IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA DISTRICT REGISTRY

AT BUKOBA

MISC. LAND APPLICATION NO. 63 OF 2021

(Arising from the judgment of the High Court of Tanzania at Bukoba (Hon. Justice N.N. Kilekamajenga, J). dated the 11th December, 2020 in Civil Appeal No. 6 of 2018 and the Order of the Court in Misc. Civil Application Ni. 12 of 2021; original Civil Case No. 45 of 2016 of the Resident Magistrate Court of Bukoba, at Bukoba)

JOHNBOSCO RWABUTITI.....APPLICANT

VERSUS

SABITI KAINAMULA.....RESPONDENT

RULING

08/07/2022 & 27/07/2022
E. L. NGIGWANA, J.

The applicant, Johnbosco Rwabutiti is seeking leave to appeal to the Court of Appeal of the United Republic of Tanzania against the decision of this court (Kilekamajenga, J.) handed down on 11th day of December, 2020, in Civil Appeal No. 06 of 2018.

The application has been preferred under section 5 (1) of the Appellate Jurisdiction Act Cap. 141 R:E 2019 and Rule 45(a) of the Tanzania Court of Appeal Rules, 2019, and supported by an affidavit sworn by the Applicant.

The factual setting giving rise to this application is as follows; in the Resident Magistrates' Court of Bukoba at Bukoba, the applicant instituted a civil case against the respondent praying for the following reliefs; payment of Tshs. **20,309,468/=** being loss caused by the respondent's heads of cattle into the

applicants farm, general damages at Tshs. **15,000,000/=**, interest on the decratal sum at the bank rate from the date of judgment till final settlement, interest on the decratal sum at court's rate from the date of judgment till final settlement, and costs of the suit.

At the end of the trial, the applicant was awarded Tshs. **6,000,000/=** being payment of loss cause by the respondent's heads of cattle into the farm of the applicant; general damages at the tune of Tshs. **2,000,000/=**, and the decratal sum at the bank rate from the date of judgment till payment in full.

Aggrieved by the decision of the Resident Magistrates' Court, the respondent successfully appealed to this court vide Civil Appeal No. 06 of 2018. In other words, the appeal was allowed with costs, the decision of the trial court was quashed and set aside.

Dissatisfied by the decision of this court, the applicant now seeks leave of this court to challenge the same in the Court of Appeal.

When this application came for hearing, Mr. Joseph Bitakwate, learned advocate appeared for the applicant while Mr. Gerase Reuben, learned advocate appeared for the respondent. At the outset, Mr. Bitakwate adopted the affidavit of the applicant and submitted that before filing this application, the applicant lodged application for extension of time vide Misc. Application No.12 of 2021 and was granted. He also stated that the applicant filed the notice of appeal on 22/12/2020.

He went on submitting that this court, when hearing Civil Appeal No.06 of 2018 did not direct itself to the pleadings but also misconstrued the facts of

the case and the evidence tendered before the trial court and wrongly decided the case that this case may be one of the fabricated cases. The learned counsel added that the reasoning of this court conflicts with the pleadings and the evidence adduced in the trial court. He added that this court held in its judgment that the case originated from perennial conflicts the existed between the appellant and the respondent. Mr. Bitakwate argued that, the holding is neither supported by the pleadings nor the evidence on record, and that is contrary to **Order XX rule 14 of the Civil Procedure Code Cap. 33 R:E 2019** which requires the judgment to be confined on the pleadings and the evidence adduced before the court. The learned counsel added that since there was the violation of the herein above cited order, the intervention of the Court of Appeal is necessary.

Speaking about the duty of this court in this application, he referred me to the case of **Jireays Nestory Mutalemwa versus Ngorongoro Conservation Area Authority**, Civil Application No. 154 of 2016 where the Court of Appeal held among other things that "*the court adjudicating on such application is not left free to do so. It can grant leave to appeal only where the ground 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. This is intended to spare the court from dealing and washing its precious time on unmerited matters*".

