

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IRINGA DISTRICT REGISTRY)

AT IRINGA

MISCELLANEOUS CIVIL APPLICATION NO. 21 OF 2021

(Originating from Civil Appeal No. 11 of 2019 before High Court of Tanzania at

Iringa, delivered by Hon. Y. J. Mlyambina, J.)

PHRETHRUM COMPANY OF TANZANIA LTD APPLICANT

VERSUS

CHESCO R. KIHWELO RESPONDENT

RULING

Date of last Order: 17/03/2022

Date of Ruling: 27/05/2022

MLYAMBINA, J.

The Applicant, PHRETHRUM COMPANY OF TANZANIA LIMITED filed before this Court the instant application seeking for leave to appeal to the Court of Appeal of Tanzania against the decision of this Court (Honourable Justice Y. J Mlyambina) dated 3rd August, 2021 made in *Civil Appeal No. 11 of 2019*. Through the impugned decision, this Court developed a principle that; *malicious prosecution can be brought from a civil suit*. The Applicant is on dire need to contest over that principle. Hence this application under *Rule 45 (a) of the Tanzania Court of Appeal Rules, 2009 as amended by Rule 6 of the*

Tanzania Court of Appeal (Amendments) Rule, 2017 and section 5 (1) (c) of the appellate Jurisdiction Act [Cap 141 R. E. 2019]. The application is supported by the affidavit of Advocate Jassey Samwel Mwamginga for the Applicant.

The application was strongly opposed by the Respondent through the Counter Affidavit sworn by Advocate Nuru Stanley.

The background of this matter, as can be deduced from the record, is that: The Respondent in this application filed a suit against the Applicant herein based on tort of malicious prosecution before a District Court of Mufindi at Mafinga (hence forth the trial Court). The suit was found to be filed out of time, hence it was dismissed with costs. Being unsatisfied with the aforementioned decision, the Respondent successfully appealed to this Court. The Applicant was aggrieved with the decision of this Court.

The Applicant was represented by Mr. Jesse Mwamginga, learned Advocate. The Respondent was represented by Dr. Ashery Utamwa, learned Advocate.

By consent of the parties, the application was argued by way of written submission. The Counsel for the Applicant listed in his submission two issues arising from the decision made by this Court in

Civil Appeal No. 11 of 2019 which need to be determined by the Court of Appeal: *One*, whether the malicious prosecution can be brought from civil suit. *Two*, whether the suit claimed to be found on tort of malicious prosecution was filed in time.

The Counsel for the Applicant submitted that the issue as to; whether malicious prosecution can be brought from civil suit is a new jurisprudence and new doctrine in our Municipal law which raise an issue of general importance or a novel point of law. He was of the view that, such point of law, shows a *prima facie* or arguable point which calls determination by the Court of Appeal. He added that, malicious prosecution cases arising from criminal cases which was prosecuted against the Defendant(s) who instituted the groundless proceedings against the Plaintiff aimed at restituting the Plaintiff to his/her original position by compensating him/her to the damage caused during and/or when prosecuting a criminal case which had been the gist of having costs in civil suit. That means, costs in civil suit are realization of malicious prosecution.

Moreover, the Applicant Counsel averred that since this Court is not in the position to entertain such issues other than granting leave, he prayed his application be granted so that he can appeal to the

Court of Appeal. Thus, failure to grant this application, will leave the intimated points of law unattended and it will occasion failure of justice to the Applicant. The Applicant was of firm position that the proposed appeal stands reasonable chances of success. Further, guidance of the Court of Appeal over the new established doctrine is of much importance.

On the second issue, the Applicant's Counsel averred that, the suit subject to the intended appeal was filed out of time without procuring extension of time from the Minister as required under *section 44 (1) of the Law of Limitation Act [Cap 89 R. E. 2019]*. He added that, for an application of leave to succeed, the Applicant must advance plausible ground to justify the ground for appeal which raise issue of general importance and as well as *prima facie* or arguable appeal. He supported his arguments with 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, at page 7 (unreported); **Sango bay Estate Ltd and Others v. Dresdner Bank AG** [1971] EA 17; **Jackson Kitime v. Juma Ngamilaga and 3 Others**, Misc. Civil Application No. 7 of 2018, High Court of Tanzania at Iringa, page 5 (unreported) and the case of

Mustapha Athuman Nyoni v. Issa Athuman Nyoni, Misc, Land Application No. 38 of 2014, High Court of Tanzania at Songea, (unreported) page 4-5.

In reply, the Counsel for the Respondent started to submit in relation to the second issue by contending that the time limit on matter of malicious prosecution is regulated by the provision of *section 6 (d) of the Law of Limitation Act [Cap 89 R. E. 2019]*, which provides that:

In the case of a suit on malicious prosecution, the right of action shall be deemed to have accrued on the date on which the Plaintiff was acquitted or the prosecution was otherwise terminated.

