IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

MISC CIVIL APPLICATION NO. 306 OF 2020

(Application for leave to appeal to the Court of Appeal of Tanzania against the judgment and Decree of the High Court of Tanzania in Civil Appeal No. 184 of 2017)

OMARY SEIF MSUMI ....APPLICANT

VERSUS

DISMAS JOHN LAWI... RESPONDENT

RULING

08th October, 2021 & 30th November, 2021

ITEMBA, J;

I have found it apposite to preface this ruling with the quotation from the decision of the Court of Appeal in the case of **Rutagatina C.L vs. The Advocates Committee and Another**, Civil Application No. 98 of 2010 (Unreported), the supreme Court of the land had this to say:-

> *"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 be judiciously exercised and on the materials before the court.* ***As the 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 case or***

arguable appeal. *(See: Buckle vs. 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."*** (Emphasis is mine)

The applicant herein is seeking for a leave to appeal to the Court of Appeal of Tanzania against the decision in Civil Appeal No. 184 of 2017 in the High Court of Tanzania at Dar es Salaam, delivered on the 06th May 2020. This application has been brought under the provisions of section 5 (1), (c) of the Appellate Jurisdiction Act, Cap. 141 R.E 2019 read together with Rule 46 (1) of The Court of Appeal Rules, G.N. No.344 of 2019 supported by an affidavit affirmed by the applicant OMARY SEIF MSUMI. The same has been contested vide the Counter affidavit sworn by the respondent one DISMASS JOHN LAWI.

Briefly, the respondent herein was the plaintiff in Civil Case No. 29 of 2014in the District Court of Ilala at Samora, in which he claimed to have entered into a partnership agreement of producing counter books from 2007 to 2013 together with the applicant. It was alleged that each party contributed to the Capital after taking a loan from different financial institutions. That the parties bought a printing machine worth Tshs. 8,000,000/= which they were both repaying in instalments. That, when the last instalment was issued, the seller of the printing machine happened to have written only the name of the applicant instead of all the parties. It was further alleged that the applicant had breached the terms agreed and

proceeded to register the business name by using his name only without consulting the respondent.

The respondent sued the applicant and prayed among other things, the cost of the printing machines to a tune of Tshs. 5,000,000/=, his share of the amount deposited in the bank to a tune of Tshs. 1,500,000/=, loss of income to a tune of Tshs. 5,400,000/= and costs of the suit. The applicant disputed the claim but the trial Court successfully awarded the respondent all the reliefs sought save for the amount alleged to have been deposited in the bank.

Aggrieved by the decision of trial Court, the applicant appealed before this Court in Civil Appeal No. 184/2017 in essence, he contended that there have been a wrong evaluation of evidence by the trial Court. The Court upon scrutinizing the so grounds; it partially allowed the appeal as the applicant was ordered to pay Tshs. 3,900,000/= to the respondent instead of Tshs. 5,000,000/= as costs of printing machine, general damages were awarded to the respondent to a tune of Tshs. 3,500,000/=, the orders issued by the trial Court for the applicant to pay Tshs. 5,400,000/= as loss of income and Tshs. 2,000,000/=as cost for starting a new office were set aside.

In his affidavit, the applicant deponed that, soon after the said decision was delivered by this Court, the applicant lodged a letter requesting to be supplied with certified copies of judgment, decree and proceedings of Civil Appeal No. 184 of 2017 to start effecting the appeal process and he filed the Notice of intention to appeal before the Court of Appeal.

As it appears under paragraph 11 of the affidavit in support of this application, divulges the issues to be determined by the Court of Appeal.

I find it apt to reproduce the relevant paragraph as hereunder:

"11. That the Judgement and decree of the High Court left out several issues to be determined by the Court of Appeal namely:-

a) *Whether the Trial Magistrate and the High Court Judge properly evaluated the evidence presented by the parties in holding that there is existed partnership relationship between the parties even without the existence of the partnership deed signed and tendered.*

b) *Whether it is proper for the applicant to be condemned to bare all the cost in the alleged partnership business,*

c) *Whether the trial magistrate and the High Court Judge properly evaluated contribution of the respondent in the alleged partnership".*

In arguing the application, the applicant was represented by Mr. Frank Kilian, learned advocate whilst the respondent fended for himself. The hearing was scheduled to be conducted by way of written submissions. The confronting parties filed their rival submissions respectively in support and in opposition to the application.

Mr. Kilian for the applicant submitted on the 1st issue for determination by the Court of Appeal in the same manner he submitted when the matter was before this Court for an appeal. In other words, the arguments brought were the repetition of what had been submitted before this Court when entertaining Civil Appeal No. 184 of 2017. The issue pertains a question of existence of a partnership between the applicant and respondent where there is no a written partnership deed. According to Mr. Killian, contended

that a partnership agreement was to be in writing. He contended that as per section 191 (1) (2) (a) and (b) of the Law of Contract Act, Cap 345 R.E: 2019, partnership relationship arises from contract and not relationship. He insisted that unless there is an agreement defining the rights, one cannot claim existence of partnership.

