THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[IN THE DISTRICT REGISTRY OF ARUSHA]

AT ARUSHA

MISC. CIVIL APPLICATION NO. 121 OF 2022

(Originating from the High Court of the United Republic of Tanzania Civil Appeal No. 36 of 2021, Arising from the District Court of Arusha at Arusha Civil Case No. 24 of 2016)

INTERNATIONAL LIVESTOCK RESEARCH INSTITUTE..... 1st APPLICANT

GLOBAL ALLIANCE FOR LIVESTOCK VETERINARY MEDICINES ..... 2nd APPLICANT

VERSUS

DR. GUISEPPE DI GIULIO.....RESPONDENT

RULING

01st & 25th November 2022

TIGANGA, J.

This is an application for leave to appeal to the Court of Appeal of Tanzania against the decision of this Court vide Civil Appeal No. 36 of 2021, originating from Civil Case No. 24 of 2016 of the District Court of Arusha, at Arusha. The application is made under Section 5(1)(c) of the Appellate Jurisdiction Act, [Cap. 141 R.E 2019] and Section 95 of the

Civil Procedure Code, [Cap. 33 R.E 2019]. It is supported by an affidavit sworn by Thomas Mihayo Sipemba, Learned Advocate.

The application was opposed by the respondent, by filing the counter affidavit sworn by Ms. Patricia Erick, an Advocate dully instructed to defend the respondent. In the counter affidavit, the learned counsel deposed that the decision for which the leave to appeal is sought was fair as there was no defamatory statement made against the applicant.

To appreciate what triggered this application a brief factual background is important. The applicants were plaintiffs in Civil Case No. 24 of 2016 before the District Court of Arusha at Arusha. They sued the respondent claiming a number of declaratory orders which included the order for permanent injunction restraining the respondent and his agents from further publishing or causing to be published defamatory statements against the applicants. Also, they prayed for an order to remove the video clips uploaded in the internet pertaining the matter in dispute. They also prayed for general damages for the loss of goodwill and reputation as well as punitive damages and costs of the suit. It is therefore further submitted that, the claim arose from alleged published

defamatory statements considered to have been done by the respondent on the internet and newspapers against the applicants.

After hearing of the suit, the decision of the trial court was given in favour of the applicants. Aggrieved by the decision, the respondent appealed to this Court. After the appeal was heard on merit, the appeal was allowed, the judgment and decree of the trial court were turned down. Following that decision, the applicants want to appeal to the Court of Appeal of Tanzania against the decision and decree of this Court in Civil Appeal No. 36 of 2021. As a matter of law and in accordance with Section 5(1)(c) of the Appellate Jurisdiction Act (supra), for the matter originating from the District Court or Court of Resident Magistrate must obtain leave of this court before appealing to the Court of Appeal of Tanzania.

The application was heard orally. Both applicants were represented by Mr. Luka Elinganya, Learned Advocate whereas the respondent had the legal service of Ms. Patricia Erick.

In support of the application, Mr. Elinganya asked the Court to adopt the affidavit sworn by his fellow Advocate, Thomas Mihayo Sipemba to form part of his submission. He said, it is a principle of law that leave is grantable where the grounds of appeal raise of general

importance or a novel point of law and facts or they show a prima facie and arguable appeal. To fortify on the submission, he cited the case of **Bulyankulu Gold Mines Ltd and 2 Others versus Petrolube (T) Ltd and Another**, Civil Application No. 364/16 of 2017 CAT at DSM. That, it does not matter whether the complaints are genuine or otherwise. To that effect, the case of **Sireys Nestory Mutalemwa versus Ngorongoro Conservation Authority**, Civil Application No. 164 of 2016 CAT at Arusha was referred to.

The counsel argued further that, the grounds under which the applicants rely to seek for leave are listed under paragraph 10 of the affidavit in support of the application. That, these grounds raise points of law involving matters of evidence which are worthy for determination by the Court of Appeal. Extensively Mr. Elinganya submitted showing that, paragraph 10 of the affidavit in general, raises matters for consideration by the Court of Appeal of Tanzania.

