

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**  
**AT TABORA**

**MISCELLANEOUS CIVIL APPLICATION NO. 30 OF 2020**

*(Originating High Court Tabora in Civil Appeal No. 1/2019 and  
Review No. 2 of 2020 and Original Civil Case No. 5 of 2016 from the  
Resident Magistrate Court Tabora)*

**DEOGRATIUS NDANU .....APPLICANT**

**VERSUS**

**1. CHELA JAMES GHANAI**

**2. PACT TANZANIA**

**.....RESPONDENT**

**RULING**

*Date: 23/6/2021-10/9/2021*

**BAHATI, J.:**

Before the court is an application for leave to appeal to the court of appeal of Tanzania against the decision of this court in Review No. 2 of 2020 in respect of Civil Appeal No 1 of 2019 which was delivered by my learned brother Hon. Kihwelo, J (as he then was) on 17<sup>th</sup> December 2020.

The application has been preferred by the Chamber Summons made under section 5(1) (C) of the Appellate Jurisdiction Act, Cap. 141 [R.E

2019] and the same was supported by an affidavit of Stella Thomas Nyaki, learned counsel.

A brief history giving rise to the case is that the applicant, Deogratias Ndanu was once an employee of the 2<sup>nd</sup> respondent and co-employee of the first respondent, the applicant was arrested in Dar es salam transferred to Tabora to answer criminal charges in criminal cases no 32/2013 and 15/2015 and then to Musoma to answer the criminal charge in criminal case No 16 /2015. All criminal charges at Musoma and Tabora ended in the applicant's favour. Thereafter he instituted a suit against the respondents claiming damages arising out of malicious prosecution.

At the hearing of this application, the counsel for the applicant Ms. Stella Nyaki while Ms. Mariam Masandika for the respondents. According to the order dated 24<sup>th</sup> March 2021, the matter was argued by way of written submission.

The Counsel for the applicant in support of the application submitted that the law requires that before appeals to the court of appeal one have to seek leave to the High Court of Tanzania according to Section 5 (1) (c ) of the Appellate Jurisdiction Act, Cap.141 [R.E 2019]. She submitted that, as stated in the affidavit, the dispute between Deogratius Ndanu, the applicant and the respondents, Chela Ghanai

and PACT Tanzania respectively arose in 2016 before the Resident Magistrate Court of Tabora as the applicant was wrongfully prosecuted by the Respondents and the Resident Magistrate Court of Tabora decided the matter in favour of the applicant, however; the respondents were aggrieved with the decision of the Resident Magistrate Court of Tabora and filed Civil Appeal No. 1 of 2019 before the High Court of Tanzania at Tabora, whereby on 28<sup>th</sup> February 2020 the High Court delivered a judgment dismissing the respondents appeal, as the respondents were still aggrieved with the decision of the High Court they filed a review No. 2 of 2020 in respect of Civil Appeal No. 1 of 2019, and on 17<sup>th</sup> December 2020 the High Court before Kihwelo, J delivered a ruling allowing the appeal, the applicant being aggrieved with the said decision and intended to appeal to the Court of Appeal of Tanzania with the leave of this court.

Further, she submitted that in the said intended appeal, there are some issues which are the point of law which are worth to be considered by the Court of Appeal that;

- i. The court did not give full consideration that; the respondents did instigate criminal prosecution against the applicant with malice.

- ii. Whether it was right for the learned judge to hold that there was a probable and reasonable cause for the respondents to prosecute the applicant.

To buttress her argument she cited the case of **Citibank Tanzania Limited Vs. Tanzania Telecommunications Company Ltd and 5 others**, High Court of Tanzania (Commercial Division), Misc.Commercial Cause No. 6 of 2003, at Dar es Salaam (Unreported) Massati, J (as he then was) has this to say:-

*"I think it is now settled that, for an application for leave to appeal to succeed, the applicant must demonstrate that the proposed appeal raises a contentious issue worth taking to the court of appeal or are of such public importance or contain serious issues of misdirection or non-direction likely to result in a failure of justice and worth consideration by the court of Appeal... In an application of this nature, all that the court needs to be addressed on, is whether or not the issue raised are contentious... the court cannot look at nor decide either way of the merits or otherwise of the proposed grounds of appeal".*

She prayed to this court that for the interest of justice that the application be granted.

