THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA
MISCELLANEOUS CIVIL APPLICATION NO. 53 OF 2021
(From the decision of the High Court of Tanzania at Mbeya District Registry in Civil Appeal No. 14 of 2020 originating from the District Court of Mbozi at Vwawa in Civil Case No. 1 of 2019)

SAFARI MWAZEMBE.....APPLICANT

VERSUS

JUMA FUNDISHA.....RESPONDENT

RULING

4th & 13th August, 2021

KARAYEMAHA, J

Essentially, the applicant sued the respondent in Mbozi District Court via Civil Case No. 1 of 2019 for defamation. After a full trial, the Trial Court dismissed the suit with costs on the ground that the applicant failed to prove the claim. Dissatisfied, the applicant preferred the appeal to the High Court in Civil Appeal No. 14 of 2020 but again he was unsuccessful. Undaunted, he intends to appeal to the Court of appeal.

In the process and in exhausting the mandatory precondition of the law, the applicant is moving this court under section 5 (1) (c) of the Appellant Jurisdiction Act [CAP. 141 RE 2019] to grant him leave to

appeal to the Court of Appeal of Tanzania against the decision of the High Court of Tanzania (Hon. L.M. Mongella J.) in Civil Appeal No. 14 of 2020.

Let me preamble my discussion by stating that the principle of law governing grant of leave to appeal to the Court of Appeal is well settled. In a proper application, the duty of this court is just to gauge out whether there are contentious issues needing determination by the Court of Appeal. In the case of **Nurbhai N. Rattansi vs. Ministry of Water Construction Energy Land and Environment and Hussein Rajabali Hirji** [2005] TLR 220, the applicant lost in a Civil Case before the Regional Magistrate's Court in 1996. He appealed to the High Court where the appeal was also dismissed in 2003. Still dissatisfied he applied to the High Court of Zanzibar for leave to appeal to the Court of Appeal. The application was dismissed on the ground that there was no point of law involved worth consideration by the Court on Appeal. Leave is, therefore, 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. (See the case of **British Broadcasting Corporation vs. Erick Sikujua Ng'maryo,** Civil Application No. 138 of 2004 (unreported). I shall be guided by this principle in my deliberations.

In the instant application, the applicant seems to solicit this court to believe that what he stated under paragraph 6 of his affidavit are points of law worthy to be considered by the Court of Appeal. The impression I gather when I comprehend it is that the applicant is vehemently faulting the High Court for dismissing the appeal on grounds that the applicant was given a right to be heard, no biasness on the part of the trial magistrate and non-framing of issues was not fatal. He simply termed them as points of law in his submission. The only raised point of law in the affidavit is that the judge erred in law for deciding that malicious prosecution was not proved by the applicant (plaintiff) dispute (sic) the existence of credible evidence. This is reflected in the 8th paragraph.

That is why after going through the affidavit of the Applicant and his submission, Mr. Moses Mwampashe, learned counsel for the respondent, responded that the applicant raised no ground which stands reasonable chances of success or reveal any disturbing features as to require the guidance of the Court of Appeal.

I am in agreement with him because the applicant apart from complaining that the appeal premised on those grounds was dismissed, he did not intimate unequivocally that he was raising them as points of law in the affidavit to be considered by the Court of Appeal. He simply

said so in his submission which in law and principle is wrong. Borrowing the words of wisdom from the case of **Tanzania Broadcasting Corporation (TBC) vs. John Chidundo Mbele,** Misc. Application No 146 of 2013, it is my candid view that the practice is that grounds to be relied upon in any application must manifest themselves in the affidavit duly sworn or affirmed by the deponent not submissions from the bar.

Further to that and of interest to me again is paragraph 8 of the affidavit where the applicant averred as follows:

> *"8. That the applicant has lodged in this Honourable Court application seeking leave to appeal to the Court of Appeal against the decision of the High Court so that which have (sic) to be canvassed in the Court of Appeal of Tanzania on the following point of law;* ***The judge erred in law for that malicious prosecution was not proved by the applicant (plaintiff) dispute (sic) the existence of credible evidence".*** **[Emphasis supplied]**

I have read the judgment of the High Court and grounds of appeal lodged thereat in depth and widely. This purported aired up point of law was never one of the grounds of appeal. It is a new ground raised at this stage of application for leave which the Court of Appeal cannot be called to look at. I am not alone in this. The Court of Appeal in the case of **Galus Kitaya vs. Republic,** Criminal Appeal No. 196 of 2015 (unreported) was confronted with an issue whether it can decide on a

matter not raised in and decided by the High Court on first appeal. It stated as follows:

> *"On comparing the grounds of appeal filed by the appellant in the High Court and in this Court, we agree with the learned State Attorney that, grounds one to five are new grounds. As the court said in the case of* ***Nurdin Musa Wailu v. Republic*** *supra, the Court does not consider new grounds raised in a second appeal which were not raised in the subordinate courts. For this reason, we will not consider grounds number one to number five of the appellant's grounds of appeal".*

The rationale of this principle is not hard to comprehend. It is that if the High Court did not deal with the new raised ground for the reason of failure by the appellant to raise it there, the Court of Appeal will absolutely and completely fail to determine where the High Court went wrong. Therefore, in exercising my discretion, if I grant leave knowing that this ground is new and cannot be considered by the Court of Appeal, I shall not be fair and reasonable in sparing the Court of Appeal's spectre of un-meriting matters and enabling it to give adequate attention to cases of true public importance. As gate keeper, I have unavoidable duty to allow matters of serious contentions or issues of general importance or novel point of law to pass which will help the Court of Appeal to digest and guide lower courts.

In conclusion, guided by the principle in the case of **Nurbhai N. Rattansi vs. Ministry of Water Construction Energy Land and Environment and Hussein Rajabali Hirji** (supra), I am of the considered view that the application has not raised contentious issues of law. Hence this is not a fit case for further consideration by the Court of Appeal. The application is therefore dismissed with costs.

It is so ordered.

J. M. KARAYEMAHA
JUDGE
13/08/2021