

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY
AT MOSHI

MISC CIVIL APPLICATION NO. 52 OF 2021

*(C/f Civil Appeal No. 11 of 2021 High Court (T) at Moshi & Civil Case No. 11 of 2019
District Court of Moshi)*

ITAEI SHORISAEI NANYARO APPLICANT

VERSUS

MANAGING DIRECTOR TANZANIA

BREWRIES LTD DAR ES SALAAM RESPONDENT

12/7/2022 & 24/8/2022

RULING

MWENEMPAZI, J:

The applicant has brought this application under the provision of Section 5(2) (c) of the Appellate Jurisdiction Act, Cap 141 R.E. 2002, Rule 45(a) of the Tanzania Court of Appeal (amendment) Rule, 2017 praying for leave to appeal to the Court of Appeal of Tanzania against the judgment and decree of Hon S.H. Simfukwe, Judge in Civil Appeal No. 11/2021 whose judgment was delivered on 28th October, 2021. He prays costs to be born by the respondent.

In the affidavit accompanying the application, the deponent, the applicant herein has stated that, he instituted a suit against the respondent, Civil Case No. 11 of 2019 in the District Court of Moshi. The applicant was claiming for payment of Tshs. 100,000,000/= being general damages for

false imprisonment. The trial court dismissed the suit with costs. The applicant was dissatisfied with the decision. He therefore appealed to this court in Civil Appeal No. 11 of 2021. The appeal was dismissed with costs. The applicant wants to appeal against the decision of the Honourable appellate judge to the Court of Appeal of Tanzania. He has listed grounds he seeks to rely which are in paragraph 6 namely; one, whether there was any theft at the respondents warehouse and two, whether the applicant had to shoulder the proof of justification of the restraint caused to the applicant by the respondent.

The Respondent is opposing the application. She has filed a counter affidavit sworn by Mr. John Mushi, advocate for the Respondent. He stated that the alleged points of law are misconceived both in fact and in law. As such they do not qualify to be points of law warranting determination of the court of Appeal.

At the hearing the applicant was represented by Mr. G.J. Ngotolainyo, learned advocate and the Respondent was represented by Mr. Denis Mworio, learned advocate. The counsel for the applicant submitted in support of the application, first by narrating the nature of the relationship and accountability of parties as a result of the relationship they have. The counsel stated that the genesis of this matter is the security contract whereby the Managing Director of the Respondent (master) secured the Services of KK Guard Ltd (servant) to guard the property of Tanzania Breweries at their offices and Godowns (warehouse).

On the other end KK Guards Ltd employed the applicant to perform the services of the master and this culminated to master and the applicant Itael Shorisael Nanyaro as servant or employee.

The basic requirements to prove a negligence case are; one, that the defendant owes to plaintiff a legal duty; two that the defendant has been guilty of a breach of that duty; and three, the damage has been caused to the plaintiff by that breach and the burden of proof must lie to the plaintiff.

The applicant in this case owed a legal duty of care to his master KK Guard Ltd as her servant and now the Respondent. Likewise KK Guard Ltd owed a legal duty of care of Tanzania Breweries. Consequently Tanzania Breweries. The respondent should have taken to task KK Guard Ltd and not the applicant as is in this case.

In the present case the servants of the master (TBL) reported the case to the police who imprisoned the Applicant without any legal duty to do so. If there was any duty of care breached, the defendant should have taken to task her servant who is KK Guard Ltd who had a Security contract with herself. Employers are vicariously liable for the tasks of their employees.

In this case there were no theft nor breakage as elaborated by the Magistrate.

It is the opinion of the counsel for the applicants that the Respondent should have taken to task KK Guard Ltd and not the applicant. For the reasons the applicant prays for leave to appeal to the Court of Appeal, so that the decision of this court may be challenged.

The Respondents are contesting and or opposing the application. The counsel for the respondent one John Mushi did swear an affidavit in reply (counter affidavit). According to paragraph 4 of the same, the deponent has stated that the points of law raised by the applicant are misconceived. They do not qualify to be points of law and therefore not warranting for determination by the court of Appeal of Tanzania.

In the written submission drawn by Mr. Mworio Dennis, learned advocate for the respondent company, the counsel has submitted in response by first narrating what transpired in the trial court. That the applicant initially filed a suit on the tort of false imprisonment, to wit Civil Case No. 11 of 2019 against the Respondent before the District Court of Moshi. The applicant complained that Patience Kazahura (DW1) and Wilson Ambilikile facilitated his arrest, detention and prosecution in Criminal Case No. 835 of 2016 at the District Court following the loss of 500 bags of barley at the Respondent's warehouse. The District Court dismissed the complaint for the applicant's failure to prove his claim to the required standard. That decision was upheld in the appeal before this court.

The respondent's counsel has submitted that the application is devoid of merit. The counsel for the applicant has failed to explain the points of law warranting determination of this dispute by the Court of Appeal. In the case of **British Broadcasting Corporation Vs Eric Sikujua Ng'maryo, Court of Appeal of Tanzania at Dar es Salaam, Civil Application No. 138 of 2004** the Court stated;-

"Leave is granted where the proposed appeal stands a 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 provisions is therefore to spare the court the specter of unmeriting matters and to enable it to give adequate attention to cases of true public importance."

It has been submitted by the counsel for the respondent that the test which was to be considered before an application for leave to appeal to the court of Appeal can be granted is whether the said ground or grounds raise issue of general importance or a novel point of law in the sense that they are not frivolous, vexatious or useless or hypothetical and they need intervention of the court of appeal.

In the opinion of the counsel. If you read the affidavit and the submission made, thereto, this court will note that there is/are no such grounds of general importance justifying intervention by the court of appeal.

The applicant's grounds in support of the application are found in paragraph 6(a) and (b) of the affidavit. The said paragraphs indicate that the applicant's counsel is challenging the decision of the High Court on matters of fact. This is contrary to the law. The intended appeal being the second appeal, the applicant is only required to raise matters of law not facts.

The points raised are not issues of general importance which require determination by the court of Appeal taking into account the applicant's claims against the Respondent and the available evidence.

The counsel for the respondent has gone far as to submit on what is needed to prove the tort of false imprisonment. This in my opinion is not necessary as the same is heading for the substantive consideration of the grounds on challenging the decision of this court.

In my view of the record, paragraph six (6) of the affidavit carry the support of the application at hand. Originally, the applicant had filed claims on tort of false imprisonment against the respondent. The suit was dismissed by the District Court and the decision was also upheld by this court on appeal.

As it will be referred to the submission made herein by the counsel for the applicant the focus has been not on the grounds but how he is deriving his argument to challenge the decision and not the importance of the issues as the law would require him to do. The respondent has submitted that, the counsel for the applicant has failed to expand on the grounds and explain the same and that shows the grounds are flivorous.

In the cited case of **British Broadcasting Corporation Vs Eric Sikujua Ng'maryo, Civil Application No. 138 of 2004, CAT at Dar es Salaam** the Court of Appeal observed that in the application of this nature the court has a task to subject the issues to analysis to see if they merit reconsideration by the court of Appeal.

Having read the judgment by appellate judge and the issues raised as the intended grounds of appeal, I have the opinion that the same are not of general importance and or do not raise a novel issues for consideration by the court of Appeal of Tanzania.

As rightly submitted by the counsel for the respondent, the applicant ought to have raised issues of law for consideration by the Court of Appeal not on facts as the intended appeal will be the second appeal.

For the reasons stated I find this application of no merit and accordingly I proceed to dismiss it with costs.

DATED and DELIVERED at Moshi this 24th day of August, 2022.




T. MWENEMPAZI
JUDGE

Ruling delivered this 24th day of August 2022 in the presence/of the applicant and Mr. Gerald Joseph Ngotolainyo Advocate for the applicant who was also Holding brief for Mr. Mworio Denis Advocate for the Respondent.


T. MWENEMPAZI
JUDGE