivered this 13th day of September, 2022 in the presence of Mr. Lusiu Peter, learned counsel for the Applicant and Mr. Gallus Lupogo and Mr. Samwel Mtabazi both learned State Attorneys, for the Respondent is hereby certified as a true copy of the original.


C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL