

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOKA DISTRICT REGISTRY

AT BUKOKA

MISC. APPLICATION NO. 75 OF 2021

(Arising from High Court Civil Appeal No.23 of 2017, Originating from Civil Case No.2 of 2016 of Bukoba Resident Magistrate Court at Bukoba)

RIBENT RWECHUNGURA APPLICANT

VERSUS

HILDA PONTIAN BWAHAMA (Adminitratix of the Estate of the

late Pontian Mutayabarwa) **RESPONDENT**

RULING

05/09/2022 & 30/09/2022
E. L. NGIGWANA, J.

This application is expressed to be made under Section 5 (1) (c) of the Appellate Jurisdiction Act, Cap 141 R: E 2019. The application is supported by an affidavit sworn by Mathias Rweyemamu, learned advocate for the applicant. The applicant is seeking for leave to appeal to the Court of Appeal against judgment of this Court (Kairo J as she then was) in Civil Appeal No. 23 of 2017 handed down on 23/03/2020.

A brief background of this matter is to the effect that, the applicant and the respondent are relatives who had entered into a sale agreement of sale of land situated at Maiga Bwizandurui Village, Maruku Ward in Kagera Region. The applicant was the seller and the respondent was a buyer who effected

part payment of **Tshs.950, 000/=** out of **Tshs. 2,500, 000/=** agreed as consideration in the sale agreement.

Before payment of the outstanding balance, the respondent discovered that the said land was sold to another person and the applicant appeared to witness that second agreement. That act made the respondent to file a Criminal Case before Kolekelo Primary Court to wit; Criminal Case No. 46 of 2012 in which the applicant was charged with the offence of false pretence. Upon trial, he was convicted and sentenced to serve six months in prison. The applicant was aggrieved therefore; appealed to the District Court of Bukoba Vide Criminal Appeal No. 64 of 2012, whereas, finally, both conviction and sentence were set aside on the ground that Criminal Case No. 46 of 2012 was improperly filed.

Thereafter, the respondent lodged an appeal to the High Court to wit; (PC) Criminal Appeal No. 8 of 2015, but his appeal ended being dismissed for being devoid of merit.

Thereafter, the applicant filed Civil Case No. 2 of 2016 in the Resident Magistrate Court of Bukoba claiming damages for **false imprisonment, malicious prosecution and defamation**. Upon hearing the parties, the suit was dismissed with costs for want of merit.

Dissatisfied with the decision of the Resident Magistrate Court in Civil case No. 02 of 2016, the Applicant appealed to this court vide Civil Appeal No. 23 of 2017, but the same ended being dismissed with costs for want of merit.

The applicant was dissatisfied by the said decision therefore, he duly filed the Notice of Appeal on 14/04/2020, followed by Application for leave to

the Court of Appeal to wit; Misc. Application No.14 of 2020 but the same was struck out on 26/11/2020 by this court (Kilekamajenga, J) for being time barred. However he was granted leave to file.

Thereafter, the Applicant filed Misc. Civil Application No.39 of 2020 seeking for leave to appeal to the Court of Appeal. On 03/03/2021, the Applicant through his advocate Mr. Mathias Rweyemamu prayed to withdraw the same with leave to re-file. The prayer was granted with leave to re-file in 14 days after official rectification of the record of this court. Official rectification of the record was done vide Misc. Civil Application No.56 of 2021 in which the court delivered its ruling on 24/11/2021, and on 04/11/2021, the instant application was filed.

When this application was pending for hearing in this court, the respondent demised and on 25/08/2022, the respondent's legal representative was substituted by an administratrix of his estate appointed by the District Court of Temeke under form 68 issued to Hilda Pointian Bwahama, therefore amendment of the pleadings was made to meet the end of justice.

In the instant application, the applicant intends to appeal against the judgment of this court to the Court of Appeal of Tanzania on the grounds contained in paragraph 7, 8, 9, 10 and 10 of the affidavit drawn, sworn and filed by the applicant's advocate Mr. Mathias Rweyemamu. The grounds were coached as follows;

7. That, the Judge of the High Court had found agreed issues were not determined by the trial court failed to nullify all proceeding and set aside

the judgment and decree of the trial court and order trial denovo before another Magistrate with competent jurisdiction.