Replying, the respondents' application was countered by Ms. Mariam Masandika. In her submission she stated that leave to appeal to the court of appeal is not an automatic right rather the applicant's application for leave must meet some of the conditions stipulated in laws for the court to grant the same.

The respondents' counsel further submitted that one of the crucial criteria for the court to grant an application for leave to appeal is the presence of a point of law in the Applicant's application for leave to appeal to the Court of Appeal. Section 5 (2) (c) of the Appellate Jurisdiction Act Cap. 141, [R.E 2019] provides the following:-

*"No appeal shall lie against any decision or order of the High Court in any proceedings under head (c) of part III of the Magistrate Court Act unless the High Court certifies that a point of law in the decision or order".*

The same position was also well established in the case of **Simon Kabaka Daniel Vs Mwita Marwa Nyang'anyia and 11 others [1989] TLR** whereby in this matter Mwalusanya, J held that;

*"In an application for leave to the Court of Appeal the applicant must demonstrate that there is a point of law involved for the attention of the court of appeal and, if the point in question*

*involves customary law in question is not superseded by statutory law."*

It was further contended that in the present application, the applicant has failed to show if there is a point of law in the intended grounds of appeal to the Court of Appeal. To witness the same on his grounds of appeal as stated in the application and submission as follows *that; the learned judge did not give full consideration that the respondents did investigate criminal prosecution against the applicant with malice"*.

She submitted that intended appeal is without dispute a pure point of facts that could be addressed during hearing for the parties to prove as to where the respondents if at all investigated the matter did investigate with malice or otherwise. It is a principle of law that any point of fact normally requires to be proved by evidence brought by the parties unlikely to the point of law that requires to be proved by the provision of the law in force in the jurisdiction.

Since the ground of appeal requires the Court of Appeal to find out whether the Respondents if at all investigated the applicant investigated with malice *this ground cannot stand* as a point of law rather is the point of fact that could be specifically proved during the hearing and not be determined by the Court of Appeal during the hearing of the intended appeal. The applicant was supposed to find out

what law contravened based on the decision of the Honourable judge and not to get ground as if the case need to be heard afresh by the Court of Appeal. Therefore as submitted in the first ground of appeal that the same is a pure point of fact since it requires evidence to be proved as to whether at all the respondents investigated the applicant with malice.

Responding to the second ground of appeal adduced by the applicant that she stated that : - *"Whether it was right for the learned Judge to hold that there was a Probable and reasonable cause for the Respondents to prosecute the Applicant"*.

While arguing the first ground of appeal will apply the same in the second ground of appeal to mean that the said ground is a pure point of fact and not a point of law. This is because calling the attention of the Court to look as to whether it was right for the learned judge to hold that there was a probable and reasonable cause for the Respondents to prosecute the applicant is the point of fact and not point of law as required by law. The decision delivered by the learned judge in respect of the matter between the parties was reached after consulting evidence tendered by the parties during the hearing and not otherwise. Hence inviting the Court of Appeal to deal with the intended appeal is like inviting the Court of Appeal to consult the evidence and if

possible to call witnesses to testify in respect of evidence in the records. On the premises, for the interest of justice, prayed to this Court to dismiss the application.

In rejoinder, the counsel for the applicant reiterated her submission in chief and added that the matter was originated from the Resident Magistrate Court, therefore the High Court was the *first appeal and not the second* as submitted by the Respondent by citing Section 5 (2) (c) of the Appellate Jurisdiction Act Cap 141 [R.E 2019]. Arguing further she submitted that the application doesn't fall on proceedings under head (c) of part III of the Magistrate Court Act, the only determination for this application to succeed the applicant has to raise contentious issues worth taking to the Court of Appeal.

The applicant conceded that the issue at hand is mostly based on facts, but since this appeal did not originate from the Primary Court, then serious issues of facts like these can also be brought to the attention of the Court of Appeal by way of appeal, in the case of **Ramadhani Manyanga Vs. Abdallah Salehe (1996) TLR 74** it was held that,

*"For leave to appeal to be granted the applicant must demonstrate that there are serious and contentious issues of law or fact fit for consideration by the Court of Appeal."*

Upon considering the submissions by both parties at lengthy, the content of the affidavit and counter-affidavit the issue is whether the application has merit.

Before I embark on the substance of the application, a brief exposition of the law governing leave to appeal to the Court of Appeal is apposite. The law on the Appellate Jurisdiction Act, Cap.141 [R.E 2019] do not provide for the criteria to be considered in granting leave to appeal.

