

IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

CORAM: WAMBALI, J.A., SEHEL, J.A And MAIGE, J.A

CIVIL APPLICATION NO.507/13 OF 2022

MEXON SANGA..... APPLICANT

VERSUS

TOTAL TANZANIA LIMITED.....RESPONDENT

**(Application for leave to appeal against the judgment and decree of the
High Court of Tanzania at Iringa)**

(Matogolo, J.)

dated the 31st day of August, 2020

in

Civil Appeal No.15 of 2019

.....

RULING OF THE COURT

23rd & 27th March, 2023

MAIGE. J.A.:

The applicant has, after a similar application had been refused by the High Court vide Misc. Civil Application No. 30 of 2020 (Mlyambina, J), moved the Court, by way of a second bite application, for leave to appeal to the Court against the decision of the High Court (Matogolo, J) in Civil Appeal No. 15 of 2019. The application is premised on section 5(1) (c) of the Appellate Jurisdiction Act (the AJA) as well as rules 45(b) and 48(1) of the Tanzania Court of Appeal Rules, 2009 (the Rules). It is founded on the affidavit of Erick

Gebehard Mhimba, learned advocate which was not factually rebutted by an affidavit in reply.

The facts giving rise to the instant application as can be gathered from the affidavit in support of the application are as follows. The applicant sued the respondent, at the Resident Magistrate Court of Njombe (the trial court) for damages and some declaratory orders arising from a breach of contract. In reaction, the respondent filed a written statement of defence in which she raised a counter-claim against the applicant. Subsequently, the applicant, with the leave of the trial court, filed an amended plaint. In response, the respondent filed an amended written statement of defence wherein the counter-claim was not incorporated. On trial, the trial court pronounced a judgment in favour of the applicant without regard to the counter claim raised in the initial written statement of defence. On appeal, the High Court nullified the proceedings of the trial court and set aside the judgment thereof. It further ordered for retrial for the reason that respondent's counterclaim was not determined.

The applicant was aggrieved by the said decision. As the decision of the High Court was on first appeal, the appeal to the Court is not automatic. It is subject to leave of the High Court or the Court. As we said above, the applicant attempted to obtain leave from the High Court but

without a success and hence the current application. In the notice of motion, the applicant has framed the following issues which he thinks deserve consideration by the Court on the intended appeal:

1. *Whether per the pleadings and proceedings of the trial court the respondent had a counter-claim capable to be determined in Civil Case No. 2 of 2017.*
2. *Whether it was correct the High Court to quash and set aside the judgment and decree for Civil Case No.2 of 2017 solely on the ground that, the trial court did not determine the respondent's counter-claim.*
3. *Whether it was correct for the High Court to order retrial of Civil Case No. 2 of 2017*

Before us, Mr. Eric Mhimba, learned counsel, appeared for the applicant whereas Mr. Jassey Mwamgiga, also learned advocate represented the respondent. Both counsel, when invited by the Court to address it for and against the application as the case might be, fully adopted the written submissions they each filed before. While Mr. Mhimba urged the Court to grant the application with costs, Mr. Mwamgiga urged us to dismiss the same with costs. We have given the rival submissions due consideration and we shall determine the application hereunder.

From the submissions, it seems to us, parties are in agreement on the principle of law that; for leave to appeal to the Court to be granted,

the applicant has to demonstrate by affidavit or otherwise existence of some serious issues in the intended appeal worth attention of the Court. There are many pronouncements in support of this position. See for instance, **British Broadcasting Corporation v. Eric Sikujua Ng'maryo**, Misc. Civil Application No. 138 of 2004 [2005] TZCA 93; [08 September, 2005 TANZLII] and **Harban Haji Mosi & Another v. Omari Hilal Seif & Another** [2001] T.L.R. 409. In the latter case, it was observed as follows:

"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. The purpose of the provision is therefore, to spare the Court the specter of unmeriting matters and to enable it to give adequate attention to cases of true public importance".

The issue which we have to direct our minds on, therefore, is whether the applicant has demonstrated some arguable issues worth to be considered by the Court in the intended appeal.

As the facts in the affidavit speak, what has aggrieved the applicant is the decision of the High Court that, there was, at the trial court, a pending counterclaim which the trial magistrate omitted to determine. In the view of Mr. Mhimba, in not pleading the same in the amended written statement of defense, the counterclaim was deemed abandoned and therefore, the trial court was right in not dealing with it. Whether the High Court Judge was right to decide as such, that is what is considered by him to be a serious issue deserving consideration of the highest court of the land.

For the respondent, it is submitted, the counterclaim was not abandoned by mere reason that, it was not included in the amended written statement of defense. In his view, there is no serious issues which deserve attention of the Court and the application, therefore, ought to be dismissed with costs.

Having examined the affidavit and rival submissions and, upon casting a quick glance over the decisions of the two courts below, we are settled that one pertinent issue meriting the attention of the Court has been established namely; *"Is a counterclaim deemed abandoned upon*

amendment of the Plaintiff as to oblige the defendant to plead it in the amended written statement of defense?"

It the final result and for the foregoing reasons, the application has merit. Accordingly, therefore, leave to appeal to the Court against the judgment and decree of the High Court in Civil Appeal No. 15 of 2019 is hereby granted. Costs to follow the outcome of the intended appeal.

DATED at IRINGA this 27th day of March, 2023.


F. L. K. WAMBALI
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The ruling delivered this 27th day of March, 2023 in the presence of Mr. Jassey Mwamgiga, learned advocate for the respondent who also hold brief for Mr. Erick Mhimba, learned advocate for the Applicant, is hereby certified as a true copy of the original.




G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL