

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

MISCELLANEOUS CIVIL APPLICATION NO.561 OF 2021.

(Arising from the decision of the High Court of Tanzania at Dar Es Salaam Registry in Civil Appeal No. 115 of 2021 NGWEMBE J, dated 20th October 2021; Original Civil Case No 1 of 2020 of the District Court of Malinyi at Malinyi dated 16th April, 2021 A.W.Kabuka Esq RM)

BETWEEN

MIKIDADI KAJUAAPPLICANT

VERSUS

LUGALA NURSING SCHOOL..... RESPONDENT

RULING

MRUMA, J.

This application is made under section 5(1) of the Appellate Jurisdiction Act [CAP 141 R.E. 2019] and Rule 45(1) of the Court of Appeal Rules, 2009 (as amended in 2017) seeking leave to appeal to Court of Appeal against the whole judgment and decree of this Court (Ngwembe, J) delivered on 20th October, 2021.

The Applicant who was the Plaintiff in Civil Case No.01 of 2020 instituted a suit before Malinyi District Court at Malinyi claiming that he was maliciously prosecuted by the Respondents herein. The claims for

malicious prosecution were founded on criminal Case No. 144 of 2019 which was instituted before Ulanga District Court at Mahenge in Morogoro against the Applicant. That criminal case ended being withdrawn under section 98(a) of the Criminal Procedure Act [Cap 20 R.E 2019].

After the withdrawal of criminal case No.144 of 2019 the Applicant instituted Civil Case No 1 of 2020 in the District Court of Malinyi at Malinyi asserting that he was prosecuted maliciously in the said criminal. The suit was dismissed prematurely following a preliminary objection, raised by the then Defendants. The Applicant being aggrieved by the decision of the District Court dismissing his suit appealed to this court in Civil Appeal No. 115 of 2021. His appeal too was dismissed with costs by this Court (Ngwembe, J), on 20th October 2021. Still unsatisfied, the Applicant has filed this application seeking for leave of this court to go to the Court of Appeal. As is the practice the application was supported by the affidavit of Applicant MIKIDADI KAJUA stating the grounds upon which the application is made.

At the hearing the Applicant was represented by Miss. Clara Madaraka learned advocated while Mr. Bageni Elijah learned advocate appeared for the respondent. The application was disposed of by way of

written submissions.

Submitting in support of the application, counsel for the Applicant stated that the applicant is applying for leave to appeal to Court of Appeal to challenge the decision of this Court in Civil case No.115 of 2021. The Applicant prays this court to exercise its discretionary power to grant the leave sought upon grounds stated in the affidavit he affirmed to himself. His advocate argued this court in granting leave to be guided by the decision of the **Court of Appeal in Civil Application No.138 of 2014 between BRITISH BRODICASTING CORPORATION Vrs ERIC SIKUJUA**, where the said court cited with approval its earlier decisions in **Civil Reference No.19 of 1997, Harban Haji Mosi and Shauri Haji Mosi Vs Omari Hilal Seif and Seif Omar (Un-reported)** and observed that:-

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

The learned counsel submitted further that it is important for this court to exercise its discretionary powers to grant the leave sought for reasons

stated in the supporting affidavit and particularly in paragraphs 7, 8 and 9 while insisting that parties in this case have capacity to sue or to be sued. He referred this court (Mruke J), to its own decision in the case of **SOSPITER NYANZA & ANOTHER Vs THE REPUBLIC, Cr App.No.289 of 2018 (Un-reported)** where it was held that:-

"Objection is against document must be done before it is admitted, the respondent to challenge the capacity of being sued at this stage is too late to challenge as the same if any was supposed to made at the trial Court".

Responding to the counsel for the Applicant's submission, the Respondent counsel submitted that Lugala Nursing School the Respondent herein is not a legal person therefore it cannot sue or be sued on its own name as it lacks legal capacity due to the fact that, Lugala Nursing School is an institution owned by Diocese of Ulanga Kilombero which is institution under the Registered Trustees of the Evangelical Lutheran Church of Tanzania. The Respondent's counsel averred that a legal issue on pure point of law as the present one can be raised at any stage including on second appeal or the present leave stage for second appeal. He cited the case of **ALLY SANDALI & ASHA ALLY, Civil Appeal No. 246 of 2019 (CAT at Mtwara Un-reported and OIL COM TANZANIA LTD Vs CHRISTOPHER LETSON MGALLA, Land Case No.29 of 2015 (HC at Mbeya, Un-reported), BETAM COMMUNICATIONS TANZANIA**

