IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: LILA, J.A., NDIKA, J.A. And MWAMBEGELE, J.A.)

CIVIL APPLICATION NO. 154 OF 2016

JIREYS NESTORY MUTALEMWA ..... APPLICANT

VERSUS

NGORONGORO CONSERVATION AREA AUTHORITY .....RESPONDENT

(Application for Leave to Appeal from the decision of the High Court of Tanzania at Arusha)

(Massengi, J.)

Dated the 28th day of April 2016
In
Misc Civil Application No. 60 of 2016
.....

RULING OF THE COURT

11th Dec. 2020 & 11th February, 2021

LILA, J.A.:

We find it worthy stating at the outset that this matter has a protracted background. We shall demonstrate. This application is predicated under Rules 45(b), 46(1), 47 and 48(1) of the Tanzania Court of Appeal Rules, 2009 (the Rules) and is supported by an affidavit deposed by Jireys Nestory Mutalemwa, the applicant. The applicant intends to challenge the decision of the High Court (Moshi, J.) in Civil

Appeal No. 16 of 2015 dated 11/3/2016 which upheld the Resident Magistrates' Court's order dismissing Employment Cause No. 32 of 2003. He is seeking leave to appeal before this Court after he was refused the same by the High Court (Massengi, J.) on 28/4/2016. This is therefore a *second bite.*

Although we are not seized with the proceedings and judgment of the Resident Magistrates' Court and those of the High Court (by Chocha, J.) which featured quite often in the applicant's submission in support of the application as are not in the record, but from the judgment of the High Court (Moshi, J.) dated 11/3/2016 intended to be challenged in the event leave is granted, it seems clear and undisputed to us that the applicant was an employee of the respondent, although it does not come out clearly from the scanty information placed before us in which capacity. That notwithstanding, from the facts deposed by the applicant and the submission in support thereof which were substantially not disputed by the respondent both through the affidavit in reply and reply submission, it is clear that the applicant's services with the respondent were terminated way back on 26/5/2001. From what the applicant

termed as underpayment of his terminal benefits, he was compelled to approach the Regional Labour Officer who prepared a report (Labour Officer's Report) and filed the same in the Resident Magistrates' Court of Arusha. Employment Cause No. 32 of 2003 was thereby initiated by that court. This was the beginning of these proceedings before us. That cause was not well received, for, it was struck out by the Resident Magistrates' Court. The reason for that is well reflected in the learned judge's judgment date 11/3/2016. Page two of that decision states:-

> *"The present appeal is in respect of the ruling in employment Cause No. 32/2003 which was struck out by the trial court for failure to comply with mandatory requirement of Order VII rule (1)(f) and (i) of the Civil Procedure Code Cap. 33, R. E. 2002."*

Aggrieved, the applicant preferred an appeal to the High Court of Tanzania, Arusha Registry. That was Civil Appeal No. 16 of 2015. He was unsuccessful. The learned judge (Moshi, J.) agreed with the Resident Magistrates' Court and after citing the provisions of section 148 she was of the view that;

> *"Literal meaning of this provision, means that where the employment cause is brought as a civil case the matter could be brought by way of plaint ar by way of a report. It is upon the parties' choice. It is therefore my view that once a party has opted to file a plaint he is duty bound to follow the rules regarding plaints. Had he opted to let the labour officer refer the report, the same would have been presumed to be a plaint. Therefore since the appellant opted for a plaint then he was bound with rules which provide the drafting of plaints. Therefore the magistrate did not error by striking the plaint which had defects."*

Undaunted, the appellant wished to appeal against the High Court decision but realized that he had to seek leave first. He accordingly applied for leave in Misc. Civil application No. 60 of 2016 but was denied (Massengi, J.). He has now accessed the Court on a *second bite*.

Before proceeding any further, we think we should also comment that a reading of the applicant's notice of motion and its supporting affidavit, a substantial part of their contents suggests that they are intended to fault the decision of the High Court refusing leave to appeal.

