

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IRINGA DISTRICT REGISTRY)

AT IRINGA.

MISCELLANEOUS CIVIL APPLICATION NO. 04 OF 2021

*(Arising from the Judgment of the High Court of Tanzania at Iringa before Hon.
Judge Matogoro in Civil Appeal No. 06 of 2020)*

UPENDO TRAVELLERS COACH APPLICANT

VERSUS

CHRISTINA CHAULA1ST RESPONDENT

ERICK MSIGWA (Next friend of ISAKA

MSIGWA and EMMANUEL MSIGWA)2ND RESPONDENT

RULING

Date of last order: 22/03/2022

Date of Ruling: 25/07/2022

MLYAMBINA, J.

The summons by the Applicant, Upendo Travellers Coach, seeks for this Court to grant him leave to appeal to the Court of Appeal challenging the decision of this Court on *Civil Appeal No. 06 of 2020* which was before my brethren Matogoro, J. The application was made under the provision of *section 5(1) of the Appellate Jurisdiction Act [Cap 141 R. E. 2019]* and supported by the affidavit sworn by Moses Ambindwile, learned Advocate. The Respondent filed his counter

affidavit in opposing the application which was sworn by Dr. Ashery Utamwa, learned Advocate.

The genesis of this matter in which this application arise is as follows: On 2016, the Respondent filed the suit before Iringa Resident Magistrates Court (the trial Court) against the Applicant and 2 Others, with registration *Civil Case No. 44 of 2016* claiming for tort of negligence and damage sustained in the accident involved a motor vehicle with Registration No. T 741 BMP make Scania. The case was heard ex parte in allegation that the Applicant herein refused the service of the summons, the judgement was in favour of the Respondent.

The Applicant unsuccessfully filed before the same Court the application for extension of time to file an application to set aside the said ex parte judgement, unfortunately it was dismissed for want of merits. As if it was the Applicant fate, his appeal to this Court was dismissed once again and the decision of the trial Court was upheld. Being aggrieved with the decision of this Court the Applicant, therefore, moved the Court to grant him leave to appeal to the Court of Appeal of Tanzania against the decision entered before Matogoro, J. The grounds are stated in the supporting affidavit at paragraph 9 as follows:

- a) *Whether it was proper and lawful for the High Court Judge to find out that the Applicant Director refused to accept summons to appear for defending the suit.*
- b) *Whether it was proper and lawful for the High Court Judge to interpret Order V Rule 5(2) and (12) of the Civil Procedure Code [Cap 33 R. E. 2019] as he did on the question of the Court process server.*
- c) *Whether it was proper and lawful for the High Court Judge to interpret Order XXIX Rule 10 of the CPC as he did on the questioning of suing by using business name.*
- d) *Whether the Judge of the High Court was lawful to hold that any employee of the Judiciary is a Court Process Server.*
- e) *Whether it was right and lawful for the High Court Judge to disregard the requirement which a legally recognised Court process server should process per Court Broker and Process Server (Appointment, Remuneration and Disciplinary) Rules 2017.*

- f) Whether the High Court Judge was right to hold that the Respondent was right to use Upendo Travellers Coach which is neither Registered name nor recognised legal entity.*
- g) Whether it was right and lawful for the High Court Judge to approve the trial Court decision on the question of ownership of a material motor vehicle through relying on the bus tickets, words that printed on the side of the bus and booking offices instead of relying on the motor vehicle registration card and Insurance Cover note.*
- h) Whether it was proper and lawful for the High Court Judge to hold that the Applicant was served with the summons notifying her on the date of ex-parte judgment contrary to what contained in the Court proceedings.*
- i) Whether the High Court Judge was right to uphold the decision of the Resident Magistrate Court which is the proceedings containing numerous illegalities like premising the ruling by relying on the*

Respondent written submission that originated from a struck-out counter affidavit.

j) Whether it was proper for the High Court Judge to uphold the decision of the lower Court despite the fact that the same Judge admitted in the same judgement that there was no proper counter affidavit in the Court and the attached documents went with it; and

k) Whether it was proper for the High Court Judge after he discovered that the counter affidavit is defective to start going through the trial Court records and coming up with the unknown documents, and using the same documents to validate decision of the lower Court without affording right to the Applicant to address the Court on the validity of those documents.

It is a requirement of the law that an appeal shall lie to the Court of Appeal with the leave of the High Court or Court of Appeal, as per *section 5 (1) (c) of the Appellate Jurisdiction Act [Cap 141 R. E. 2019]*. For easy of reference, the above section provides that:

In civil proceedings except where any other written law for the time being in force provides otherwise an appeal shall lie to a Court of appeal with the leave of the high Court or of the Court of appeal against every other Decree, Order, Judgement, Decision or Findings of the High Court.

Therefore, the use of the word 'shall' imply the mandatorily of the requirement to apply for the leave to appeal. It is further well known that it is the discretion power of the Court to grant or to refuse the leave which has to be exercised judiciously. Reference may be made to the case of British **Broadcasting Corporation v. Erick Sikujua Ng'maryo**, Civil Application No. 138 of 2004, Court of Appeal of Tanzania at Dar es Salaam (unreported). Further, leave to appeal will only be granted if the ground of appeal raises issues of general importance or a novel point of law or where the ground shows a prima facie arguable appeal.

From the record, the Counsel for the Applicant raised 11 grounds for appeal in which 1st and 7th grounds was not raised on the first appeal stage. Therefore, such grounds are afterthought. The 2nd, 4th and 5th grounds are based on the allegation which was raised by the Applicant

himself at the first Appellate Court. Therefore, he cannot benefit from his own wrong. As for the 3rd, 6th and 8th grounds are meaningless on the ground that the main task of the Judge is to interpret the law accordingly. As long as the Applicant did not deny the name in proceedings, that it is not his name, the law allows to sue a person on his business name or style other than his own name, as *per Order 29 Rule 10 of the Civil Procedure Code (supra)* which provides:

Any person carrying business in a name or style other than his own name, may be sued in such name, or style as if it were a firm name; and, so far as the nature of the case will permit, all rule under this Order shall apply.

The Applicant herein did not refuse if the name used was not his business name or it has nothing to do with his business. As such, this ground too has no leg to stand.

Notwithstanding the afore discussed grounds, the remaining grounds of appeal which are 9th, 10th and 11th raises an arguable issue. In the case of Safari **Mwazembe v. Juma Fundisha**, Civil Application No. 503/06 of 2021, Court of Appeal of Tanzania at Mbeya (unreported) the Court of appeal has this to say:

...the Court has to be satisfied that; the ground of the intended appeal raised arguable issue(s) for consideration by the Court. The Court has to be satisfied that the grounds raised should merit a serious judicial consideration by the Court in order not to waste the precious time of the Court.

Conclusively, being guided by the afore quoted principle of the Court and from the above reasoning, I hereby allow the application. Order accordingly.



Y. J. MLYAMBINA
JUDGE
25/07/2022

Ruling delivered and dated 25th day of July, 2022 through Virtual Court in the presence of Mosses Ambindwile, Advocate for the Applicant and in the absence of the Respondent. The Applicant was stationed at the High Court of Tanzania Iringa District Registry's premises. Right of Appeal fully explained.



Y. J. MLYAMBINA
JUDGE
25/07/2022