

**IN THE COURT OF APPEAL OF TANZANIA**

**AT ARUSHA**

**(CORAM: MUSSA, J.A., MWARIJA, J.A., And MWANGESI, J.A.)**

**CIVIL APPLICATION NO 27/O2 OF 2016**

**KUMBWANDUMI NDEMFOO NDOSSI ----- APPLICANT**

**VERSUS**

**MTEI BUS SERVICE LIMITED ----- RESPONDENT**

**(Application from the ruling of the High Court of  
Tanzania at Arusha District Registry)**

**(Moshi, J.)**

**Dated the 17<sup>th</sup> day of June, 2016**

**In**

**Miscellaneous Civil Application No. 69 of 2016**

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**RULING OF THE COURT**

**7<sup>th</sup> & 12<sup>th</sup> March, 2018**

**MWANGESI, J.A.:**

The application at hand is by way of notice of motion which has been taken under the provisions of Rules 45 (b) and 49 (1) (3) of the Court of Appeal Rules, 2009 (**the Rules**), section 5 (1) (c) of the Appellate Jurisdiction Act, Cap 141 R.E 2002 (**AJA**) whereby, the applicant is moving the Court to grant him leave to appeal to the Court of Appeal to challenge the judgment and decree of the High Court in Civil Appeal No. 1 of 2016

that was handed down on the 17<sup>th</sup> June, 2016. It is a second bite after the first application at the High Court, had been refused. It is supported by an affidavit that was sworn by one Beatrice Joseph an advocate.

On the date when the application was called on for hearing before us, the applicant was represented by Mr. John Materu learned counsel, whereas the respondent had the services of Mr. Emanuel Kinabo also learned counsel. As Mr. Materu had failed to file written submission in compliance with the requirement under Rule 106 (1) of **the Rules**, he sought leave, which was granted by the Court, to amplify the grounds of application orally.

In his argument wherein, he adopted the affidavit that was sworn in support of the motion, the learned counsel argued that, the applicant was the respondent in Civil Appeal No. 1 of 2016, which was before the High Court of Tanzania at Arusha District Registry. The said appeal was decided in his disfavor and hence, the desire to challenge it in this Court. He argued that, his first attempt was made to the High Court of Tanzania at Arusha, where his application was dismissed on the reason that, no convincing grounds had been advanced before the Court to the effect that, there was any issue worth being determined by the Court of Appeal.

Mr. Materu challenged the decision of the High Court contending that, it was unfounded. He submitted that the judgment of the High Court intended to be impugned was founded on the question of vicarious liability an issue which was initiated by the learned Judge in her judgment and thereby, denying the parties the right to be heard on such an issue. He therefore, implored the Court to grant the sought leave so that, such an issue can be addressed by this Court. In support to his averment, he referred the Court to the decisions in **National Bank of Commerce Vs Star Transport Company** [1997] TLR 293 and **M/S Tanzania Wildlife Corporation Vs Ms. Frida Mwijage**, Civil Application No. 32 of 2014 (unreported).

In response to the submission by his learned friend, Mr. Kinabo argued that, the basis of the application by the applicant being refused by the High Court was from the fact that, in arguing it, Mr. Materu did raise the issue of vicarious liability, which was not contained neither in his memorandum of appeal nor in the affidavit in support of the application for leave. Furthermore, such an issue was never discussed in the High Court in the course of arguing the appeal. Under the circumstances, there was no way in which the learned Judge could entertain an issue not contained in

the pleadings. In fortification to his argument, he referred us to the decision in the case of **SDA Church Keisangura Vs Nyaikabwe Masare**, Land Appeal No. 83 of 2011 (unreported). The learned counsel concluded his submission by requesting us to dismiss the application with costs.

At issue for our determination in light of what was submitted by the learned counsel from either side above, is whether or not this application for leave is founded. The basis under which an application for leave to appeal to the Court of Appeal can be granted, was given by the Court in the case of **Nurbhai N. Raittansi Vs Ministry of Water Construction Energy Land and Environment and Another** [2005] TLR 220, when it stated that:

*"In determining an application for leave to appeal to the Court of Appeal, the Court must ascertain if there is a legal point worth of being considered by the Court of Appeal."*

In the instant application, Mr. Materu argued before us that, the basis of their intended appeal to this Court is to challenge the decision of the High Court, which did determine the appeal that was before it, basing

on the question of vicarious liability, which was initiated by itself and the parties were never given a chance of arguing on it. Our reading of the judgment in Civil Appeal No. 1 of 2016 that was handed down on the 30<sup>th</sup> March, 2016, convinced us to concede to the argument by Mr. Materu that, the question of vicarious liability did indeed form its basis as reflected at page 5 of the judgment where it reads:

*"In the matter at hand the appellant was not the person who committed the act which lead (sic) to the respondent to suffer damages. But it was another person. Then there must be a legal aspect pleaded in the pleadings and evidence which brings in liability against the appellant. That aspect is the vicarious liability whereby the respondent has to prove all ingredients required so appellant to be held, as demonstrated in the case of **Bamprass Star Service Station Limited vs Mrs. Fatuma Mwale** [2000] TLR 392.*

*The same with the matter in hand. The principles of vicarious liability were not applied and proved as the appellant was a master who in law will be held liable for servant's negligence which occurs (sic) in cause of employment, and is not pleaded nor prove (sic) in this case then appellant cannot be held*

*liable. For these reasons I find proceeding before the trial court to be nullity and quash and allow the appeal on different reasons from those of the appellant."*

Now the point for our deliberation and determination in line with the above quoted decision, is whether or not, there is any legal point or a legal point mixed with facts that calls for determination by the Court of Appeal in the intended appeal by the appellant.

The fact that it was conceded by both learned counsel that, the issue of vicarious liability did not feature in the appeal which they argued before the High Court, corroborates the contention by the learned counsel for the applicant that, the decision of the learned Judge was founded on an issue of which, they never happened to be given a chance to submit on it. In terms of the holding in **National Bank of Commerce Vs Star Company Limited** (supra), the appellant was condemned unheard in the appeal before the High Court, which is a legal issue fit for determination by the Court of Appeal in line with **Nurbhai N. Raitans Vs Ministry of Water Construction Energy and Environment and Another** (supra).

See also: **Mariam Mula Letifhussein and Two Others Vs Mohamed Hatibu Mbwana**, Civil Application No. 5 of 2014 (unreported).

In the event, we hold that the application by the applicant for leave to appeal to the Court of Appeal is meritorious. We hereby grant it with costs.

Order accordingly.

**DATED at ARUSHA** this 12<sup>th</sup> day of March, 2018.


K. M. MUSSA  
**JUSTICE OF APPEAL**

A. G. MWARIJA  
**JUSTICE OF APPEAL**

S. S. MWANGESI  
**JUSTICE OF APPEAL**

I certify that this is a true copy of the original.



  
E.Y. MKWIZU  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**