IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: JUMA, C.J., GALEBA, J.A. And KIHWELO, J.A.)

CIVIL APPLICATION NO. 503/06 OF 2021

SAFARI MWAZEMBE.....APPLICANT

VERSUS

JUMA FUNDISHA .....RESPONDENT

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

(Mongella, J.)

dated the 1st day of October, 2020

in

Civil Appeal No. 14 OF 2020

.....

RULING OF THE COURT

23rd & ... February, 2022

KIHWELO, J.A.:

The applicant is seeking to invoke the jurisdiction of this Court under Rule 45 (b) of the Tanzania Court of Appeal Rules, 2009 (the Rules) intending to challenge the decision of the High Court (Mongella, J.) in Civil Appeal No. 14 of 2020 dated 01.10.2020 which upheld the decision of the District Court of Mbozi at Vwawa which dismissed the defamation case lodged by the appellant in Civil Case No. 01 of 2019. The applicant is seeking leave to appeal before this Court following his unsuccessful attempt to seek leave before the

High Court (Karayemaha, J.) in Miscellaneous Civil Application No. 53 of 2021 which was dismissed on 13.08.2021. Hence this is a *second bite*.

We find imperative to briefly give a historical account of this matter which has a protracted background. The applicant and the respondent had a historical dispute dating way back in 2018 when the respondent instituted criminal charges against the applicant in Criminal Case No. 40 of 2018 at Totowe Primary Court for malicious damage to property in which the respondent claimed that the applicant killed the respondent's calf which was found dead in the applicant's farm where several cows belonging to the respondent had gone for grazing. The applicant was convicted of the offence charged by the Primary Court but later he was acquitted on appeal to the District Court of Mbozi in Criminal Appeal No. 28 of 2018. Subsequently, the applicant lodged a defamation case against the respondent claiming among other things Tanzania Shillings Forty Million (Tshs. 40,000,000/=) only. He lost the case at the District Court. Nonetheless, like the fate of his case at the District Court, his appeal to the High Court was dismissed. Undeterred, he lodged the application for leave before the High Court which was not successful as hinted above.

The application is supported by an affidavit of Safari Mwazembe, the applicant, containing 10 paragraphs. The applicant also lodged written

submissions in support of the application. In order to appreciate the essence of the application, we find it desirable to reproduce paragraphs 4, 5, 6, 7, 8 and 9 of the applicant's affidavit. Its reads:

> *"4. That in 2019 the Applicant I filed Civil Case No. 01 of 2019 before the District Court of Mbozi at Vwawa claiming for defamation and malicious prosecution which was dismissed on 7th day of August, 2019.*
>
> *5. That after he was aggrieved with the decision of the District Court of Mbozi, the Applicant filed an appeal to the High Court which was also dismissed on 1st day of October, 2020.*
>
> *6. That I am dissatisfied with the decision of the High Court of Tanzania (Hon. L.M. Mongella, J.) dated 1st October, 2020 in Civil Appeal No. 14 of 2020, lodged a notice of appeal to the Court of Appeal of Tanzania.*
>
> *7. That I filed an application for leave to the High Court of Tanzania in Miscellaneous Application No. 53 of 2021 which was dismissed on 13th day of August, 2021. A copy of the Ruling is annexed as Annexure "SM-2" to form part of this affidavit.*
>
> *8. That the proceedings, judgment and decree in Civil Case No. 01 of 2019 and Civil Appeal No. 14 of 2020 were coupled with illegalities in that;*
>
> *(a) The first appellate court erred in law to hold that the Applicant was not denied right to fair trial.*

(b) The first appellate court erred in law to hold that failure to raise issues is curable

(c) The Judge erred in law by misconceiving the issue of standard of proof.

9. That pursuant to what is stated in paragraphs 8 (a), (b) and (c) above are points or law to be determined in the Court of Appeal."

The respondent on his part, filed an affidavit in reply affirmed by Juma Fundisha, the respondent herein. Along with the affidavit in reply, he lodged written submissions in reply in terms of Rule 106 (8) of the Rules. We have deliberately reproduced the above paragraphs of the applicant's affidavit for reasons that we shall explain later.

Before us, both the applicant and the respondent appeared in person without legal representation and essentially, they implored us to adopt their affidavits and the respective written submissions without more.

Arguing in supporting of the application the applicant complaints were premised on what he alleged to be illegalities committed by the trial court and which the first appellate court did not consider. Essentially, his complaints focused on the denial to the right to fair trial, failure to frame issues which the first appellate court found not to be fatal and finally, the issue of standard of proof. However, he dropped two complains and remained with one in relation

to failure by the first appellate court to find that the applicant was denied his right to fair trial. Admittedly, the applicant argued that this complaint was not raised before the High Court but curiously contended that this was a point of law which may be raised at any time as it touched upon jurisdiction issues. For that he referred us to the decision of this Court in **Tanzania- China Friendship Textile Co. Ltd v. Our Lady of Usambara Sisters** (2006) TLR 70 which without mincing words we are decidedly of the view that it is not relevant here.

Illustrating further, he argued that, the applicant was not afforded the opportunity to re-examine the witness during the trial and that offended the principles of fair trial. To bolster his submissions, he cited to us a chain of authorities of this Court in **Wegesa Joseph M. Nyamaisa v. Chacha Muhogo**, Civil Appeal No. 161 of 2016, **Joseph Balami @ Panga v. Republic**, Criminal Appeal No. 237 of 2016, **Godfrey M. Makori v. His Excellence, The President of the United Republic of Tanzania and Another**, Civil Appeal No. 67 of 2008, **Dishon John Mtaita v. DPP**, Criminal Appeal No. 132 of 2004 (all unreported) and **Mbeya-Rukwa Autoparts and Transport Ltd v. Jestina George Mwakyoma** [2003] TLR 251. He rounded up by praying that the application be granted with costs.