**LIMITED Vs CHINA INTERNATION TELECOMMUNICATIONS
CONSTRUCTION COPORATION AND ANOTHER (2017) TLS 465.**

In the case of Hassani Ally Sandali (Supra) the Court of Appeal held that:-

*".....The first relate to the criticism by respondent against the appellant for not raising the issue on the validity of the certificate before the Primary Court. It is true that the issue featured as a ground of appeal for the first time on a second appeal before the High Court. However, whilst it is desirable that all issues must have been dealt with at the earliest possible opportunity, the High Court was not precluded from dealing with it as it did. That ground involved a point of law touching on the competence of the proceedings before the Primary Court which could be raised at any time. In **Murwa Mahende Vs R (1998) TLR 249**, this Court underscored the duty of the appellate Court to apply and interpret the law of the land and ensuring proper application of the laws by the Courts below (page 9)"*

It is further submissions of the learned counsel that the Applicant indirectly agrees that Lugala Nursing School is without legal capacity to sue or be sued as this could discerned from his counter affidavit where it is deposed that the Respondent is owned by a church-Dioceses of Ulanga Kilombero which is also under the registered Trustee of Evangelical Lutheran church of Tanzania. Counsel submitted further that if the intended appeal ends in favor of the Applicant the entire process will be a

futile exercise because no decree can be executed against non-existence entity. He cited the case of **KANISA LA ANGELIKANA UJJI Vs ABED s/o SAMSON HEGUYE, Labour Revision No. 5 of 2019** at Kigoma where Mugeta J, had this to say.

"Society as legal persons are therefore sued and can sue in their incorporation names not registered names. I accordingly hold that the respondent sued a legally non-existed entity. This is an error which cannot be allowed to stand much as I sympathize the resources already spend on prosecuting this case. To avoid situation like this, it is advisable that entrusted with the administration of justice should always ensure that when artificial persons sue or are being sued, they do so in their incorporation names. This can be achieved by demand for certificates of incorporation not registration certificates before the trial commences"

That notwithstanding the counsel for Respondent submits further that as the Applicant was never prosecuted and no case ended in his favour as pleaded in his own plaint at paragraphs 8 and 9 to in that he discharged after the withdrawal of his criminal case. The counsel contended that the prosecution ending in favour of the accused is one of the conditions precedent for institution of case for malicious prosecution.

In his brief rejoinder the counsel for Applicant submitted that, this court has discretional powers to grant leave, where there is sufficient

cause to do so as it was celebrated by the Court of Appeal in Civil Application No.138 of 2014 between where the court of Appeal held that:

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

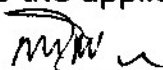
I have carefully considered the submissions of both parties. It is trite law that leave to appeal will be granted where the grounds of appeal raise issues of general importance or a novel point of law or where the grounds show prima facie or arguable appeal see **(Buckle Vs Holmes [1926] All ER Rep.90 at page 91)**. Speaking for myself the issues raised by the Applicant are pure matters which touch on facts and laws. I will confine myself on the pure point of law and to be specific the legal capacity or status of the Respondent Lugala Nursing School. There is no dispute that, the applicant filed a suit for malicious prosecution against Lugala nursing school which has registration certificate number 0052 dated on 06th April, 2011. The said nursing school is owned by Evangelical Lutheran Church of Ulanga which is owned by the Evangelical Lutheran Church of Ulanga Kilombero which is under the Registered

Trustee of Evangelical Lutheran church of Tanzania, Ulanga Diocese. Similarly there is no dispute that the said nursing school is Registered as Lugala Nursing school, therefore Lugala Nursing School is its registered name and not its incorporation name. It follows therefore that the proper person to sue would have been the Registered Trustee of Evangelical Lutheran Church in Tanzania, a society with legal capacity to sue or to be sued. By suing a non-existing legal entity, the suit was incompetent for being preferred against a party without legal capacity to be sued. Similar consequences should follow on every proceedings originating from an incompetent suit. In the case of **KANISA LA ANGELIKANA UJJI Vs ABED s/o SAMSON HEGUYE**, Labour Revision No. 5 of 2019 Mugeta J, had this to say.

"Society as legal persons are therefore sued and can sue in their incorporation names not registered names. I accordingly hold that the respondent sued a legally non-existed entity. This is an error which cannot be allowed to stand much as I sympathize the resources already spend on prosecuting this case. To avoid situation like this, it is advisable that entrusted with the administration of justice should always ensure that when artificial persons sue or are being sued, they do so in their incorporation names. This can be achieved by demand for certificates of incorporation not registration certificates before the trial commences"

On the illegality, nothing was demonstrated to constitute illegality in the way the matter was handled by the trial court and on appeal. Moreover illegality however grave is, cannot save incompetency of the proceedings. Once the matter is held to be incompetent it lacks legal ability to be determined in the courts of law. It does not require a determination by the Court of Appeal to decide whether a none registered nursing school can sue or be sued. Allowing such matter to go to the Court of Appeal for determination is to turn that court into a dump waste of cases. That cannot be the mandate of the highest court of the land.

For reasons stated hereinabove, I find that the Applicant has failed to show sufficient cause to warrant this court to grant leave to appeal to the Court of Appeal. I proceed to dismiss the application with Costs.


A.R. MRUMA,

Judge.

Dated at Dar Es Salaam on 24th Day of August 2022.