

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(MOSHI DISTRICT REGISTRY)

AT MOSHI

MISC. CIVIL APPLICATION NO. 1 OF 2020

MARY SIRIL CHUWA (Administratrix
of the Estate of the Late Siril Tilito (Chuwa) 1ST APPLICANT
BAZIL RAUYA 2ND APPLICANT
PANTALEO WAWAYA 3RD APPLICANT
PATRISI PANTALEO 4TH APPLICANT
HIPOLITI P. MUSHI 5TH APPLICANT
EVAREST T. MUSHI 6TH APPLICANT
VICENT S. CHUWA 7TH APPLICANT
RONARD RAUYA 8TH APPLICANT

VERSUS

URU SHIMBWE RURAL PRIMARY
CO-OPERATIVE SOCIETY RESPONDENT

RULING

MUTUNGI .J.

This application has been filed seeking for grant of leave to appeal to the Court of Appeal under **section 5 (1) (c) of the Appellate Jurisdiction Act, Cap.141 R.E. 2002**. The applicants

further pray for costs to follow event as well as any other order this Court may deem fit and just to grant.

The application is supported by an affidavit dully sworn of Mr. Jailos Mpoki Josephat learned advocate representing the applicants. The respondent on the hand contested the application by filing a counter-affidavit. In prosecuting the application the applicants enjoy the legal representation of Mr. Edward Peter Chuwa learned Advocate, whereas the respondent is represented by Mr. A. Sindato learned Advocate.

On 30th June, 2020 when the matter came up for hearing the parties concurred with the court's opinion that, the application be argued by way of written submissions due to the Covid-19 pandemic. The filing schedule was fixed as follows: the applicants to file their written submission by or on 14th July, 2020, reply submission by or on 28th July, 2020, and rejoinder if any by or on 4th August, 2020. Ruling was reserved for 13th August, 2020.

In support of the application Mr. Edward Peter Chuwa, Advocate contended that, the applicants were aggrieved by the decision and drawn order of this Court in the

Consolidated Taxation Reference Nos. 2 and 3 for not granting costs as it appeared in their bill of costs particularly the Advocate's fee.

Expounding on the claim, he submitted that the decision of the Honorable Judge is in agreement with that of the Taxing Master save for the amount of cost awarded which is a total of Tshs. 5,000,000/= instead of Tshs. 40,000,000/=. That both the Taxing Master and the Honorable Judge arrived at their decisions with the assumption that, there was no Advocate/client relationship between the applicants and Advocate Edward Chuwa. The basis was that, there were no receipts to evidence payment of instruction fees.

The applicants' learned Counsel went on submitting that, the point of whether or not the applicants engaged an advocate was never raised by the Counsel for the respondent. The only dispute was that the instruction fee was excessive and not based on the scale. The Deputy Registrar therefore went on to decide negatively on the point not raised without affording the parties a right to be heard. Very unfortunate, the Trial Judge also went along the same line and fell in the same trap. Substantiating his argument the

Learned Advocate cited the cases of **Mbeya-Rukwa Auto Parts and Transport LTD v. Jestina George Mwakyoma [2003] T.L.R 251**, and **Margwe Erro and two others v. Moshi Bahalulu, Civil Appeal No. 111 of 2014, Court of Appeal of Tanzania at Arusha (Unreported)**, where the Court of Appeal emphasized the right to be heard as one of the fundamental right by virtue of **Article 13 (6) (a) of the Constitution**.

Now that the Trial Judge in the References confirmed the findings of the Taxing Master, the same constitutes the reason for which leave is sought, so that this matter can be determined by the Court of Appeal. Cementing on this point, Mr. Edward Chuwa invited the court to the case of **Harban Haji Mosi and another v. Omari Hilal Seif and another, civil Reference No. 19 of 1997** citing with approval the case of **British Broad casting Corporation v. Erick Sikujua Ng'maryo, Civil Application No. 138 of 2004, Court of Appeal of Tanzania at Dar es Salaam**, where it was held that: -

"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..."

Be as it may, the learned counsel contended further that, the production of EFD receipts as point of payment of instruction fees is still unsettled due to the existence of conflicting decisions of the court and this is the area which needs the consideration and ultimately the decision of the Court of Appeal.

Reacting to the Applicants Counsel's submission, Mr. Sindato Learned Advocate for the respondent stated that, the whole submission presented by the applicants' Advocate is to be rejected since the affidavit does not unveil the criteria (such as chances of success) to warrant this Court to grant leave to appeal to the Court of Appeal. Supporting his argument, the learned Advocate referred the court to the cases of **Rajabu Kidimwa Ng'eni & another v. Iddi Adam [1991] TLR 38,** and **Samson Kishosha Bagra v. Charles Kingongo Gabba [1990] TLR 133.**

Apart from that, it was Mr. Sindato's argument that, the affidavit is not accompanied by a copy of the decision desired to be appealed against, failure of which makes the same fatally defective. Substantiating this he cited the cases of **Cosmas Construction Co. Ltd v. Arrow Garments Ltd [1992]**

TLR 252, and Bruno Wenceslaus Nyalifa v. The Permanent Secretary Ministry of Affairs, Civil Appeal No. 82 of 2017 at Arusha (Unreported).