In opposition thereto to, the respondent had countered the same by justifying the position of the law that a partnership deed just like any other contract can be either written or orally. He quoted the writing by the trial Court of DR, Autah Singh, "CONTRACT AND SPECIFIC RELIEF", 10TH Edition which articulated that contract can be in different forms including orally.

From the records, both two Courts had a concurrent finding on the notion that there is an existence of partnership between the parties. The Court of Appeal is the second Appellate Court and it only deals with matters of law however it can fault the concurrent findings of facts by two courts below when there is a misapprehension of the evidence, a miscarriage of justice or violation of some principle of law. (See the case of **D.P.P. v. Jaffari Mfaume Kawawa,** [1981] T.L.R 149).

From that point, I have gone through the provision cited by the applicant's advocate which is *section 191 (1)* of the Law of Contract Act, Cap 345 R.E: 2019 but I have not come across any *prima facie* point of determination by the second appellate Court in respect of existence of the partnership between the parties, since both Courts had a concurrent view that the contract had arose through oral communications of the parties and went on to order for reliefs sought.

I am alive with the position in **Regional Manager-TANROADS Lindi vs. DB Shapriya and Company Ltd**, Civil Application No. 29 of 2012 CA (Unreported) that this Court while hearing an application should restrain from considering substantive issues that are to be dealt with by the appellate Court. This is so in order to avoid making decisions on substantive issues before the appeal itself is heard. Again, principally, the question of Contract which partnership deed categorically is, I believe does not need necessary interpretation by the Court of Appeal since from the cited provision by the applicant there is no restriction that a partnership deed need to be only in written form. For that reason, I do not see a necessity of Court of Appeal intervention on this unfolded and obvious point.

As to the second issue, Mr. Killian has argued that the applicant had been ordered by the High Court to pay the respondent Tshs. 3,900,000/= as half costs of the printing machine while the printing machine has the name of the applicant thus the purchase was not done on partnership basis. He had contended that if leave is granted the applicant will move the Court to decide if it was proper for it to order payments without assessing the current market value.

Upon keen perusal to the records; both Courts had agreed that the applicant and the respondent purchased the said printing machine in partnership basis. Both previous forums had concurrently decided that the parties had contributed to the purchase of the said machine as the same was purchased in installments and it was only the last installment which the seller of the machine wrote the name of the applicant alone. This is the concurrent finding of the lower Court which from the submission by the applicant's

counsel, I have failed to get a disturbing feature for the Apex Court's intervention. The issue of current market value does not commend for an Appeal since principally the parties are bound by their own pleadings and the Court cannot award more than what has been pleaded for. [See the cases of **Astepro Investment Co Ltd vs. Jawiga Company Ltd**, Civil Appeal no. 8/2015 (Unreported), **Peter Ng'homango vs. Attorney General,** Civil Appeal No. 214/2011 (unreported), **James Funke Gwagilo vs. Attorney General** [2004] T.L.R 161 and **Scan TAN Tours Ltd vs. Catholic Diocese of Mbulu,** Civil Appeal No. 78/2012 (Unreported).

As to the third issue, the applicant has contended that the contribution by the respondent in the purported partnership was not proved. He contended that there was no proof that was tendered to prove that the respondent had acquired loan from Pride Tanzania, Access Bank and FINCA Tanzania as a contribution to the Partnership. This is actually a point of fact. The Court of Appeal will be the second appellate Court. The commended appeal before the Prime Court of the land is expectedly to be on a point of law as articulated in **D.P.P. v. Jaffari Mfaume Kawawa** *(supra)* as it being the second appellate Court.

Actually, this aspect had never been raised before the first appellate Court which is the High Court. Principally, the Court of Appeal being a second appellate Court only look into matters which were determined in the high court as a first appellate court not on matters which were not raised before the first appellate Court. This is the position by the Apex Court. For instance, in the case of **Hassan Bundala @ Swaga vs. Republic**, Criminal Appeal No. 386 of 2015, where it stated that;

> *"Mr. Ngole, for obvious reasons resisted the appeal very strongly. First of all, he pointed out that* ***the first and third grounds were not raised in the first appellate Court and have been raised for the first time before us. We agree with him that the grounds must have been an afterthought.*** *Indeed, as argued by the learned Principal State Attorney,* ***if the High Court did not deal with those grounds for a reason of failure by the appellant to raise them there, how will this Court determine where the High Court went wrong?*** *It is now settled that as a matter of general principle* ***this Court will only look into matters which came up in the lower court and were decided..."***
>
> [Emphasis is added]

(See also the cases of **Hotel Travertine Ltd and 2 Others vs. National Bank of Commerce Limited** [2006] T.L.R 133 and **Galus Kitaya vs. Republic**, Criminal Appeal No. 196 of 2015)

From the above position, I believe the third issue will have no room for determination for being an afterthought which by any definition, it cannot warrant leave of this Court.

Therefore, this court is not satisfied that the applicant has demonstrated any sufficient reason to warrant the grant for leave sought as per the condition envisaged in section 5 (1), (c) of the Appellate Jurisdiction Act, Cap. 141 R.E 2019. The application is hereby dismissed. Each party to bear his own costs.

It is so ordered.

L. J. Itemba

JUDGE

30/11/2021

Rights of the parties have been explained.

L. J. Itemba

JUDGE

30/11/2021