In reply the respondent was very brief and focused. He prefaced his submission by traversing principles governing this Court's discretionary powers in granting leave to appeal to the Court as they were clearly articulated in the celebrated decision of **Rutagatina C.L. v. The Advocates Committee and Another**, Civil Application No. 98 of 2010 (unreported) as was also cited in **Jireys Nestory Mutalemwa v. Ngorongoro Conservation Area Authority**, Civil Application No. 154 of 2016 (unreported) and contended that the intended appeal does not raise any ground which merit serious judicial consideration by the Court.

Elaborating further, he argued that, the intended appeal is useless and hypothetical in that the intended ground of appeal was neither raised nor determined by the first appellate court and that it will be raised at the Court for the first time if leave is so granted and he further argued that, even if leave is granted , the intended ground of appeal will serve no meaningful purpose in law as the trial court record is very clear to the extent that the applicant was accorded the right to re-examine his witness. In his considered opinion granting the applicant the sought leave will be meaningless and a waste of the precious time of the Court dealing with something which is not meritorious in the first place. He further contended that the alleged illegality is not apparent on the face of the record. To facilitate further the appreciation

of his proposition put forward he cited the case of **Mussa S. Msangi and Another v. Anna Peter Mkomea**, Civil Application No. 188/17 of 2019 (unreported) in which the Court underscored that any allegation of illegality must be apparent on the face of record and not to be discovered by a long-drawn argument or process. He finally, prayed that the application be dismissed with costs.

We have dispassionately considered the submissions of the parties in support and opposition to the application along with the authorities cited and the main issue which we are invited to address is whether or not the instant application for leave is meritorious. In so doing, it is imperative to stress that, in an application for second bite, the Court is invited to reconsider, on its own perspective the same application that was placed before the High Court Judge and it is at liberty to come up with a just decision. This position has been restated time and again, see for example, **Bulyanhulu Gold Mine Limited and Two Others v. Petrollube (T) Limited and Another**, Civil Application No. 364/16 of 2017 (unreported).

Looking at the affidavit in support of the application in particular paragraphs 8 and 9 when read together with the applicant's submission, the applicant has concentrated merely on one issue as the basis of his prayer for seeking leave of this Court, and that is the alleged illegality on the basis of the

denial to re-examine his witness. In his view, this is a crucial issue to be determined by the Court in the event that leave is granted. Admittedly, the question on whether we should exercise the discretion of the Court in this application or not has exercised our mind considerably.

We wish to begin by stating that the law does not expressly state factors to be considered in granting the application for leave to appeal to the Court. However, through case laws, the law is now settled and clear that leave to appeal will be granted where the grounds of appeal raise issues of general importance or novel point of law or where the grounds show a prima facie or arguable appeal. See, for instance, this Court's unreported decisions in **British Broadcasting Corporation v. Eric Sikujua Ngámaryo**, Civil Application No. 138 of 2004; **Rutagatina C.L** (supra) and **Jireys Nestory Mutalemwa** (supra). The Court in discussing the grounds to be considered it stated that:

> *"Needless to say, leave to appeal is not automatic. It is within the discretion of the court to grant or refuse. The discretion must, however be 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 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."

Arguably, much as the grant of leave is the discretion of the Court, the same is not automatic in the sense that, the Court has to be satisfied that the grounds of the intended appeal raise arguable issue(s) for consideration by the Court. The Court has to be satisfied that the grounds raised should merit a serious judicial consideration by the Court in order not to waste the precious time of the Court.

Back to the application under our consideration, the question is whether the ground raised by the applicant under paragraph 8 (a) and 9 merit a serious judicial consideration by the Court. We entertain no doubt that the answer will be no, and the reason is not far-fetched. The applicant admittedly argued that this ground was neither raised nor determined by the High Court and therefore this Court will not have any jurisdiction to determine. Time without number, and we need not cite any authority, this Court has clearly stated that usually the Court will look into matters which came in the lower court and were decided. It will not look into matters which were neither raised nor decided either by the trial court or the High Court on appeal. The complaint by the applicant was not raised at the High Court hence the Court in terms of section 4 and 5 of the Appellate Jurisdiction Act, Cap 141 R.E. 2019 will not have

jurisdiction to entertain it. Even if we assume for the sake of argument that the ground is a point of law and therefore qualifies to be entertained by the Court, closely examined we find that the complaint does not raise important issues for judicial consideration.

For the above reasons, we find that under the circumstances of this matter the application is misconceived and we strike it out with costs.

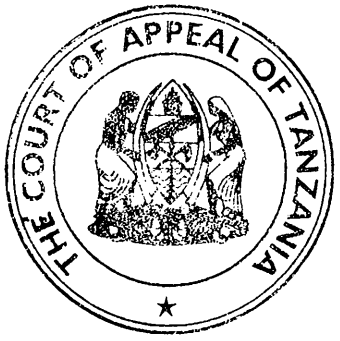
DATED at **MBEYA** this 25th day of February, 2022.

I. H. JUMA
CHIEF JUSTICE

Z. N. GALEBA
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The Ruling delivered this 25th day of February, 2022 in presence of the applicant in person and respondent is absent, is hereby certified as a true copy of the original.



C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL