

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

MISC. CIVIL APPLICATION No. 103 OF 2020

(Arising from Extended Jurisdiction Civil Appeal No. 02/2019 of the Resident Magistrates Court of Mwanza Hon. M.O Ndyekobora-RM (Ext. Jurisd))

YASINTA SHAYOAPPLICANT

VERSUS

ZUBERI BUS SERVICE1ST RESPONDENT

DASTAN MILANZI2ND RESPONDENT

NATIONAL INSURANCE CORPORATION (T) LTD.....3RD RESPONDENT

RULING

09th March & 13th April, 2021

TIGANGA, J.

In this application, the applicant Yasinta Shayo (the Administrator of the Estate of late Francis George Mtui) moved this court through the chamber summons filed under section 5(2)(c) of the Appellate Jurisdiction Act [Cap 141 R.E 2019] and Rule 45(a) of the Court of Appeal Rules, 2009 to grant her leave to appeal to the Court of Appeal of Tanzania and award the cost of the application.

The application was supported by the affidavit sworn by the applicant in which, the reasons and grounds as well as the background information of the application at hand was given.

The background of this application is that, it started as RMs Civil Case No. 53 of 2013 before the Court of Resident Magistrate for Mwanza. That, suit was dismissed on the successful objection raised by the counsel for the respondent that the suit was time bared. Dissatisfied by the decision, the applicant filed Civil Appeal No. 60 of 2014, before the High Court where my senior brother Hon. Gwae, J, allowed the appeal and directed the suit to be heard on merits.

When the suit was returned to the trial court, the 1st respondent filed a third party notice applying to join the 3rd respondent an insurance Company which insured the bus which caused an accident which claimed the life of one Francis George Mtui, the husband of the applicant. After having been allowed to join the 3rd respondent, an objection was raised challenging the jurisdiction of the trial court on the ground that the 3rd respondent is a specified corporation which the Court of Resident Magistrate has no jurisdiction to entertain, but the High Court has. The trial



court Hon. Ruboroga, SRM, sustained the objection thereby dismissing the suit.

Following that dismissal, the applicant appealed before the High court before the appeal was transferred to the Court of Resident Magistrates, to be heard by the Resident Magistrate with Extended Jurisdiction, where it was registered as Extended Jurisdiction Civil Appeal No. 02 of 2018, in which the applicant was the appellant while the respondent in this application was the respondent.

The appeal was dismissed by the RMs Court with Extended Jurisdiction in the favour of the respondent. That decision aggrieved the applicant; she decided to commence the appeal processes by filing a Notice of Appeal and this application for leave to appeal to the Court of Appeal of Tanzania.

The applicant believes that there exist the points of law to be certified by the High Court for consideration by the Court of Appeal of Tanzania. Pinpointing those grounds, she deposes in paragraph 4 of the affidavit as follows;

- i) That, the court erred in law and in fact to assign this old and complicated case to a young junior and inexperienced Resident Magistrate with extended jurisdiction to try it, and thus misdirected herself in a number of issues,
- ii) That, the learned trial Resident Magistrates with extended Jurisdiction erred in law to determine this case through preliminary objection instead of hearing the evidence on both parties and determine it on merits as it was directed by the High Court Hon. Gwae, J in Civil Appeal No.60/2014,
- iii) That, the learned trial Resident Magistrates with extended Jurisdiction erred in law and fact to dismiss the suit on ground of third party procedure when the applicant did not apply for third party Notice in suing the first and second respondents as envisaged in Order 1 Rule 3 of the CPC Cap. 33 R.E 2002,
- iv) That, the learned trial Resident Magistrates with extended Jurisdiction erred both in law and fact to have acted on a dead law not applicable after coming into effect, the Public Corporation " De – specification of National Insurance cooperation order 2018 Government Notice No. 748 of 2018,



That, the learned trial Resident Magistrates with extended Jurisdiction erred both in law and in fact to hold that the jurisdiction of the case remained with the domain of the High Court to grant leave to sue to the third party whereas in fact, the High Court could not act on a dead law after the National Insurance was de-specified by G.N 748/2018 published on 02-12-2018,