We hasten to say that this is not the purpose of an application of this nature. The Court was once faced with a similar scenario in the case of **Bulyanhulu Gold Mine Limited and Two Others vs Petrollube (T) Limited and Another**, Civil Application No. 364/16 of 2017 (unreported) and stated that:-

> *"At the outset we wish to state, as conceded by counsel for the parties and in particular Mr. Vitalis, that the application before the High Court was for leave to appeal to the Court and not for the determination whether the proposed issues had merit or not. In that accord, we are not expected to consider whether the learned judge was justified to refuse to grant leave to the applicants. Instead, this being a second bite, as rightly argued by Mr. Vitalis, we are entitled to examine the very grounds raised before the High Court on our own perspective and come up with a finding we consider just. It follows therefore that, closely examined, the greater part of the applicant's submissions appear to have been aligned to fault the finding of the learned judge. Suffice it to say that we are not sitting on appeal against the learned judge's findings. And, in line*

with that, we shall consider the grounds for seeking for leave in isolation of the submissions seeming to challenge the finding of the learned High Court judge."

Just as a reminder to the applicant, in a *second bite*, in terms of Rule 47 of the Rules, the Court is invited to reconsider, on its own perspective, the same application that was placed before the High Court and is at liberty to come up with a just decision. That said, we shall not therefore consider the grounds, averments in the supporting affidavit and the submission thereof bent towards that end. We shall, instead, ignore them. Similarly, in applications of this nature, it is a well-established principle of law that the Court is not expected to determine the merits or otherwise of the substantive issues before the appeal itself is heard. We are reinforced towards that position by our decision in the case of **The Regional Manager-TANROADS Lindi vs DB Shapriya and Company Ltd**, Civil Application No. 29 of 2012 CA (unreported) in which we stated that:-

"It is now settled that a Court hearing an application should restrain from considering substantive issues that are to be dealt with by the

appellate Court. This is so in order to avoid making decisions on substantive issues before the appeal itself is heard..."

The duty of the Court at this stage is to confine itself to the determination of whether the proposed grounds raise an arguable issue(s) before the Court in the event leave is granted. It is for this reason the Court brushed away the requirement to show that the appeal stands better chances of success as a factor to be considered for the grant of leave to appeal. It is logical that holding so at this stage amounts to prejudging the merits of the appeal [see **Murtaza Mohamed Viran vs Mehboob Hassanali Versi**, Civil Application No. 168 of 2014 and **Victoria Real Estate Development Limited vs Tanzania Investiment Bank and Three Others**, Civil Application No. 225 of 2014 (both unreported)]. We are compelled to expound these principles not without a purpose. Closely examined, the submission by the respondent, in all fours, befits arguments at the time of hearing the appeal. They are counter arguments to the issues the applicant intends to be placed before the Court for determination and for which he is

seeking leave to appeal. They cannot, on the authorities, above be considered at this stage. We shall, accordingly, ignore them.

At the hearing of this application before us, the applicant appeared in person; unrepresented. Mr. Peter Musetti and Ms. Grace Lupondo, both learned State Attorneys, appeared for the respondent. Both parties lodged written submissions and they adopted them as part of their respective oral submissions.

In elaborating, the applicant concentrated on only two issues which he said were the basis of his prayer for leave to appeal to the Court. **First**, he argued that in view of the fact that Employment Cause No. 32 of 2003 was instituted in terms of section 133(1) of the Employment Ordinance Cap. 366 hence prior to the enactment of the new Labour Laws in 2004 (The Employment and Labour Relations Act, 2004 and the Labour Institutions Act, 2004), the issue to be considered by the Court is whether the learned Judge (Moshi, J.) was entitled to apply the new laws. In his view, since what was lodged in the Resident Magistrates' Court was a Labour Officer's Report, it was not bound by the rules of procedure as stipulated in the Civil Procedure Code Cap. 33 R.E. 2002 on how a plaint should be framed. **Second**, whether it was

proper for the Resident Magistrates' court of Arusha to, again, determine the issue whether it had jurisdiction to hear and determine the dispute after the same issue was heard and determined by the High court (Chocha, J.) hence *res judicata.* He stressed that these are crucial issues to be considered by the Court in the event leave is granted and he urged the Court to exercise its discretion and grant leave to the applicant.

