

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

MISC. CIVIL APPLICATION NO. 127 OF 2019

**(C/F Civil Review No. 01 of 2018 in the High Court of Tanzania at Arusha, Civil Appeal No. 56 of 2016,
Original, Civil Case No. 39 of 2016 in the Resident Magistrate's Court of Arusha)**

POP VRIEND (TANGANYIKA) LIMITED.....APPLICANT

VERSUS

MELEMBUKI KITESHO MOLLEL.....RESPONDENT

RULING

20/04/2021 & 13/08/2021

GWAE, J

In this application the applicant is seeking leave to appeal to the Court of Appeal of Tanzania against the decision delivered by this Court in Civil Review No. 01 of 2018. The application is preferred under the provisions of section 5 (1) (c) of the Appellate Jurisdiction Act cap 141 Revised Edition, 2002, Rule 45 (a) of the Tanzania Court of Appeal Rules, G.N. No. 368 of 2009. The application is duly supported by an affidavit sworn by Mr. Boniface Joseph, the learned advocate for the applicant.

The brief background which I think will serve the purpose of appreciating the essence of the present application is as follows; the applicant herein filed a suit against the respondent in the Resident Magistrates' Court in Civil Case No. 39 of 2016 where judgment was entered in favour of the applicant. Aggrieved, the respondent successfully filed an appeal to this court where the judgment, decree and proceedings in Civil Case No. 39 of 2016 were nullified on the reason that the decision was procured from a defective plaint to wit that; the applicant's claim of Tshs. 52,376,197/= in the plaint was vague as it included the interest, general damages and costs of the suit.

Dissatisfied by that decision of the court (Opiyo, J), the applicant preferred an application for review before this court alleging that there was an error on the face of the record of the decision of the court in its finding and holding that the applicant's claim of the sum of Tshs. 52,376,197 in the plaint filed in the Resident Magistrate's Court of Arusha, was vague as it included the interest, general damages and costs of the suit. In his ruling of the Review, the court (**Mzuna, J**) dismissed the entire application for review on the reason that there were no errors apparent on the face of record in Civil Appeal No. 56 of 2016.

Following the dismissal of the applicant's application for Review, the applicant has accessed the Court, again, seeking leave. The applicants' quest for leave is found in a proposed memorandum of appeal attached to this application

which calls upon the Court of Appeal of Tanzania to determine as to whether “the High Court erred in law and in fact in finding that there was no error apparent on the face of the record in Civil Appeal No. 56 of 2016 warranting review of the decision/judgment by the High court”. In contesting the application, the respondent filed an affidavit in reply which was sworn by Mr. Lengai Nelson Merinyo, the learned counsel for the respondent.

At the hearing of the application before me, **Mr. Ipanga Kimaay**, learned counsel, appeared for the applicant whereas **Mr. Lengai N. Merinyo**, learned counsel, appeared for the respondent. With the leave of the court the application was disposed of by way of written submissions which were filed by the parties accordingly.

Amplifying the ground for grant of leave to appeal to the Court of Appeal of Tanzania Mr. Kimaay was of a considered view that the High Court Judge in the application for review erred in finding that there was no apparent error on the face of the record in Civil Appeal No. 56 of 2016 and according to him, this is a legal point worth for determination by the Court of Appeal of Tanzania as per the decision in the case of **British Broadcasting Cooperation vs. Eric Sikujua Ng’maryo**, Civil Application No. 138 of 2004 (Unreported) the decision which laid down conditions to guide our courts in grating applications for leave.

In opposing the application, Mr. Lengai submitted that the basis of challenging this application is on the propriety of Civil Review No. 01 of 2018, the counsel further stated that the point alleged by the applicant to be considered by the Court of Appeal of Tanzania is not explained by the applicant. According to him the mere fact that the applicant alleges that there are errors apparent on the face of the record is so general, the applicant ought to have explained such errors to demonstrate what was violated in review. Therefore, he was of the view that the applicant has not put clear the point of law which he wants the Court of Appeal of Tanzania to address. The counsel concluded by adopting his counter affidavit in particular paragraph 5 where he stated that there is no any material error apparent on the face of the record.

Having considered the applicant's application and submission by the parties it is apparent that for applications for leave to be granted, the court has to ensure that certain conditions are met. Such conditions were with lucidity, expounded by the Court of Appeal of Tanzania in **British Broadcasting Corporation vs Eric Sikujua Ng'maryo**, (Supra) where the court stated 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 must, however 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 raise issues of general importance or a novel point of law or where the grounds show a prima facie or arguable appeal (see: *Buckle v Holmes* (1926) ALL E.R. 90 at page 91). However, where the grounds of appeal are frivolous, vexatious or useless or hypothetical, no leave will be granted.”

(See also a decision of the Court of Appeal of Tanzania at Dar es Salaam in the case of **Bulyanhulu Gold Mine Limited & 2 Others vs. Petrolube & another**, Civil Application No. 364/16 of 2017 (Unreported).

On the foregoing authorities, there is no doubt that grant of leave is not automatic, but condition is that it can only be granted where the grounds of the intended appeal raise arguable issue (s) in an intended appeal before the Court of Appeal. The grounds raised should merit a serious judicial consideration.

In the application at hand, the main issue for determination by this court is whether the ground raised by the applicant is embraced in the conditions set out in the above decision of the Court of Appeal of Tanzania for this court to grant leave to appeal. From the factual setting in this application, the applicant is intending to challenge the decision of the High Court in Civil Review No. 01 of 2018 which was dismissed on the reason that there were no errors apparent on the face of the record in Civil Appeal No. 56 of 2016 which allowed the appeal and quashed

the judgment decree and proceedings of Civil Case No. 39 of 2016 as the same were founded from a defective plaint.

While Mr. Kimaay was insistent that, the issue raised qualifies to be an arguable issue worth for determination by the Court of Appeal of Tanzania, Mr. Lengai was of a different view and adamantly refuted the contention arguing that the applicant has not stated in particular, the error apparent on the face of record in Civil Appeal No. 56 of 2016. It is worth noting that at this juncture, I am not expected to consider whether the learned judge was justified to dismiss the application for Review, this court is only entitled to consider the grounds for the sought leave and not to sit as an appellate court.

Just as a matter of guidance, it is also important to note that the duty of a court in applications for leave is not to determine the merits or demerits of the ground of appeal raised by the applicant when seeking leave to appeal. Instead, a court has only to consider whether the proposed grounds are arguable by the highest court of the land as set in **British Broadcasting Corporation vs Eric Sikujua Ng'maryo** (supra).

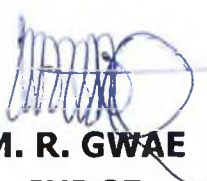
Although the counsel for the parties agree to the principles applicable in considering and granting of leave to appeal to the Court of appeal of Tanzania, they have parted ways on whether the issue raised by the applicant constitutes good cause for the sought grant of leave to appeal.

A carefully study of the point raised by the applicant worth for consideration by the Court of Appeal of Tanzania and in relation to the impugned judgment, at this stage it suffices to say that the ground raised has no merit on the reason that it is apparent from the applicant's plaint at paragraph 3 that the claims are so vague in the sense that the amount claimed by the applicant includes both specific damages, general damages, interest and costs of the suit. I therefore find no arguable appeal by the Court of Appeal against the decision of this court (Mzuna, J)

That being said, this application is hereby dismissed with costs.

It is so ordered.




M. R. GWAE
JUDGE
13/08/2021