

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(ARUSHA DISTRICT REGISTRY)
AT ARUSHA

MISC.CIVIL APPLICATION NO. 85 OF 2020

*(From the decision of the High Court of Tanzania in DC Civil Appeal No. 2 of 2019;
Originating from the Resident Magistrates' Court of Arusha in Civil Case No. 43 of
2015.)*

OLOPONO PERMET APPLICANT

Versus

SLUIS BROTHERS LTD 1ST RESPONDENT

ABRAHAM SMITH 2ND RESPONDENT

RULING

15th April & 11th June, 2021

Masara, J.

This application is preferred under section 5(1) (c) of the Appellate Jurisdiction Act, Cap. 141 [R.E 2002] and Rule 45(a) of the Tanzania Court of Appeal Rules, 2009 as amended by G.N 362/2017. The Applicant is praying for leave to appeal to the Court of Appeal against the decision of this Court (Gwae, J.) in DC Civil Appeal No. 2 of 2019. The Application is supported by an affidavit by the Applicant. The Respondents contested the application by filing a counter affidavit deponed by Mr. Ruta Erneus Rugaigalira, the advocate for the Respondents. The application was disposed of through filing of written submissions.

The scheduling order of filing written submissions by the parties was made in the following order: Written submission by the Applicant was to be filed by 8/3/2021, Reply submission by the Respondents was to be filed by 22/3/2021 and rejoinder was to be filed by 29/3/2021. The record shows that the Applicant's advocate, Mrs. Christina Y. Kimale, filed her written submissions on 8/3/2021. The Respondents' advocate, Mr. Ruta Erneus

Rugaigalira, filed his written submission on 23/3/2021. According to the schedule, reply submission was to be filed by 22/3/2021. No application was made to allow the same to be filed out of time. By filing the same on 23/3/2021, it means that the Respondents' defied the order of hearing set. It is tantamount to having filed no submissions at all. Failure to file written submission on the date ordered by the Court is as good as failure to file written submission at all.

Failure to file written submission has been held time and again to be equivalent to failure to enter appearance in Court on the date the case is fixed for hearing or failure to prosecute one's case. This was held by the Court of Appeal in the case of **Godfrey Kimbe Vs. Peter Ngonyani**, Civil Appeal No. 41 of 2014 which cited its previous decision in **National Insurance Corporation of (T) Ltd & Another Vs. Shengena Limited**, Civil Application No. 20 of 2007 (both unreported), where the Court made the following observations:

"In the circumstances, we are constrained to decide the preliminary objection without the advantage of the arguments of the Applicant. We are taking this course because failure to lodge written submissions after being so ordered by the Court, is tantamount to failure to prosecute or defend one's case"

From the above, as the reply submission was filed outside the time ordered by the Court, there being no explanations given for the late filing and there being no extension of time sought by the Respondents' advocate to justify filing out of time, I will therefore not consider the reply submissions in the determination of the application. Having so said, I deem it necessary to recount facts preceding this Application.

Briefly, the Applicant was charged of the offence of malicious damage to property in Criminal Case No. 46 of 2010 at Monduli District Court. He was found guilty, convicted and sentenced to serve 2 months imprisonment. His cows which had previously been seized were ordered to be sold so as to compensate the Respondents. The Applicant successfully appealed to this Court vide Criminal Appeal No. 37 of 2011 (Sambo, J.). This Court ordered the money paid to the Respondents as compensation to be returned to the Applicant. Following that directive, the Applicant sued the Respondents in the Resident Magistrate's Court of Arusha vide Civil Case No. 43 of 2015, claiming to be paid TZS 90,000,000/= as compensation (both Specific and General damages). The Respondents were ordered by the RM's Court to hand over to the Applicant 18 cows as well as payment of TZS 10,000,000/= as General damages.

The Applicant was dissatisfied, he appealed to this Court vide DC Civil Appeal No. 2 of 2019. On 6/9/2019 this Court (Gwae, J.) ordered the Respondents hands back to the Applicant a total of 24 herds of cattle or pays him a sum of TZS 12,000,000/= in lieu thereof. The Court also upheld payment of TZS 10,000,000/= as general damages.

