

THE UNITED REPUBLIC OF TANZANIA
(JUDICIARY)
IN THE HIGH COURT OF TANZANIA
(IRINGA DISTRICT REGISTRY)
AT IRINGA

MISC. APPLICATION NO. 3 OF 2022
(Originating from Civil Appeal No. 3 of 2018)

UNIVERSITY OF IRINGA..... APPLICANT

VERSUS

DAUD MWAKYEMBE RESPONDENT

Date of last order: 08/7/2022

Date of Ruling: 29/8/2022.

RULING.

MATOGOLO, J.

This ruling is in respect of an application for leave to appeal to the Court of Appeal which was filed by the applicant University of Iringa who lost in Civil Appeal No. 3 of 2018.

In this application the applicant through his advocate Mr. Rutebuka Samson Anthony is praying for leave of this court so that can appeal to the Court of Appeal of Tanzania.

This application is by chamber summons made under section 5(1)(c) of The Appellate Jurisdiction Act, [Cap. 141 R.E 2019], rule 45 (a) of the Tanzania Court of Appeal Rules and any other enabling provision (s) of the law. The application is supported by an affidavit sworn by Rutebuka Samson Anthony. In the supporting affidavit specifically in paragraph 12,13,14, and 15 has raised four (4) grounds for consideration by the Court of Appeal as follows:-

1. Whether section 50(1)(2) and (8) imposes a statutory duty of care to the Applicant in consideration of the evidence on record.
2. Whether a party can argue on a ground of appeal not raised in the memorandum of appeal in consideration of Order XXXIV Rule (2) and (3) of The Civil Procedure Code [Cap 33 R.E 2019].
3. Whether the court would consider on the remedy where a party is arguing on the ground of appeal not raised in the memorandum of appeal.
4. Whether the purported statutory duty of care was breached by the applicant to warrant compensation as awarded.

The brief facts of the matter are that, the Respondent herein was a student at Iringa University, in the Tourism class. On the fateful day he was on safari to Ruaha National Park together with other students for study tour. In the bus they boarded they got an accident as a result the Respondent was injured on his right-hand palm and head. He instituted a suit, Civil Case No 43 of 2016 at Iringa Resident Magistrate Court claiming

compensation for injuries he has sustained. At the end other defendants were found liable for breach of duty of care and occasioning injuries to the Respondent. But the Applicant was absolved from tortious liability on ground that her duty of care was too remote. The Respondent successfully appealed to this Court, the Applicant was also held liable. The Applicant was not satisfied with the whole decision and he preferred this application for leave so that, he can appeal to the Court of Appeal of Tanzania.

At the hearing parties were represented, while the Applicant was represented by Mr. Rutebuka Samson Anthony the learned Advocate the Respondent was represented by Dr. Ashery Fred Utamwa the learned Advocate. The application was disposed of by way of written submissions.

Mr. Rutebuka first of all prayed for their affidavit and its annexures be adopted and form part of their submission.

With regard to the first point Mr. Rutebuka submitted that, looking at section 50(1) imposes a duty to the University to establish an office of a person of integrity and outstanding experience and capacity in administration or counselling to be responsible for the proper, effective and efficient administration of the affairs of the student's institution the said subsection provides:-

"An institution shall provide under its enabling legal instrument for an office of a person of integrity and outstanding

experience and capability in student administration or counselling to be responsible for the proper, effective and efficient administration of the affairs of the students of the institution”.

Mr. Rutebuka cited subsection (2) which provides that:-

“The designation of the holder of the office under subsection (1) shall in the case of a university accredited to offer degree programmes and confer degrees be the dean of students or equivalent designation”.

He went on contending that, when someone sues on statutory he must provide the provisions of the applicable law and stick to the wording of the relevant statute.

With regard to the second issue Mr. Rutebuka submitted that, the respondent herein filed a memorandum of appeal containing two (2) grounds of appeal. On 11th October 2018 the appellant (now Applicant) prayed to amend the memorandum of appeal and this court granted the prayer. The appellant amended the memorandum of appeal by exonerating 1st, 2nd and 3rd Respondents from previous memorandum of appeal thus remained with the 4th Respondent the University of Iringa. He contended

that, in the amended memorandum of Appeal filed raised only one new ground of appeal that; the Honourable Resident Magistrate erred in law and fact by finding that the Respondent was liable for tortious damages occasioned to the appellant but still absolved it from paying damages to the Appellant without any legal justification.

Mr. Rutebuka was of the opinion that, despite the fact that, the appellant argued on the two grounds of appeal which were left after amendment and the issue was raised and this court at page 8 of the impugned judgment agreed with the objection but did not make any order in respect of the objection. He went on arguing that, the question for consideration by the Court of Appeal would be to determine on the remedy available where the court violates or ignores the law above cited.

With regard to the third point Mr. Rutebuka submitted that, the 1st Appellate court awarded compensation of TZS 107.2 Million as specific damages which was not proved by the Respondent before the trial court. For that reason, he was of view that, this court cannot respond to this question, it is the Court of Appeal that can. Thus, if it would prudent if this court allows the Applicant to approach the Court for determination of the matter.

Mr. Rutebuka submitted that, in the case of ***British Broadcasting Corporation versus Eric Sikujua Ng'maryo***, Civil Application No. 133 of 2004 (unreported) where it was stated that leave to appeal is not automatic. It is within the discretion of the court to grant or refuse leave.

And that, leave to appeal will be granted where the grounds of appeal raises issues of general importance or a novel point of law or where the grounds show a prima facie or arguable appeal.

He concluded by submitting that, this is the case of true public importance to the extent that if the disputed provisions of law are not interpreted well, it may harm or cause harm to other institutions, this application has all qualities to be allowed by the looking at the nature of the raised issues for determination by the Court of Appeal. Thus, he prayed for this application be granted with costs.

In his reply Dr. Utamwa first of all prayed for his counter-affidavit be adopted to form part of his arguments.

He referred section 5(1)(c) of the Appellate Jurisdiction Act and rule 45(a) of the Court of Appeal Rules and according to him he was of view that, basing on the above cited provisions of law not all appeals to the Court of Appeal are matters of right, but some of them, like the instant one cannot be entertained by the Court unless leave has been sought and granted in advance.

He further referred the case of ***Rutagatina C.L versus The Advocates Committee and Another***, Civil Application No. 98 of 2010, Dar es Salaam (unreported) in which at page 7 referred to another case of ***British Broadcasting Corporation versus Eric Sikujua Ng'imaryo***, Civil Application No. 133 of 2004 (unreported). He argued that, an application for leave to appeal to the Court of Appeal is not an automatic

and solely, a court discretionary. He insisted his point by quoting the holding in the cases cited above that;

"Needless to say, leave to appeal is not automatic, it is within the discretion of the Court to grant or refuse leave"

It was further held that;

"As a 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 or arguable appeal" (quoting *Buckle v Holmes (1926) ALL ER Rep. 90* at page 91) the CAT says;

"However, where the grounds of appeal are frivolous, vexatious or useless or hypothetical, no leave will be granted".

He went on submitting that, what concurrently found correct and true by the subordinate courts cannot be subject for interference by the second appellate court, to support his argument he cited the case of ***Bomu Mohamed v. Hamisi Amiri***, Civil Appeal No.99 of 2018 (unreported) at page 9 it was held that:-

"We are very alive to a well-established rule of practice that on a second appeal,

the court will not normally interfere with the concurrent finding of fact of courts below unless there are sufficient grounds to do so. These grounds will be things like mis-directions, non-directions or misapprehension of the evidence”.

Dr. Utamwa went on submitting that, this application does not qualify for grant of the sought leave.

With regard to the first issue that, whether it was correct to exonerate the Applicant from paying compensation to the Respondent. He submitted that, the 1st appellate court found the Applicant liable to pay compensation basing on the evidence adduced in the court, it will be in violation of the rule in ***Bomu Mohammed case*** to bring the intended ground No.4 to the attention of the CAT for re- assessment of the evidence, he prayed for the ground to be expunged.

With regard to the 2nd ground, Dr. Utamwa submitted that, according to Rule 2 and 3 of Order XXXIX of the CPC a party cannot argue on a ground of appeal which was not raised in the memorandum of appeal, unless he seeks permission and is allowed by the court. He submitted further that, in numerous times, Respondent's submission argued on the sole ground of amended memorandum of appeal which had two arguable issues of liability and exoneration of the applicant from paying compensation. He submitted that he asked the court to find that, the applicant was substantially liable and he asked the court to order the

applicant to pay compensation to the respondent after finding that she was liable. And the court found the Applicant liable and ordered him to pay compensation.

Dr. Utamwa submitted, only that there was confusion of language in his submission in chief at the introduction part, instead of saying that there were two issues for determination in the amended memorandum he said there were two grounds. He submitted that, Rule 2 O.39 of the CPC allows the court to decide without being bound by the ground of appeal, he argued that even if he had argued on different ground to the intended one, the court was not bound to decide pegging on that wrong ground and the Applicant was not affected at all by complying with rule 2 of the said Order 39.

He went on arguing that even if his submission was based on a ground not set forth in his memorandum, since the applicant was able to reply to the same, he cannot be allowed to go to the Court of Appeal and re-claim on the same.