For the respondent, Ms. Lupondo simply adopted the averments in the reply affidavit and the written submission in reply as part of their submission without more and urged that the application be dismissed.

We are alive to the fact that the requirement to seek and be granted leave to appeal to the Court before lodging an appeal against a decree, order, judgment decision or finding of the High Court other than those outlined under section 5(a) and (b) of the Appellate Jurisdiction Act, Cap. 141 R. E. 2002 (the AJA) is entrenched in section 5(1) (c) of the AJA. We acknowledge that the law does not expressly state the factors to be considered for the grant of leave to appeal to the Court. However, it is now accepted that the conditions were, lucidly, expounded by the Court in the case of **British Broadcasting Corporation vs Eric Sikujua Ng'maryo,** Civil Application No. 138 of 2004 (unreported). In

that case, as cited in the case of **Rutagatina C. L. vs The Advocates Committee and Another**, Civil Application No. 98 of 2010 (unreported), the Court stated that;

> *"Needless to say, leave to appeal is not automatic. It is within the discretion of the court to grant or refuse leave. The discretion must, however judiciously exercised and on the materials before the court. 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 (see: **Buckle v Holmes** (1926) ALL E. R. 90 at page 91). However, where the grounds of appeal are frivolous, vexatious or useless or hypothetical, no leave will be granted."*

On the foregoing authority, much as the grant of leave is discretionary, yet it is not automatic. The court adjudicating on such application is not left free to do so. It can grant leave to appeal only where the grounds of the intended appeal raise arguable issues for the attention of the Court. In other words, the grounds raised should merit a serious judicial consideration by the Court. This is intended to spare the

Court from dealing and wasting its precious time on unmerited matters (See the Court's decisions in the case of **(i) Harban Haji Mosi (ii) shauri Haji Mosi vs (i) Omar Hilal Seif (ii) Seif Omar,** Civil Reference No. 19 of 1997 cited in the case of **British Broadcasting Corporation vs Eric Sikujua Ng'maryo** (supra).

In the instant application, the central issue for our determination is whether the applicant has raised grounds passing the test set out in the above decisions of the Court for the grant of leave to appeal.

After ignoring the averments in the notice of motion, the supporting affidavit and the submission in support of the application aligned to fault the High Court judge who refused to grant leave to appeal for reasons stated above, our scrutiny of such documents leaves the applicant with only the following grounds or issues worth being considered in the determination of this application as are reflected in paragraphs 5(b), (c), (d) and (i) of the supporting affidavit which state that:-

> *"5. **THAT** had the Hon. Judge F. H. Massengi considered and determined the said Affidavit she*

would have drawn to the following findings of the court that:-

a) ***THAT*** *ssues in dispute in a pending appeal of jurisdiction, res-judicata and functus officio were appealable to the Court of Appeal of Tanzania.*

b) ***THAT*** *issue in dispute in a pending appeal of inapplicable laws of* ***CIVIL PROCEDURE CODE [Cap 33.R.E (2002) ORDER 1 Rules 1 (f) & 1 (i)*** *that were wrongfully deployed to determine the* ***Appeal No. 16/2015*** *is appealable before the Court of Appeal of Tanzania.*

c) ***THAT*** *issues in dispute in a pending appeal of inapplicable law of* ***CAP 366 [R.E (2002)]*** *that was deployed to determine the* ***appeal No. 16/2015*** *was in serious contravention of* ***GN. 312/2004*** *that came into force on* ***01st September, 2004, and was illegally used to determine EMPLOYMENT CAUSE NO. 32/2003 whose cause of action arose on 26th May, 2001 following summary dismissal decision and was initiated by***

Labour Officer's report on 21st November, 2002.

d) ***THAT*** *issue in dispute in a pending appeal of gross misconception of who initiated the* ***EMPLOYMENT CAUSE No. 32/2003*** *between* ***Labour Officer's report and a fictitious plaint*** *and amended plaint is appealable before the Court of Appeal of Tanzania.*

i) ***THAT*** *the awarding of costs in the* ***Appeal No. 16/2015*** *was in serious contravention of* ***section 143 of the CAP. 366*** *a fertile ground to be considered and determined by the Court of Appeal of Tanzania."*

