

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

**MISC CIVIL APPLICATION NO.109 OF 2020**

*(C/F High Court of the United Republic of Tanzania Civil Appeal No. 37 of 2018 Originating from Civil Case No. 37 of 2017 at the Resident Magistrates' Court of Arusha at Arusha.)*

**INTIMATE PLACES LIMITED.....1<sup>ST</sup> APPLICANT**

**HERITAGE INSURANCE CO. LIMITED.....2<sup>ND</sup> APPLICANT**

**Vs**

**PETER GWAYDES GORWA@ QWYDES.....RESPONDENT**

*Date of last order: 23/08/2021*

*Date of Ruling: 29/10/2021*

**B. K. PHILLIP, J**

**RULING**

This ruling is in respect of an application for leave to appeal to the Court of Appeal. The application is made under the provisions of section 5 (1) (c) of the Appellate Jurisdiction Act Cap 141 ( R.E ) 2019 and Rule 45 (a) of the Tanzania Court of Appeal Rules. It is supported by an affidavit affirmed by the learned Advocate Sheck Mfinanga .The application is contested. The learned advocate John Shirima, filed a Counter Affidavit in opposition to the application. Mr Sheck Mfinanga and John Shirima appeared for the applicants and the respondent respectively.

Let me give a brief background to this matter for ease of understanding the coming discussion.

In the year 2017, the respondent herein sued the applicants at the Resident Magistrates' Court of Arusha at Arusha praying for judgment and decree against the applicants as follows;

- (i) Payment of Tshs. 86,596,846/= being Residual value of Motor vehicle with registration No. T. 665 DBF.
- (ii) Payment of Tshs. 64,000,000/= being transportation costs incurred by plaintiff to transport hardware goods from Arusha to Karatu, from July, 2016 to March 2017.
- (iii) Payment of Tshs. 118,000/= for valuation charge.

It was the respondent's case that on the 12<sup>th</sup> of July, 2016 at Kilimamoja area within Arusha region, a Motor Vehicle with registration No.T.194 BMS, owned by the 1<sup>st</sup> applicant was involved in an accident whereby it collided with the respondent's Motor Vehicle with Registration No.T.665 DBF. The respondent's Motor Vehicle was damaged beyond repair. The 1<sup>st</sup> applicant's driver who was driving the Motor Vehicle with registration No. T.665 DBF passed on. Moreover, the respondent alleged that the 1<sup>st</sup> applicant's driver was

driving negligently as a result he caused the said accident. The 1<sup>st</sup> applicant's Motor Vehicle was insured by the 2<sup>nd</sup> applicant.

The trial Court delivered its judgment on 26<sup>th</sup> September 2018, in favour of the respondent and ordered as hereunder;

- (i) *Payment of Tshs 50,000,000/= being Residual value of Motor Vehicle with Reg. No. T. 665 DBF.*
- (ii) *Payment of Tshs. 118,000/= for valuation charge.*
- (iii) *Each party to bear its own costs.*

The applicants being aggrieved with the decision of the Resident Magistrates' Court appealed to this Court on the following grounds;

- i) That the Trial Magistrate erred both in law and fact in holding that the Police Report tendered before the Honourable Court suggested that the 1<sup>st</sup> Defendant's car was the cause of the accident without any evidence to support. In alternative; the Hon Trial Magistrate erred in law and in fact in failing to properly evaluate the evidence on record.*
- ii) That the Trial Learned Magistrate erred both in law and in fact in holding that the Defendant's car was at the highest speed and as the result the said car lost its way and collided with the plaintiff's car without evidence thereof.*

- iii) That the Trial Learned Magistrate erred both in law and in fact in holding that the 1<sup>st</sup> Defendant's driver was negligence without any proof.*
- iv) That the Trial Learned Magistrate erred both in law and in fact in holding liable the defendants for the plaintiff's claims for reason that the 1<sup>st</sup> Defendant did not deny that the 2<sup>nd</sup> Defendant had comprehensive Insurance.*
- v) That the Trial Learned Magistrate erred both in law and in fact in awarding the plaintiff the sum of Tshs 50,000,000/= as special damages without assessment of the same and without proof thereof at the required standard.*
- vi) That the Hon. Trial Magistrate erred in law and fact in granting the Plaintiff reliefs that were not contained in the Plaintiff's plaint.*

This Court delivered its judgment on 16<sup>th</sup> October 2020, in which it dismissed the appeal with costs . The applicants herein being aggrieved by the decision of this Court filed this application for leave to appeal to the Court of the Appeal as required by the law.

Back to the application, Mr. Mfinanga started his submission by adopting the contents of the affidavit in support of the application. He went on to submitting as follows; That the law does not stipulate any specific

grounds which have to be established by the applicant for the application for leave to appeal to the court of Appeal to be granted by the Court. However, Courts have established some factors which have to be considered in granting or not granting the leave to appeal to the Court of Appeal, to wit; that the applicant has to show that the intended appeal raises arguable issues for the attention of the Court of Appeal, that is, the of appeal should merit serious judicial consideration. Mr Mfinanga cited the case of **Jirey Nestory Mutalemwa Vs Ngorongoro Conservation Area Authority, Civil Application No.154 of 2016**, (unreported) to bolster his arguments. Referring this court to the contents of paragraph seven of the affidavit in support of this application which stipulates the applicant's complaints against the decision of this Court and the lower court, Mr. Mfinanga maintained that the applicants herein have shown that the intended appeal raises arguable issue worthy the attention of the Court of Appeal. He argued that the order for payment of Tshs 50,000,000/= is erroneous as the respondent did not pray for the payment of the amount awarded by the Court, (that is Tshs 50,000,000/=). The lower court did not give any justification for granting the respondent the sum of Tshs 50,000,000/= after he had failed to prove the claimed amount, that is Tshs 86,596,846/=. No mathematical calculations were presented to

substantiate the said sum of Tshs 50,000,000/= that was granted to the respondent, contended Mr. Mfinanga. He insisted that parties are bound by their pleadings.