Section 5(1) thereof provides as hereunder:-

*“ In civil proceedings, except where any other written law for the time being in force provides otherwise, an appeal shall lie to the Court of Appeal-*

*(a) against every decree, including an ex parte or preliminary decree made by the High Court in a suit under the Civil Procedure Code, in the exercise of the original jurisdiction.*

*(b) Against the following orders of the High Court made under its original jurisdiction, that is to say-*

*(i)- (ix)- irrelevant.*

*(c) With leave of the High Court or the Court of Appeal, against every other decree, order, judgment, decision, or finding of the High Court.*

Indeed, leave to appeal is not automatic. It is within the discretion of the court to grant or refuse. However, I am mindful that discretion must be judiciously exercised. The rationale behind the leave

requirement has been stated in **Saidi Ramadhani Mnyanga vs. Abdallah Salehe** (1996) TLR 74 that;

*“To spare the Court the spectre of unmeriting matters and enable it to give adequate attention to cases of true public importance Leave to appeal will be granted if the applicant demonstrates substantial issues that call for the attention of the Court of Appeal.”*

Similarly, in **British Broadcasting Corporation vs. Eric Sikujua Ng’amaryo**, Civil Application No. 138 of 2004. It was held inter alia that;

*“ 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 or useless or hypothetical no leave will be granted.”*

Applying those principles, it is a law that the court before which an application for leave has the discretion to grant or refuse it.

As stated before, the issue for consideration is whether the applicant has fulfilled the condition stipulated in the above decisions. Those facts must be shown by the applicant both in his affidavit and the submissions and the deficits moving him to appeal be clearly seen in the proceedings and the impugned decision.

In this application the applicant through paragraph 6 of the Affidavit in support of the Application pointed out issues to be considered by the Court of appeal that *whether the learned judge did not give full consideration that, the respondents did instigate criminal prosecution against the applicant with malice and whether it was right for the learned judge to hold that there was a probable cause for the respondent to prosecute the applicant.*

Having an opportune to traverse through the records of the proceedings and the ruling of Kihwelo, J(as he then was) I am of the considered view that the issues raised do not reveal any disturbing feature which requires the guidance of the court of appeal.

On the first ground of appeal, the applicant submitted that the learned judge did not give full consideration that the respondents instigated criminal prosecution against the applicant with malice and on another ground that whether it was right for the learned judge to hold that there was a probable cause and reasonable for the respondent to prosecute the applicant.

With respect to the counsel for the applicant, having traversed through the records on the affidavit and submission by the applicant filed and I am satisfied that the Hon. Judge considered wider and made an extensive analysis on the grounds and arguments presented and

finally concluded. Looking at the appeal, the Hon Judge recognized that whether the appellant's act of reporting the matter to the police and hence arrest and prosecution of the respondent was actuated by malice. The facts shows that the appellant reported the matter to the police in compliance with the legal duty to report the crime that they become aware of as provided under section 7 of the Criminal Procedure Act, Cap 20, and the process was actuated by an audit report that revealed fraudulently misuse of fund. For that reason, it is my view that the prosecution was actuated by a desire to bring justice to the respondents.

Furthermore, on the second ground that *whether it was right for the learned Judge to hold that there was a probable cause for the respondent to prosecute the applicant*. I find it prudent that it is not true that the mere innocence is proof of want of probable cause and reasonable, it must be innocence accompanied by such circumstances as raise the presumption that there was a want of reasonable and probable cause. The act was done by the appellants to put the respondent to justice.

To sum up, I am of the considered view that I do not see any issue of general importance or a novel point of law or and disturbing features which require the guidance of the court of appeal. Having said all these

I find the application to be wanting of merit, it stands to be dismissed with costs.

Order accordingly.



**A.A.BAHATI**

**JUDGE**

**10/9/2021**



Date: 10/09/2021

Coram: Hon. N. Mwakatobe, DR

Applicant: Stella Nyaki, Advocate.

Respondent: Raphael Rwezahura

B/C Grace Mkemwa, RMA

**Court:** Ruling is delivered this 10<sup>th</sup> day September, 2021 in presence of Stella Nyaki, Advocate for Applicant and Raphael Rwezahura Advocate for Respondents.



**N. MWAKATOB**

**DEPTY REGISTRAR**

**10/9/2021**

Right to appeal is hereby explained.



**N. MWAKATOB**

**DEPTY REGISTRAR**

**10/9/2021**