He concluded by submitting that, the intended ground No.2 and 3 are legally not energetic enough to attract the attention of the CAT because they don't raise issues of general importance or a novel point of law, more to that they don't show a prima facie or arguable appeal in line with the authority in the case of ***Rutagatina*** and he prayed for the court to decline this application with costs.

In a rejoinder Mr. Rutebuka submitted that, at page 4 of the Respondent's reply submission, the respondent's counsel has impliedly conceded that the issues raised pass the test as set in the decision of the

case of ***British Broadcasting Corporation case*** (supra). He went on arguing that, guided by the case of ***British Broadcasting Corporation*** as cited by the counsel for the Respondent, basing on ground No. 2 and 3 this Court may grant the application.

Regarding the argument by the counsel for the Respondent that, the subordinate Court and the 1st appellate court found concurrent finding that applicant has duty of care is misdirecting this court as the trial court did not make such decision, it decided that, the duty of care was too remote.

With regard to the ground that, the respondent argued on the ground of appeal not pleaded in his memorandum of appeal. Mr. Rutebuka submitted that, the counsel for Respondent has conceded that no party can be allowed to argue on the ground of appeal which was not raised in the memorandum of appeal.

He concluded by instating for this application be allowed with costs.

Having considered the submissions by the parties as well as the affidavit and counter affidavit, in my opinion the issue for determination here is whether or not this application for leave to appeal to the CAT has merit.

It is settled principle of law that, in applications for leave to appeal to the CAT the Applicant must adduce sufficient grounds for the leave.

In applications of this nature, the law is settled. Leave may be granted where there is a point of law, or where there is a point of public importance to be determined by the Court of Appeal.

In the case of ***Kadili Zahoro (Administrator of the Estate of the late Bahati Ramadhani Mponda and Another versus Mwanahawa***

Selemani (supra) at page 6 when the Court of Appeal referred its previous decision in the case **Harban Haji Mosi and Another versus Omar Hilal Seif and Another**, Civil Reference No. 19 of 1997 (unreported), the Court of Appeal stated that:-

"Leave is granted where the proposed appeal stands reasonable chances of success or where, but not necessarily, the proceedings as a whole reveal such disturbing features as to require the guidance of the Court of Appeal. The purpose of the provision is therefore to spare the Court the specter of unmeriting matter and to enable it to give adequate attention to cases of true public importance".

The same principle was reiterated in the case of **Saidi Ramadhani Mnyanga versus Abdallah Salehe [1996] TLR 74**, in which it was held that:-

"For leave to appeal to be granted, the applicant must demonstrate that there are serious and contentious issues of law or fact fit for consideration by the Court of Appeal".

Again, in the case of ***British Broadcasting Corporation versus Eric Sikujua Ngmaryo*** (supra), it was held that:-

"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 judiciously exercised and on the materials before the court. As a 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 or where the grounds show a prima facie or arguable appeal..."

Now the question that begs an answer is whether the application at hand met the conditions discussed in the cases cited above.

The applicant has raised four (4) grounds that need to be considered by this court and grant leave to appeal to the Court of Appeal.

With regard to the 1st ground Mr. Rutebuka learned advocate argued that when one sues on statutory duty, he must provide the provisions of the applicable law and stick to the wording of the relevant statute. He was of the considered opinion that, the appellate court did not construe well section 50(1)(2) and (8) in line with the complaint as presented in the plaint and the evidence on record. Dr. Utamwa on the other hand was of the view that, the first issue was meant to examine whether or not the

Applicant was liable or not for injuries caused to the Respondent. Having examined the arguments by both parties, it is my considered opinion that, this ground raises an issue of point of law as it is on the interpretation of the provisions of the law. The complaint by the applicant's counsel is that, the 1st appellate court did not construe well the provision in line with the complaint as presented in the plaint and the evidence on record. This court as 1st appellate has construed the provisions the way it did the decision Applicant now seeks to challenge. I do not think if this court in the present application is mandated to have its own interpretation of the same provision of the law. By doing that it would amounts to discussing merit of the intended appeal which is not the duty of this court. It is that is why I am of the view that the ground deserves consideration by the Court of Appeal. It should be noted that the duty of this court in an application for leave is not to discuss on merit or demerit of the appeal, but just to see if the appeal is worthy consideration by the Court of Appeal. In the case of ***Bulyanhulu Gold Mine Limited and 2 others vs. Petrolube (T) Ltd and Another***, Civil Application No. 364/16 of 2017, CAT (unreported), The Court at page 13 last paragraph has this to say:-

"Just as a matter of guidance, we wish to emphasize that the duty of a court in applications of this nature is not to determine the merits or demerits of the ground of appeal raised when seeking leave to appeal. Instead, a court

*has only duty to consider whether the proposed issues are embraced in the conditions set in the case of **British Broadcasting Corporation vs. Eric Sikuju Ng,maryo (supra)**".*

The Court of Appeal referred its previous decision in the case of ***The Regional Manager TANROADS Lindi vs. DB Shapriya and Company Ltd.*** Civil Application No. 29 of 2012 CAT (unreported), in which it stated that:-

"It is settled that a court hearing an application should refrain 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".