8. That, the Judge of the High Court highly dismissed the Appeal as a trial Court that the respondent had no malice, despite the all pleadings and the evidence were watertight against the respondent that was actuated by malice and he is the one who put matters on motion.

9. That, the High Court Judge misconceived her decision to shift the burden of proof to the Court which had nothing to prove or disapprove the evidence before the Trial Court on behalf of the parties to the suit.

10. That, the High Court Judge wrongly dismissed an appeal with costs on failure to allow an Appeal which disclosed facts and laws were in favour of the applicant.

11. That, there are triable legal and factual issues which need to be resolved on appeal to the Court of Appeal.

The respondent on the other hand objected the present application through a counter affidavit sworn by the respondent's advocate Mr. Abel Rugambwa. The counter affidavit did not dispute the background of the matter at hand. The contents of the herein above paragraphs were contested. The same stated that the appellate court having passed through the records of the trial court found that malicious prosecution, defamation and false imprisonment were not proved thus this application is nothing but wastage of time.

During the hearing of this application, Mr. Mathias Rweyemamu, learned advocate appeared for the applicant while Mr. Abel Rugambwa, learned advocate appeared for the respondent.

Submitting in support of the application, Mr. Rweyemamu adopted his affidavit to form part of his submission. He added after noting that there are issues which were not framed, the court's duty was to exercise its discretion nullify the proceedings, quash and set aside the judgment and orders of the trial court, and order re-trial before another Magistrate with competent jurisdiction. He further stated that the applicant proved his case to the balance of probabilities required in civil cases.

In reply, Mr. Rugambwa submitted that leave is granted at the discretion of the court whether there are arguable issues worthy of consideration by the Court of Appeal. He added that since Pontian Mutayabarwa had passed away, the case (tortious act) cannot go to the Adminitratrix. He made reference to section 9 (1) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, Cap 310 R:E 2019 which provides that;

" Subject to the provisions of this section , on death of any person after the commencement of this Act all causes of action subsisting against or vested in him shall survive against , or as the case may be, for the benefit of his estate :

Provided that this subsection shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to claim for damages on the ground of adultery."

He also referred this court to the case of **Saidi Kibwana and General Tyre E.A Ltd versus Rose Jumbe** [1993] TLR 175 where the court held that;

*"The general rule is that all rights of action and all demands existing in favour of or against the person at the time of his death survive to and against his representative, except those rights which are tied up with the individuality of the deceased, these are caught up in the maxim – **actio personalis moritur cum persona**, i.e. a personal right dies with the person. As a general rule this maxim applies to actions in respect of torts so that on the death of either party to such action, the right to sue will be extinguished."*

In his rejoinder, Mr. Rweyemamu stated that the herein above provision does not exempt the wrong doer, in our instant case, the deceased. He stated that the cause of action still survives because the plaintiff now applicant is alive.

Having heard the submissions for and against the application, I will determine whether the application is meritorious. It is trite that in application proceedings the affidavits constitute not only the pleadings but also the evidence. Equally straight that the applicant must make out his case in his founding affidavit and that he must stand or fall by the allegations contained therein. It follows therefore that the applicant must set out sufficient facts in his founding affidavit which will entitle him to the relief sought.

Appeal is right which is guaranteed in our Constitution. The exercise of that right, is however not absolute. There are certain procedures to be complied

with before one can exercise his right to appeal and in the case of appeal from the High Court to the Court of Appeal, such procedures are stipulated under Section 5 (1) (c) of the Appellate jurisdiction Act, [Cap 141 RE 2019]. The provision states as follows;

*"In civil proceedings, except where any other written law for the time being in force provides otherwise, **an appeal shall lie to the Court of Appeal with the leave of the High Court or of the Court of Appeal, against every other decree, order, judgment, decision or finding of the High Court.**"*

From this provision, it is apparent that appeals to the Court of Appeal against a decree, order or judgment of the High Court should be with the leave. The requirement for leave imposes a duty upon this court to filter out frivolous and vexatious appeals and in so doing, spare the Court of Appeal from the specter of un-meriting matters and to enable it to give adequate attention to cases of true public importance.