Furthermore, the learned Counsel for the Respondent also pointed out that, this application being filed in court on 8/1/2020, it is unknown as to when the Registrar of the High Court supplied the applicants with the copies of the impugned decision. Thus the same contravenes **Rule 45(b) of the Tanzania Court of Appeal Rules 2009** as amended by **Rules 6 and 7 of the Court of Appeal (amendment) Rules, 2017 GN No. 367, and the Court of Appeal (amendment) Rules, GN No. 344 of 2020.**

He also insisted that, the applicants have not demonstrated sufficient reasons as to how the Court of Appeal of Tanzania will usurp powers of the High Court bestowed to it under **Order 46 and 47 of the Advocates Remuneration Order, 2015 GN 264** in order to confer rights to applicants. The decision of the High Court was legally justified ordering through the Bill of Costs No. 6/2019 and awarding Tshs. 5,000,000/= as instruction fee for each and every applicant.

The learned Advocate for the respondent also submitted on the points of law allegedly violated and the intended grounds of appeal. He contended order 48 of the advocate's remuneration, order (Supra) was vividly offended by the applicants by bringing up excessive claims without any supporting evidence. To be precise the learned advocate submitted, the High Court Judge had correctly interpreted the law and applied his intellectual mind on the matter.

In rejoinder it was Mr. Chuwa's contention that, what the respondent's advocate has done is to raise objections on points of law in his submission which is unprocedural. All in all he proceeded to make comments on the submission filed as hereunder.

Substantiating his position, he argued that **S. 45 (b) of the Court of Appeal Rules** is not applicable in the High Court. Therefore the respondent's Advocate misconceived the said provision which clearly refers to applications made before the Court of Appeal, instead the High Court is guided by Rule 43 (3) of the Court Rules. In support thereof, he cited the case of **Alex Maganga v. Director Msimbazi Center, (2004) T.LR**

213. In that regard a copy of judgment need not be attached.

Concerning sufficient grounds to be addressed by the Court of Appeal, Mr. Chuwa contended that, the Counsel for the Respondent is confusing between the application for extension of time where the applicant is required to demonstrate sufficient grounds for the delay, with an application for leave where the applicant is only required to show that there are important points of law or facts to be addressed by the higher court. That since the applicant's grievance is on the denial of their constitutional right when the court suo mottu raised the issue of proof of existence of the contract of service between the applicants and their counsel without requiring the counsel to respond, this in itself is an important point of law. It is thus necessary that, the court should grant leave for the interest of justice.

Regarding the EFD receipts as a mandatory requirement to prove the payment of instruction fees in bill of costs, Advocate Chuwa alleged that, there are conflicting decisions and therefore it requires the intervention of the Court of Appeal to give guidance thereto. Basing on the

reasons stated, it was the applicants' counsel submission that, the applicants' affidavit and submissions thereto have demonstrated that, there are important issues to be addressed by the Court of Appeal and thus be granted leave with costs.

I have carefully examined this application and in the upshot agree with the Learned Counsel for the Applicants that, leave to appeal to the Supreme Court of this land is not automatic. It is discretionary however, the same has to be exercised judiciously and on the merits.

It is also a well-known position of the law that, the application for leave can be granted where the grounds of appeal are likely to raise issues of general importance or a novel point of law or where the grounds show a prima facie case worth the consideration of the Court of Appeal. See the case of **Sango Bay Estates Ltd & Others v Dresdner Bank AG [1971] EA at p. 17.**

One purpose of having such a procedure in place, is to spare the Apex Court the specter of unmeriting matters and to enable it to give adequate attention to cases of public importance. What then are these novel points of law as

propounded by the applicants. Having scrolled through the Corresponding Affidavit appended to the chamber summons, the same are found on paragraph 9 (i) and (ii). For the sake of reference let me reproduce the same: -

- (1) That, the decision of the High Court is problematic as the Honourable Judge, wrongly interpreted the law and arrived at a wrong and unjust decision.
- (2) The Honourable Judge erred in law by upholding the finding of the taxing matter which held that, the counsel for the applicants had failed to prove the existence of advocate/client contract without affording the applicants right to be heard on the point of instruction contract.

Tasking myself, I find that the issues raised above can in no way be labelled as useless. There is obviously a need having gone through the applicants' submission for the court of appeal to address the rival contentions in order to have an authoritative interpretation over the raised legal problems. The respondent's counsel has faltered the applicants' failure to attach a copy of decision intended to be challenged to the application. I find the same has not caused any injustice,

since the court has the record in its possession even at the time of composing this ruling. I have carefully gone through the cited case of **Bruno Wenceslaus Nyalifa vs. The Permanent Secretary Ministry of Home Affairs and another (Supra)** and find the same is distinguishable from the application at hand. What was at issue was the documents which were annexed to the appellant's affidavit which were disregarded on account that, the same were not tendered in court at the time of the hearing whereas in the instant matter the question was the requirement of attaching the copy of the impugned decision to the application. Hence the argument on this point by the respondent's counsel does not hold water.

Conclusively, I proceed to grant leave to the applicants to appeal to the Court of Appeal.




B. R. MUTUNGI

JUDGE

13/8/2020

Ruling read this day of 13/8/2020 in presence of 5th, 7th and 8th applicants, Mr. Alfred Sindato (Advocate) and Deodat Temba (Board Chairman) for the respondent.


B. R. MUTUNGI
JUDGE
13/8/2020

RIGHT OF APPEAL EXPLAINED.


B. R. MUTUNGI
JUDGE
13/8/2020