As the issue challenges interpretation of the above mentioned provision by this court as 1st appellate court, this court cannot have its own interpretation on the same provision of the law as doing so would tantamount to hearing the intended appeal, which is not the duty of this court.

Having discussed as herein above, and by considering the argument by the applicant's counsel as narrated above, the issue raised therefore deserves consideration by the Court of Appeal.

With regard to the 2nd and 3rd grounds, it is my considered argument that, the same lack merit and do not qualify as ground on point of law or public importance worth for consideration by the Court of Appeal.

It is not true as alleged by the counsel for the applicant that, the Respondent argued on the ground of appeal raised in the memorandum of appeal which is not raised in the amended memorandum of appeal. The 1st appellate court judgment is clear, the trial judge discussed this issue in detail and his decision was not based on the ground of appeal raised in the memorandum of appeal rather, the same was based on the ground of appeal raised in the amended memorandum of appeal, the judgment of the 1st appellate court at page 8 clearly shows that the said issue was discussed. The problem that I see, and as it was pointed out by Dr. Utamwa learned counsel in his submission, the learned counsel referred to "ground" instead of issue which was interpreted to mean that in the amended memorandum of appeal there were two grounds of appeal the fact which is incorrect. The truth is that there was one ground of appeal which essentially covered two issues as raised in the two ground raised in the memorandum of appeal formerly filed. Also, the ground that, whether it was proper for the 1st appellate Court to consider the remedy where a party is arguing on the ground of appeal not raised in the memorandum of appeal. I have already stated above that, the 1st appellate Judge in his judgment did not consider the ground of appeal not raised in the amended memorandum of appeal. Thus, the 2nd and 3rd grounds do not qualify the

test that was discussed in the case of **British Broadcasting case** (supra). Thus, the same must fail.

Regarding the 4th ground as to whether the statutory duty of care was breached by the Applicant to warrant compensation as awarded. The applicant argued that, the appellate court awarded compensation which was not proved by the Respondent in the trial court. Dr. Utamwa was of the considered opinion that, this issue cannot call for any grant of leave of this Court because it intended to invite the Court of Appeal to re- assess matters of fact. Having considered the arguments by the parties, leave is granted if the proposed issues for consideration and determination by the court raise point of law, facts or mixed law and facts, (see **Rutagatina case**). It is not strictly prohibited for all matters of evidence to be placed before the Court. The issue of breach of statutory duty by the Applicant has been dealt with by the trial court which found it to be too remote. But the 1st appellate court faulted the Applicant to have breached that duty and condemned to pay compensation to the Respondent for the injuries he has sustained. When considering whether or not this issue deserves to be considered by the Court of Appeal courts are guided by the decisions of the Court of Appeal. What appears to be a current position as provided in case law is that it is now not necessarily for the court to consider whether the appeal stands chances of success as it was held in **Bulyanhulu Gold Mine Ltd. and 2 others case** in which at page 15 paragraph 1 the Court of Appeal said that:-

*"This accounts for the reason **why the Court did away with the***

***requirement to consider whether
"the appeal stands chances of
success on appeal as ground for
granting leave to appeal".***
(Emphasis added).

By looking at the order for compensation for injuries sustained by the Respondent, the circumstances under which the order was made and the law applicable, there is no doubt that the ground raises an arguable appeal. In no way can it be termed frivolous, vexatious or useless not to be considered by this court. It raises contentious issue of both law and fact, thus deserve attention by the Court of Appeal.

Having discussed as herein above it is my considered opinion that, this application has merit the same is allowed and leave is granted.

It is so ordered.




F.N. MATOGOLO
JUDGE
29/8/2022.

Date:	29/08/2022
Coram:	Hon. F. N. Matogolo –Judge.
Applicant:	} Mr. Rutebuka – Advocate
For the Applicant:	

Respondent:

For the Respondent } Dr. Utamwa - Advocate
C/C } Grace

Mr. Rutebuka Samson - Advocate.

My Lord I am appearing for the applicant.

Dr. Ashery Utamwa - Advocate.

My Lord I am appearing for the Respondent.

Mr. Rutebuka - Advocate.

My Lord the matter is for ruling we are ready.

COURT:

Ruling delivered.




F. N. MATOGOLO,
JUDGE.
29/08/2022.

Right of appeal in case of dissatisfaction is explained.




F. N. MATOGOLO,
JUDGE.
29/08/2022.