The prosecution was ended by 17th day of March, 2016 when the matter was withdrawn at Iringa High Court. The matter was filed after one year, ten months and eleven days. Time to file malicious case is 3 years from when the suit was ended. Thus, the above arithmetic is too simple to require the guidance of the Court of Appeal of Tanzania. It was the firm view of the Respondent that this Court was not time barred as contended by the Applicant.

The Applicant contended that malicious prosecution is available to criminal cases only and the same is meant to compensate the victim following groundless criminal proceeding but he does not say why not for the victim of civil prosecution. He alleged further that the English Supreme Court when examining the ingredients of malicious in two laws (Criminal and Civil Laws) found that there is no difference in them, hence decided malicious prosecution is available to both laws, and that's what this High Court decided. The Respondent's Counsel beseeched this Court that malicious prosecution in civil cases as it applies in the United Kingdom be the position in our legal system.

The Applicant's Counsel reminded this Court that malicious prosecution is meant to check frivolous prosecution without probable cause caused by the abuse of the state machinery (Police or Court) be criminally or civilly, devised to injure other people physically, psychologically or even monetary without any probable cause.

The Respondent's Counsel, on his party, submitted that there is no dispute that the Respondent was injured by the Applicant through frivolous civil prosecution without any probable cause. Thus, the civil matter was brought to different adjudicators, wherein the cases were

turned down. All such prosecutions were meant to injure the Respondent. He prayed this application to be dismissed with costs.

This Court has carefully considered the submissions from both sides and after going through the record of the Court, it is of the findings that, as rightly argued by the Counsel for the Respondent, the position of the law as laid in different cases decided by this Court and the Court of Appeal is to the effect that, grant of leave to appeal to the Court of Appeal is not automatic but is granted where there is an important arguable issue of law, facts or mixed facts and law which need to be determined by the Court of Appeal. The said position of the law was stated in the case of **British Broadcasting Corporation** (supra) where it was stated that:

*"Needless to say, leave to appeal is not automatic. It is within discretion of the Court to grant or refuse leave. The discretion must, however judiciously be exercised and on the materials before the Court. as a matter of general principle, leave to appeal will be granted where the grounds of appeals 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 ER Rep 90 at page 91). However, where the grounds of appeal are frivolous, vexatious or useless or hypothetical, no leave will be granted."

Applying the above position of the law in the application at hand, the Court has gone through the two issues advanced by the Applicant and found, as right as submitted by the Respondent in relation to the second issue, that the case was filed within time. *Item 6 of the schedule in the Law of Limitation Act (supra)* provide requires the suit found on tort be instituted within three years from its occurrence.

From the record the case was filed after one year, eight months and ten days since the cause of action arose. As the matter of facts, the issue of limitation is *pari materia* with the issue of jurisdiction, and it has to be taken into carefully consideration. Unfortunately, the case which is subject to the appeal was filed within the time prescribed by the law.

As for the first issue that the principle established herein by Hon. Mlyambina J. is the new in our jurisdiction because malicious prosecution case can only be preferred out of criminal cases. Though I strongly don't agree with the Applicant's Counsel on his submission

that malicious prosecution is limited to the abuse of the State Machinery (Police or Court) be criminally or civilly, I'm still convinced that it is the time for the victim of the civil litigation to be considered and be protected. The reasons thereof are clearly stated in the impugned Judgement. I still maintain that whenever there is a proof that the prosecution in civil suit, criminal prosecution or other legal proceedings were instituted maliciously and without a probable cause, after their termination in favour of the Defendant therein will constitute malicious prosecution.

Needless, as rightly submitted by the Counsel for the Applicant, this issue is arguable and it raises the issue of general importance capable to require the guidance of the Court of Appeal of Tanzania.

Therefore, I'm of the findings that the Applicant has been able to convince the Court that there is issue of general importance or a novel point of law or a *prima facie* arguable ground from the impugned decision which deserve to be considered and determined by the Court of Appeal of Tanzania.

In the end, this application is allowed with no costs. The Applicant has to file his appeal to the Court of Appeal of Tanzania within the time prescribed by the law. It is so ordered.



Y. J. MLYAMBINA

JUDGE

27/07/2022

Ruling delivered and dated 27th day of July, 2022 through Virtual Court in the absence of the Applicant and in the presence of Senior Advocate Dr. Ashery Utamwa for the Respondent. The Respondent's Counsel was stationed at the High Court of Tanzania Iringa District Registry's premises.



Y. J. MLYAMBINA

JUDGE

27/07/2022