- v) That, the learned trial Resident Magistrates with extended Jurisdiction erred in law to dismiss the suit against the 1st respondent Zuberi Bus Service whose motor vehicle Reg. No. T.209 ACQ Scania Passenger bus had killed the deceased Francis George Mtui and many other names,
- vi) That, since the applicant did not apply for Third Party Notice to join the National Insurance Corporation into the suit, the learned trial Resident Magistrates with extended Jurisdiction erred in law and in fact to have dismissed the suit against 1st Respondent as it could have dropped the third party Notice whose motor vehicle had killed the above mentioned deceased persons in the road accident,

The application was countered by the joint counter affidavit filed by the first and second respondents in which the deponent one James Kaimukilwa who introduced himself as the principal officer of the first respondent deposed that, paragraph 4 (i)(ii)(iii) and (vii) apart from arrogantly in subordinating the learned Resident Magistrate, nothing has been brought up by the applicant via the said paragraph for the attention of the Court of Appeal. Also that on the same token, the right to apply for the Third Party Notice is in favour and discretion of the respondents and not the applicant herein.

Regarding the contents of paragraph 4(iv) (v) and (vi) that the de-specification order in favour of the 3rd respondent had no retrospective effect to cover matters that took their course before the de-specification date.

In reply to the counter affidavit, the applicant just reiterated what she deposed in the affidavit filed in support of the application and in her belief the reasons she gave are enough to move the court to grant leave for the applicant to appeal to the Court of Appeal of Tanzania.

Hearing of the application was oral, where the applicant being an unrepresented layperson adopted her chamber summons and affidavit filed in support of the application and asked the court to decide on merits.

Mr. Rutahindulwa learned counsel for the respondent, submitted generally that, the applicant has not fulfilled the requirement of the law. He submitted that, when the case was filed, the respondent noted that the case had element of Bankruptcy which the lower court had no jurisdiction, but the High Court. That objection was sustained and the decision was appealed against to the High Court before the said appeal had been transferred to the Resident Magistrate with Extended Jurisdiction.

Regarding the posed issued of inability of the appellate Magistrate, he submitted that, the magistrate had powers to determine the case and was properly assigned the case after the same had been transferred to the court of Resident Magistrate.

In rejoinder, the applicant submitted that the issue of joining insurance was asked by the first respondent, they were allowed to join the insurance, and then they raised an objection that the applicant sued the



Insurance Corporation which was under liquidation. He prayed this court to allow her to go to the Court of Appeal.

The law upon which this application has been brought that is section 5 (1) (c) of the Appellate Jurisdiction Act [Cap 141 R.E 2019] requires that the appeal shall lie in civil proceedings from the High Court to the Court of Appeal with the leave of the High Court or of the Court of Appeal, against every other decree, order, judgment, decision or findings of the High Court, except where any other written law for the time being in force provides otherwise. While Rule 45(a) of the Court of Appeal Rules, 2009 as amended provides for the manner in which and time within which the application for leave should be made before this court.

The issue remains what are the requirements which the applicant must fulfil in order to be entitled to the grant for leave to appeal to the Court of Appeal of Tanzania in civil proceedings? In other words, what the court before which an application for leave has been filed should consider in granting the leave?

The provision of section 5(1)(c) of the Appellate Jurisdiction Act, (supra) cited above does not provide for the criteria to be considered in

granting leave to appeal, but a plethora of case laws have extensively discussed and provided for general principles and guidance.

In **Harban Haji Mosi and Another Vrs Omar Hilal Seif and Another**, Civil Reference No. 19 of 1997 CAT, the following principles were laid down;

"Leave is grantable where the proposed appeal stands reasonable chances of success or where, but not necessarily the proceedings as a whole reveals such disturbing feature as to require the guidance of the Court of Appeal. The purpose of the provision is therefore to spare the court the spectre of unmeriting matters and to enable it to give adequate attention to cases of true public importance"

In the authority of **British Broadcasting Cooperation Vrs Erick Sikujua Ng'maryo** Civil Application No.138 of 2004 (CAT) - Dar Es Salaam (Unreported) which was cited and relied on in the decision of **Swiss Port Tanzania Ltd Vs Michael Lugaiya** (supra)) it was held *inter alia* that;

"Needless to say leave to Appeal is not automatic. It is within the discretion of the court to grant or refuse leave. The discretion should 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



raises issues of general importance or a novel point of law or where the grounds show a prima facie or arguable Appeal....However, where the grounds of Appeal are frivolous, vexatious, useless or hypothetical, no leave will be granted."

Those issues with such disturbing features proving that there would be the arguable appeal must be shown by the applicant both, in her/his affidavit and the submissions made in support of the application.

Now the issue is whether the applicant in this application has managed to show in the affidavit and submissions made by her that, there are arguable points or disturbing feature or any novel point of law worthy to be attended by the Court of Appeal of Tanzania? In other words whether the intended grounds of Appeal, raise issues of general importance or a novel point of law or a prima facie or arguable Appeal, where the intended grounds of appeal exhibit to be frivolous, vexatious, useless or hypothetical, the court will not grant leave to appeal.

In such an endeavour, I have painstakingly passed through all seven points raised as the intended grounds of appeal, some carry qualities of being the grounds of appeal, while others are framed in a manner which not only that they lack qualities, but also show little understanding of what

the applicant is supposed to do at this stage. I am aware, as already pointed out that, this court in the exercise of its powers to grant or refuse leave to appeal, should always avoid as much as it possibly can, to turn itself into the appellate court thereby stepping into the shoes of the Court of Appeal.

However, even after warning myself on that danger, yet, I find myself unable to keep quiet on some of the intended grounds of appeal. It is common ground that the appeals are preferred from the decision of the court, not on individual personalities of the adjudicators, this is because the courts of appeal will never have anything to decide on the individual personality of the adjudicator. Looking at the first intended ground of appeal, it is glaringly clear that, it is both frivolous and vexatious in substance as it is attacking the individual personality of the Hon. Resident Magistrate with extended jurisdiction.

From its phraseology, it does not end up attacking the personality of the Magistrate, it complains against the High Court which transferred the Case to the said Magistrate. In my opinion, that ground had no foundational bearing, what he needs to challenge is the decision not the personality of an individual adjudicator as that will not be of any help to

her. Having said all these, I find the first ground frivolous and vexatious unworthy to be a ground of appeal.

In my further examination of the intended grounds of appeal generally, I also find the second intended ground to be misconceived. This intended ground raises the complaint that the trial court erred to determine this case through preliminary objection instead of hearing the evidence on both parties and determine it on merits as it was directed by the High Court, Hon. Gwae, J in Civil Appeal No.60/2014. In my considered view, this is a misconception because, the appeal before Hon. Gwae, J, was against the decision of the trial court which dismissed the case on the pretext that the suit was time barred. Hon. Gwae's decision was to the effect that, the suit was not time barred therefore it be heard on merit.

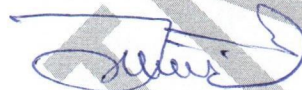
He did not direct parties not to raise a preliminary objection on other aspects, with these shortcomings, this intended ground of appeal is also unworthy to be a ground of appeal.

Having discredited, these two first intended grounds of appeal, now I turn to examine the rest of the intended grounds of appeal and see whether they are worthy to be considered by the Court of Appeal. Having

carefully passed through the rest of the intended grounds of appeal, I find them raising disturbing features worthy for consideration by the Court of Appeal.

I thus, allow the application in terms of prayer 1 in the chamber summons. The costs of this application shall abide to the appeal before the Court of Appeal.

DATED at MWANZA this 13th day of April 2021



J. C. Tiganga

Judge

13/04/2021

Ruling delivered in open chambers in the presence of the applicant in person on line but in the absence of the respondent on line this 13th day of April 2021.



J. C. Tiganga

Judge

13/04/2021