The Applicant is still dissatisfied. He lodged Notice of Appeal intending to appeal to the Court of Appeal on 17/9/2019. Consequently, he brought this Application as is the norm that leave should be granted by this Court in appeals originating from a district court or resident magistrates' court before knocking the doors of the Court of Appeal.

Submitting I support of the application, Mrs. Kimale, while adopting the contents of the affidavit in support of the application, maintained that this Court in DC Civil Appeal No. 2 of 2019 reversed the trial Court's decision to some extent specifically on the value/price of the cows without affording the parties the right to address and be heard on the same. According to Mrs. Kimale, parties were denied the fundamental right to be heard. That it was not proper for the Court to raise the issue *suo motu* and give its decision on the same without affording the parties a right to submit on it.

Further, the learned counsel submitted that this Court increased the number of cows seized from 6 to 8 and not 35 as claimed by the Applicant without assigning any reasons for not doing so. Therefore, once leave is granted, the Court of Appeal will have to revisit the evidence on record and weigh the validity of the decision made by this Court. Mrs. Kimale sought leave of the Court so that the Court of Appeal can re-assess the special damages assessed by this Court on the ground that there was no basis of the computation made.

I have given deserving consideration to the affidavits of the parties. Similarly, I have considered the written submission by the Applicant's advocate. The only issue for determination is whether the application has merits.

It is a common norm that appeals to the Court of Appeal against a decision of this Court while exercising appellate jurisdiction are not automatic. They are subject to leave of this Court upon satisfaction that the intended

grounds of appeal raise issues of general importance or novel points of law or a prima facie or arguable appeal. Leave is not granted where the intended grounds of appeal are frivolous, vexatious, useless or hypothetical. This position got credence of the Court of Appeal in **Harban Haji Mosi and Another Vs. Omar Hilal Seif and Another**, Civil Reference No. 19 of 1997 (unreported), where the Court held:

"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 spectre of unmeriting matters and to enable it to give adequate attention to cases of true public importance."

In the subsequent decision of **British Broadcasting Corporation Vs. Eric Sikujua Ng'maryo**, Civil Application No. 138 of 2004 (unreported), the Court observed:

"Speaking for myself, the issues raised by the Applicant cannot be labelled as frivolous, vexatious or useless. I think there is need for this Court to resolve the rival contentions of the parties and have an authoritative interpretation by this Court on the disputed provisions of the Advocates Remuneration and Taxation of Costs Rules, 1991."

In the instant application, Mrs. Kimale advanced three grounds against the decision of this Court which call for the Court of Appeal's intervention. First, that this Court reversed the trial Court decision by reducing the price of the cows from TZS 800,000/= to TZS 500,000/= without affording the parties the right to be heard on the same. Second, that the number of cows were enhanced from 6 to 8, while the Applicant had claimed 35 cows. According to Mrs. Kimale, that decision was arrived at without any reasons. The last ground relates to the assessment of the special damages

by this Court which; in her view, did not disclose the formula assigned in assessing such damages.

Having gone through the record, the grounds raised in Mrs. Kimale's submissions and as stated under paragraph 6 of Applicant's affidavit may be said to pose an arguable appeal. They are not, in my view, frivolous or vexatious. The Applicant who managed to get both the decisions of the trial Court and that of this Court in his favour appear to be unhappy on the amounts of compensation granted to him. Preventing him to knock the doors of the Court of Appeal cannot be in the interest of justice. Having made the impugned decision, this Court is not in a position to pronounce itself on the merits or demerits of the intended appeal. It suffices to state that the Applicant has sufficiently made his case, its merits or demerits notwithstanding, deserving the scrutiny of the Highest Court of the land.

On the premises and considering what I have hereinabove stated, it is the opinion of this Court that the Applicant's application for leave has merits. I henceforth allow it. The Applicant is given 21 days within which to file his intended appeal to the Court of Appeal. Costs shall abide the outcome of the intended appeal.

Order accordingly.



Y. B. Masara
Y. B. Masara
JUDGE

11th June, 2021