Moreover, Mr. Mfinanga argued that the evidence adduced by the respondent at the trial Court showed that investigation was still going on, therefore, the case was filed prematurely. The sketch map of the scene of the accident ( exhibit P5) , that was tendered in evidence was not sufficient for the court to make a finding that the 1<sup>st</sup> applicant's driver was negligent and that he is the one who caused the accident. In addition during the trial of the case, it was revealed that Exhibit P 5 was not the one that was prepared by PW3 at the *locus in quo*, contended, Mr. Mfinanga.

~~Another concern raised by Mr. Mfinanga was that the respondent failed to summon the investigator who was an important witness for the respondent's case and no reason was given for the failure to call him, thus the Court was supposed to make adverse reference against the respondent. Mr Mfinanga maintained that this application is meritious.~~

In rebuttal, Mr. Shirima, submitted as follows; That the claim for specific damages was pleaded in paragraph four of the plaint. The award of Tshs 50,000,000 is supported by the testimony of PW2 who testified

that the respondent's Motor Vehicle was damaged beyond repair, and by 2016 its actual price was Tshs 104,000,000/=. PW3 is the one who prepared the sketch map of the *locus in quo* and tendered in Court the traffic report ( Form No ,90). In conclusion of his submission, Mr. Shirima contended that the applicant has failed to raise any point of law worthy to be entertained by the Court of Appeal.

In rejoinder, Mr Mfinanga reiterated his submission in Chief. He conceded that the claim for specific damages was pleaded but insisted that the respondent failed to prove the same and in its judgment the trial Court stated categorically that it granted the respondent the sum of Tshs 50,000,000/= because there was no receipt produced in evidence to prove the amount that was claimed as specific damages. ~~Form No.90 which was tendered in evidence, shows clearly that~~ investigation was still going on, contended Mr Mfinanga. He insisted that the case was filed prematurely.

Having analyzed the submissions made by the learned Advocates, as well as perused the Court's records, let me proceed with the determination of the merit of this application. I wish to start by pointing out that an order for leave to appeal to the Court of Appeal is among the discretionary orders that can be granted by this Court. The Court's

discretion must be exercised judiciously. [see the case **British Broadcasting Corporation** (supra)]. As correctly submitted by Mr Mfinanga the law does not stipulated the factors which need to be considered in determination of an application of this nature. However, our courts have formulated general guidelines which can be applied by the courts when considering an application for leave to appeal to the Court of Appeal like the one in hand . In the case of **Jirey Nestory Mutalemwa** ( supra) referred to this Court by Mr Mfinanga the court of Appeal said the following;

*"We are alive to the fact that the requirement to seek and be granted leave to appeal to the Court before lodging an appeal against a decree, order, judgment decision or finding of the High Court other than those outlined under section 5(a) and (b) of the Appellate Jurisdiction Act, Cap 141. R. E. 2002 (The AJA) is entrenched in section 5(1) ( c) of the AJA. We acknowledge that the law does not expressly state that factors to be considered for the grant of leave to appeal to the court..... Much as the grant of leave is discretionary, yet it is not automatic. The court adjudicating on such application is not left free to do so. It can grant leave to appeal only where the grounds of the intended appeal raise arguable issues for the attention of the Court. In other words, the grounds raised should merit a serious judicial consideration by the Court."*



In the case of **Abubakari Ali Hamid Vrs Edward Nyelusye, Application No 51 of 2007** (unreported) the court said the following;

*"Leave to appeal is granted where the proposed appeal stands reasonable chances of success or where but not necessary the proceedings as a whole reveal such disturbing features as to require the guidance of the Court of Appeal"*

From the foregoing, the task of this court is to determine whether or not the applicants have shown that the intended appeal raises arguable issues for the attention of the Court of Appeal.

First of all, let me state categorically that the plaint reveals that the claim for special damages was pleaded. The respondent claimed for the payment of Tshs 86,596,846/= as residual value of the Motor Vehicle with registration No. T. 665 DBF. In Its judgment the lower court awarded the respondent a sum of Tshs 50,000,000/= as residual value of the Motor Vehicle with registration No. T. 665 DBF instead of the amount prayed by the respondent because the respondent failed to produce in Court the receipts/documents to prove the same. On the other hand, in its judgment, this Court relying on the testimony of PW2, was of the view that the award of a sum of Tshs 50,000,000/= to the respondent was justifiable and reasonable as the respondent's Motor Vehicle had undergone depreciation. Looking at the findings of

the lower Court and this Court pertaining to the award of the said Tshs 50,000,000/=, I find myself in agreement with Mr Mfinanga that there are arguable issues regarding the said award of Tshs 50,000,000/= which deserve the attention of the Court of Appeal.

In the upshot, this application is granted. I give no order as costs.

Dated this 29<sup>th</sup> day of October 2021



A handwritten signature in blue ink, consisting of a stylized 'B' and 'K' followed by a horizontal line.

**B. K. PHILLIP**

**JUDGE**