Admittedly, the averments in the above quoted paragraphs may appear not that much clear, but the applicant who is understandably not learned in legal matters though he appeared conversant and fluent in English language is not to blame. Interest of justice demands courts to seriously indulge themselves on the materials before them with a view of understanding the essence of the dispute and issues involved in a matter before them. The rationale here is to avoid allowing language barrier,

one's inability to properly express himself and or ignorance of the legal language to impede justice. Acting in that spirit, issues which may be drawn from the above quoted paragraphs are that:-

(a) The Civil Procedure Code, Cap. 33 R.E. 2002 was wrongly invoked by the learned judge in determining the appeal (Civil Appeal No. 16 of 2015).

(b) That the cause of action in Employment Cause No. 32 of 2003 arose on 26/5/2001 and instituted in court by a Labour Officer's Report on 21/11/2002 hence GN. No 312 of 2004 was inapplicable instead of the Employment Ordinance Cap. 366 R. E. 2002.

(c) There was a misconception on the part of the learned judge as to how the Employment Cause No 32 of 2015 was initiated between the Labour Officer's Report and a plaint.

(d) The learned judge awarded costs in Civil Appeal No. 16 of 2015 in contravention of section 143 of the Employment Ordinance, Cap. 366 R. E. 2002.

(e) The issue of jurisdiction of the Resident Magistrates' Court to entertain Employment Cause No. 32 of 2003 was *res-judicata*

and that such court was *functus officio* to consider that issue again.

In applications of this nature it matters nothing whether the complaints are genuine or not. As alluded to above, that is a matter to be determined by the Court in the appeal. That stance, just as a matter of insistence, was set out in the case of **East Africa Development Bank vs Blueline Enterprises Limited**, Civil Application No. 30 of 2007 (unreported). In that case East Africa Development Bank was refused leave to appeal by the High Court hence halting its efforts to appeal against the decision of the High Court which enhanced the bill of costs from Tsh. 114,720,120.00 to Tsh. 155,503,493.00. Worse still, at the time the application was lodged, the respondent (Blueline Enterprises Limited) had already realized the amount complained of by was of a garnishee order. On a *second bite,* the Court stated that:-

> *"In a nutshell, the applicant is complaining that the learned judge excessively enhanced the bill of costs by over 40 Million shillings. [Tsh. 155,503,493.00 less Tsh. 114,720,120.00 = 40,783,376.00].* ***The applicant may or may not have a genuine complaint despite the***

> ***fact that execution has already been conducted***. *The exact position and propriety of the enhancement of the decretal sum from Tsh. 114,720,120.00 to Tsh. 155,503,493.00 can only be tested if leave to appeal is granted to the applicant. Under the circumstances, I find merit in this application. I accordingly grant leave to the applicant to challenge the enhancement of the bill of costs in the intended appeal."*
> (Emphasis added)

Closely examined and by analogy, we find the complaints raised by the applicant raise issues of importance and important points of law calling for judicial consideration by the Court. They have therefore passed the test set in the case of **British Broadcasting Corporation vs Eric Sikujua Ng'maryo** (supra). They are matters of law worth being investigated by the Court. As earlier on stated the respondent's arguments on the substance and or propriety or otherwise of those issues, are matters to be considered and adjudicated by the Court in the appeal. They have to await for that momentous opportunity.

We, therefore, grant leave to the applicant to appeal to the Court so that the merits or otherwise of the aforesaid issues shall be considered. Costs to follow the event in the appeal.

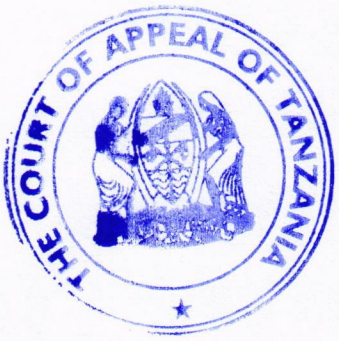
DATED at **DAR ES SALAAM** this 4th day of February, 2021.

S. A. LILA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

The ruling delivered on this 11th day February, 2021, in the presence of applicant in person - linked via video conference at Arusha and Ms. Grace Lupondo, State Attorney for the respondent, is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL