

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

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 382 OF 2020

(Originating from the Judgment and Decree of the High Court of Tanzania at Dar es Salaam District Registry in Civil Appeal No. 65 of 2019 dated 29th day of June, 2020 made by Hon. Masabo, J.)

BETWEEN

RAMADHANI OMARY NGALEBA.....APPLICANT

VERSUS

AUGUSTINO ELIAS MDACHI.....RESPONDENT

RULING

Date of last Order: 09/04/2021

Date of Ruling: 19/05/2021

MLYAMBINA, J.

This is an application for leave to appeal to the Court of Appeal of Tanzania against the Judgement and Decree of this Court dated 29th June, 2020. By consent of the parties, the application has been disposed by way of written submissions.

It is in record that the centre of dispute is on defamation. The lower Court dealt with *inter alia* issues; whether the Applicant was defamed by the Respondent. The trial Court answered the issue in the affirmative. On appeal, this Court nullified the decision of the

trial Court with costs. At page 12 of the impugned Judgement, this Court observed:

As regards the falsity of the statement, it is to be noted that, the Appellants case during trial was that he never uttered the said statements. In addition, the Appellant pleaded and testified that the Respondent was illegally extracting sand in an area which is not planned for such purposed and he had no permit at all which entails that, the statement that;

"unafanya biashara ya mchanga bila kibali" if anyhow altered was true...thus in the instant case the onus was on the Appellant to provide proof that the Respondent was not authorized to extract sand in the area. In my view, the Appellant sufficiently discharged his duty by rendering exhibit D1, D2, D3 and D4 all of which specifically barred sand extraction at Kidimu area which entails that the conduct of the Respondent was in contravention of the lawful orders of the local government authorities. Hence forth the statement:

"Unafanya biashara ya mchanga bila kibali" was with justification"

The Applicant wants to appeal to the Court of appeal. The ground thereof, as can be gathered in her supporting affidavit and

submissions in chief is that there are issues arising from the decisions of the High Court fit for consideration including:

- i) The Appellate Court was wrong to hold that the Applicant was defamed without considering the evidence on records adduced by the Applicants witness.
- ii) The Appellate Court was wrong to hold that the Applicant filed to prove his case basing on the exhibits tendered by the Respondent while the suit before the lower Court was a defamation and not illegal extraction of sand.
- iii) The Appellate Court was wrong to entertain submission of facts which were not raised into memorandum of appeal as a ground of appeal.
- iv) The Appellate Court was wrong to allow the appeal by entertaining a ground which was not raised and argued by the Respondent.

The application was vehemently resisted by the Respondent through his counter affidavit and reply submissions.

I have noted, however, both parties do not dispute on the guiding legal principles established in among other cases, the case of **British Broad Casting Corporation v. Erick Sikujua**

Ngmaryo, Civil Application No. 133 of 2004 (unreported) in which it was observed:

*Needless to say, leave to appeal is not automatic it is within the discretion of the Court to grant or refuse leave. As a matter of general principle, leave to appeal will be granted where the grounds of appeal raise issues of general importance or a novel point of law or where the grounds shows a prima facie or arguable appeal (see, **Buckle v. Holmes** (1926) all E.E. Rep. 90 at page 91). However, where the grounds of appeal are frivolous, vexations or useless or hypothetical, no leave will be granted.*

In another case of **Tanzania East Africa Limited v. The Minister for Energy and Minerals**, Misc. Commercial Application No. 331 of 2015 this Court made the following observation:

Leave to appeal in civil, criminal or other proceedings will only be granted by the High Court if satisfied that the case involves a substantial question of law as to the interpretation of the law, and that the reasons advanced as a ground of appeal raises a question of general importance or novel points of law, and of course not issues of facts or evidence.

The Applicant has argued *inter alia* that he proved the defamation case before the trial Court but this Court erroneously allowed the appeal on the reason that the Applicant failed to tender a mining licence, thereby contravening the Local Government Authorities.

In response, the Respondent stated *inter alia* that the Applicant was duty bound to exhibit before the trial Court, a permit which allowed him to extract the alleged sand in the barred area but he failed so to exhibit. I have had time to go through the records, I noted the uttered words read:

We mpumbavu, mbwa tushakuelekeza kuwa hutakiwei kufanya biashara katika kata hii ya pangani na ukibisha utakiona" kwani huna akili ya tutakufuatilia sana katika kata hii mpumbavu tutakufilisi na tutapiga simu polisi mjinga wewe" "We mpumbavu huishi kulaumu hapa huruhusiwi kutoa mchanga nilishakuambia unajifanya jeuri hapa hauruhusiwi kutoa mchanga kumamako.

The issue is whether the above altered statements were fair comment or not. If true that the Applicant was extracting sands at a banned area, then the disputed statements were fair comment.

In the case of **Valentine M. Eyakuze v. The Editor of Sunday**

News and 2 Others (1974) LRT No. 49 at page 198 the Court observed.

...the position in law is that it is a complete defence to an action of libel, or slander if the defamatory imputation is proved true. The truth of the imputation then becomes an answer to the action because in that event the plaintiff is said to have no right to a character free from that imputation and if he does not possess such a right he cannot in justice recover damages for the loss of something he did not possess in the first place. But in order to establish a plea of justification, the defendant (s) must prove that the defamatory imputation is true and for this prove that the defamatory imputation is true and for this purpose it is not enough to prove that he believed that the imputation was true or that, he merely repeated or reported what other people said... hence the defamatory imputation must be proved true in fact...

As observed by this Court on appeal and properly replied by the Respondent herein, the Applicant failed to prove if he extracted the sands legally. As such, there is nothing worth for consideration by the Court of Appeal. There is no contentious issue to be determined by the last Appellate Court.

In the circumstances, the application is hereby dismissed with costs for lack of merits.



Y. J. MLYAMBINA

JUDGE

19/05/2021

A handwritten signature in blue ink, written over a curved line that underlines the judge's name and title.

Ruling delivered and dated 19th May, 2021 in the presence of both parties in person.



Y. J. MLYAMBINA

JUDGE

19/05/2021

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