Mr. Bitakwate ended his submission urging the court to grant this application and costs be in the due course.

On his side, Mr. Gerase submitted that the applicant has not shown whether the intended appeal has chances of success. He added that this court as a first appellate court has discharged its duty by re-evaluating the entire evidence adduced before the trial court, but also it considered the pleadings, therefore Order XX rule 14 of the CPC duly complied with by this court. Mr. Gerase went on submitting that, the learned counsel for the applicant did not show how the High Court misconstrued the facts and the evidence tendered before the trial court, hence the grounds are too general. He added that the court arrived to the decision that there was a conflict between the parties after reading the entire evidence and the proceedings of the trial court. Mr. Gerase ended his submission urging the court to dismiss this application since no arguable case worth consideration by the Court of Appeal.

In his rejoinder, Mr. Bitakwate stated that the argument that the applicant has to demonstrate that the intended appeal has chances of success is no longer a requirement. He ended his rejoinder that it is in the interest of justice that this application be granted.

I have carefully considered the submissions from both sides, thus the issue for determination is whether the applicant has been able to satisfy the court that he deserves to be granted leave to Appeal to the Court of Appeal of Tanzania against the decision made by this court in the above mentioned matter.

It is common knowledge that leave to the Court of Appeal is not automatic. It is granted where the court is satisfied that the grounds of appeal raise issues of general importance or where the grounds of appeal show that there is an arguable issue of law, facts or mixed facts and law which need to be

determined by the court of Appeal. See **British Broad Casting Corporation versus Erick Sikusieas Ngimiro**, Civil Appeal No. 138 of 2004 (CAT), **Hamisi Mdida and Another versus the Registered Trustees of Islamic Faundation**, Civil Appeal No. 232 of 2018 (CAT) (both unreported), **Ramadhani Mnyanga versus Abdala Salehe** [1996] TLR and **Jireys Nestory Mulalemwa versus Ngorongoro Conservation Area Authority** (Supra).

It should be noted that I have no mandate to go into the merits or deficiencies of the judgment or orders of the Hon. Judge or to analyse the grounds of the proposed appeal. All what I am duty bound to do is to consider whether there is an arguable case or compelling reasons or disturbing features or point of law or point of public importance requiring the Court of Appeal intervention in the intended appeal.

In the intended appeal, the court of Appeal of Tanzania is expected to sit as the second appellate court and the Apex Court of the land as beyond it, no other court in the Hierachy.

It is common understanding that the role of the second appellate court is to determine matters of law only unless it is shown that the courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. See **Otieno Ragot and Co. Advocates versus National Bank of Kenya** [2002] eKLR. I agree with Mr. Bitakwate that the issue whether the intended appeal has chances of success is no longer a requirement in the application for leave.

While guided by the principles stipulated in the here in above Court of Appeal decisions, I have gone through the judgment of this court and submissions by both parties, as well as the proposed grounds of the intended appeal deponed at paragraph 4 and 5 of the affidavit supporting the application which are to the effect that the High Court in Civil Appeal No. 6 of 2018 misconstrued the facts of the case and evidence tendered before the trial court and hence, arrived to a wrong decision, and found that the applicant has managed to satisfy the court that there is an arguable appeal which deserve to be determined by the Court of appeal of Tanzania.

In the upshot, I am convinced that the application meets the legal threshold for its grant. Accordingly, I grant it as prayed. Costs to be in the course. It is so ordered.

E. L. NGIGWANA
JUDGE
27/07/2022

Ruling delivered this 27th day of July 2022 in the presence of the Applicant and his advocate Mr. Joseph Bitakwate who is also holding brief for Mr. Reuben Gerase, learned advocate for the Respondent, Hon. E.M. Kamaleki, Judges Law Assistant and Tumaini Hamidu, B/C.

E. L. NGIGWANA
JUDGE
27/07/2022