The Court of Appeal in **Paulo Juma versus Diesel & Auto Electrical Services Ltd & 2 Others**, Civil Appeal No 183 of 2007, (unreported) held that:

"The purpose of the provision is therefore to spare the court the specter of un-meriting matter and to enable it to give adequate attention to cases of public importance".

The grant or refusal of the application is within the spectrum of discretionary powers of the High Court. The discretionary powers of the court in granting of leave and the exercise of that discretion is as stated in the excerpt below from the **British Broadcasting Corporation versus**

**Eric Sikujua Ng'ymaro, Misc. Civil Application No. 138 of 2004.
(Unreported)**

"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 appeals raise issues of general importance or a novel point of law or where the grounds show a prima facie or arguable appeal....The purpose of the provision 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."

In the case of **Ramadhani Mnyanga versus Abdala Selehe** [1996] it was held that;

"For leave to be granted the application must demonstrate that there are serious and contentious issues of law or fact fit for consideration of appeal"

In **Jireys Nestory Mutalemwa versus Ngorongoro Conservation Area Authority**, Civil Application No. 154 of 2016 it was held that;
"Much as the grant of leave is discretionary, yet it is not automatic. The court adjudicating on such application is not left free to do so. It can grant leave to appeal only where the grounds of the intended appeal raise arguable issues for the attention of the Court."

From the above authorities, we can learn that there are conditions to be met for the grant of leave to appeal to the Court of Appeal, amongst them being that; there are compelling reasons why the appeal should be heard, including conflicting judgments on the matter under consideration, the

proceedings as a whole reveal disturbing features requiring the Court of Appeal intervention and provision of guidance, there is point of law or point of public importance detected from the appealed decision and that there are arguable issues fit for the consideration of the Court of Appeal.

In our case however, I would like to state very clearly that I have no mandate to go into the merits or deficiencies of the judgment or orders of the Hon. Judge or to analyze the grounds of the proposed appeal because this is not the Court of Appeal, and application of this nature does not mean re-hearing of the appeal. All what I am duty bound to do is to consider whether there are arguable issues or compelling reasons, or disturbing features, or point of law or point of public importance requiring the Court of Appeal intervention.

I have carefully gone through the proceedings of the trial court and of this court as a whole and the judgments to see whether they reveal disturbing features requiring the Court of Appeal intervention and provision of guidance but found no disturbing features. Part of the judgment of this court as the first appellate court reads;

" It is imperative to note at this juncture that the wrongful acts of false imprisonment , malicious prosecution and defamation are all tortuous liabilities under common law principles and each has its own distinct elements to prove as they are pleaded. It should further be noted that the said torts were all pleaded in the plaint. However, the issues framed at the trial court touched only one on the tort of malicious prosecution. In other words the trial court did not bother to frame the issues the tort of false imprisonment and defamation. Though, the flaw is an irregularity; but it is

the finding of this court that neither part was prejudiced..... After carefully reviewing the records in the trial court and the submissions of both counsels, I am of the view that the major issues for consideration as follows;

- 1. Whether the tort of false imprisonment was proved?*
- 2. Whether the appellant was defamed by the respondent*
- 3 Whether the tort of malicious prosecution was proved?"*

It is trite that the duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. However, there are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court or otherwise.

This court stepped into the shoes of the trial court, analyzed and re-evaluated the evidence adduced before the trial court and answered the three the herein above three issues in the negative. After all, the applicant did not explain how he was prejudiced by the approach taken by the High Court.

Indeed, reading the proceedings and the judgment of this court as a whole together with proposed grounds of appeal as they appear in paragraph 7, 8, 9, and 10 of the founding affidavit, I am convinced to believe that there is nothing contentious neither legal nor factual exhibited that is worthy of consideration by the Court of Appeal of the United Republic of Tanzania.

Consequently, the application is hereby dismissed for want of merit. Each party shall bear its own costs.

Dated at 30th day of September, 2022




E. L. NGIGWANA

JUDGE

30/09/2022

Ruling delivered this 30th day of September, 2022 in the presence of the Applicant and his advocate Mr. Mathias Rweyemamu, Respondent in person, Hon. E.M. Kamaleki, Judge's Law Assistant and Ms. Tumaini Hamidu, B/C.




E. L. NGIGWANA

JUDGE

30/09/2022