

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

C AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 257 OF 2023

**(Arising from the High Court decision in Misc. civil Application No 407 of
2022 dated 28th April 2023)**

K-FINANCE LIMITED APPLICANT

VERSUS

LIPINA MICHAEL MREMA..... RESPONDENT

RULING

13th July & 4th August 2023

MKWIZU, J

This application for leave to appeal to the court of appeal is brought under the provision of section 5(1) (c) of the Appellate Jurisdiction Act No. 15 of 1979 Cap 141 R: E 2019. The leave sought is to appeal against the decision of Civil Appeal No 111 of 2019 originating from the District Court of Temeke in Civil Case No 14 of 2017. The application was supported by an affidavit of the applicant's counsel Ms. Judith Minzi a Principal officer of the Applicant.

When the matter came for hearing on 13/7/2023, Ms Herieth James learned counsel made an appearance for the applicant and Benson Kuboja also advocate was in court for the respondent.

The applicant's counsel submissions in support of the applicant were brief. She said the decision in Misc. Civil application No. 407 of 2022 was given in disregarding of the illegality in the impugned decision. She supported

her submissions by the decision in **Harban Haji Mosi And Another V Omari Billal Seif and Another** (2001) TLR 409

Mr Kuboja on the other hand opposed the application. He said, before the court was an application for enlargement of time to file restoration of an appeal dismissed by Mruma J. And that the applicant's application is premised on a new issue not raised or considered by this Court (Kisanya J) in Misc. Application No. 407 of 2022. The court's attention was drawn to the affidavit in support of application No. 407 of 2022 and its decision thereof. He contended that leave is usually granted where there is a point of law that calls for the Court's intervention. Citing the decisions in **Rutagatina CL V Advocates Committee and another**, Civil Application No 98 of 2010 (CA- Unreported) and MS **Airport Properties Limited V The registrar of Titles and another**, Civil Application No 389/17/2020. Mr. Kuboja said the point raised being a new issue, cannot qualify moving the court for the leave sought. He prayed for the dismissal of the application with costs.

I have perceptively considered the application. As stated by the parties, to grant an application for leave to appeal, there must be exhibited arguable grounds calling for the attention of the Court of Appeal. This is the position in **Rutagatina C.L Vs the Advocate Committee & Another**, (supra) that:

"An application for leave is usually granted if there is a good reason, normally a point of law or on a point of public importance, that calls for this intervention.

So, my duty in this application is to see to it that there are arguable issues or compelling reasons, or disturbing features, points of law, or points of public importance requiring the court of appeal intervention and not otherwise.

I have traversed through the entire records and the impugned decision. It is evident that this application emanates from the order dismissing an appeal for want of prosecution. It is from that order that the applicant filed an application for enlargement of time to set aside the dismissal order that this court (Hon. Kisanya J) declined for lacking merit. The applicant feels that this court was wrong in declining her application. In paragraph 18 of the supporting affidavit, the applicant is deposing that:

"The High Court judge erred in law by failure to deliver the judgment contrary to the court record by requiring the applicant to account for the delay in the application for extension of time for setting aside dismissal order in the appeal against the illegal judgment which has been issued by the trial court without framing issues"

Respondent's contention is that this is a new issue not raised in the application for extension of time nor decided upon by Hon. Kisanya J, and therefore is not a fit ground for granting leave.

The law is settled that where illegality is raised as a ground for seeking extension of time, such ground amounts to sufficient cause. The Court in **Ngao Godwin Losero v. Julius Mwarabu**, Civil Application No. 10 of 2015 (unreported) observed as follows when the issue of illegality was raised:-



"In our view, when the point at issue is one alleging illegality of the decision being challenged, the Court has a duty, even if it means extending the time for the purpose, to ascertain the point and if the alleged illegality be established, to take appropriate measures to put the matter and the record straight."

However, to have it considered, the point ought to have been first brought before the court by the applicant. The main point here is whether the issue of illegality was raised for the court's determination in application No. 407 of 2022. I have perused the records. The applicant's application for an extension of time was premised on the advocate's negligence, for abandoning the case without her knowledge. This ground was deposed in paragraphs 3,4 and 5 of the supporting affidavits in application no 407 of 2022.

The issue of illegality was not at issue and never formed part of the applicant's affidavit or even the court's decision. The Court of Appeal cannot, therefore, be called upon to fault the High Court for an issue that was never brought before it for a decision. I am thus convinced by the respondent's counsel submissions that this issue is not tenable. The application is thus dismissed with costs.

Order accordingly.

Dated at Dare es salaam, this 4th Day of August 2023



E. Y Mkwizu
Judge
4/8/2023