Submitting in opposition of the application, Ms. Patricia adopted the contents of counter affidavit filed in opposition of the application. She also agreed on the conditions set by law to be considered in granting of the leave to appeal to the Court of Appeal as submitted by the Counsel for Applicants. However, in her views, the issues raised by

Mr. Elinganya do not constitute good cause. She reminded the court that, despite the fact that the court has power to grant leave, such leave is not automatic. The applicant has to meet the criteria set out in a number of case laws. That the counsel for the applicants has raised the grounds half way as most of the words uttered by the respondent were not defamatory because of the defence of justification, fair comment and qualified privilege. The counsel went on discussing the matter as if this court is determining the appeal rather than advancing the grounds under which leave to appeal is grantable. Lastly, she said that this application does not have any arguable issue that needs judicial consideration by the Court of Appeal.

On the issue of novel of point of law, she said, in the submission made by the applicants' counsel, he did not show such novel point of law to be determined by the Court of Appeal. Ms. Patricia submitted further that, her fellow Advocate has failed to attached the letter requesting for the copy of judgment, proceeding and decree to the application for leave. That the only letter which the applicant attached, is a reminder letter dated 21/10/2022 which was received in court on 24/10/2022. In her view, failure to file the said latter on time renders the application incompetent because the judgment was delivered on

17/08/2022. Thus, the application would have been filed on 17/09/2022. To buttress the point, she cited the case of **Deogratius Kassinda versus Makiu Kwajwangya and Another**, Misc. Land Case Application No. 34 of 2021 (Unreported). Still on that point, she went on submitting that, rule 90 of the Court of Appeal Rules requires the application for copies of proceedings and judgment to be made within thirty (30) days of the date of the delivery of the decision against which is desired to appeal and failure to do that renders the appeal incompetent.

Lastly the Advocate was of the view that, the application is frivolous and vexatious and therefore she prayed the court to find that the application lacks merits.

In rejoinder, the advocate for the applicants reiterated his position in submission in chief. Also, he went further submitting that, the cited provisions of the Court of Appeal Rules are irrelevant in the instant matter and that the requirement among others, when applying for leave is to make an application within 14 days since the delivery of the decision sought to be challenged. That, there is no requirement of attaching the letter and notice to the application as contended by the respondent's counsel. He actually cautioned this court that deciding on

those issues is as good as stepping into the shoes of the Court of Appeal, the Advocate rested his case.

That being the summary of the record and the submission made in support or opposition of the application, I find it apposite that, before indulging to the merit of the application, it is perhaps compelling to refer the meaning of Court in accordance to the Court of Appeal Rules, 2009 (GN 268 of 2009). The Rules under section 3 interprets the word Court has hereunder. It provides:

> *"Court" means the Court of Appeal of the United Republic of Tanzania established by the Constitution, and includes any division of that Court and a single Judge exercising any power vested in him sitting alone."*

I have started with such introductory remarks of which probably might be seen unusual for the reasons to be open soon. It is my considered opinion that although both Advocates in this application have submitted referring the Court of Appeal Rules, they forgot and it is worthy to remind them that the Court of Appeal Rules do not apply in this court.

This means, without even going to the details of what was argued in relation to Rule 90 of the Court of Appeal Rules, (supra) regarding the

time within which to apply for copies of the proceedings, judgment and decree, this relates to the proceedings which are before the court of Appeal not the one which are before the High Court. That said, I find the arguments advanced to be raised prematurely and in misinterpretation of the law.

As earlier on pointed out in various decisions raised by the counsel for parties, the issue of application for leave to appeal is not a virgin ground. The provision making it a requirement for the persons intending to appeal to the Court of Appeal to first seek and obtain leave of the High Court, has been interpreted by a legion of court decisions, all of which require the court before granting the leave to appeal to first satisfy itself as to whether the application raises issues of general importance or a novel point of law or where the grounds show a prima facie or arguable appeal. Some of the decision are in the case of **Charles Kimambo versus Clement Leonard Kusudya (As an Administrator of the Estate of Leonard Kusudya, Deceased) and Another**, Civil Application No. 477/03 of 2018 (unreported) observed that:

> *"It is settled that leave to appeal is not granted automatically. In* ***British Broadcasting Corporation v.***

Eric Sikujua Ng'maryo, *Civil Application No. 138 of 2004 (unreported), it was 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.*** *" (Emphasis added)*

Thus, as clearly intimated by both counsel and the authorities cited by them in support of what should be considered when granting the leave to appeal, the following three ingredients can be extracted from the above cited case law. **One**, whether the grounds of appeal raise issues of general importance. **Two**, whether there is novel point of law. And **three**, that the grounds show a prima facie or arguable appeal.

Thus, it expected of the applicant to demonstrate that, the intended appeal meets the criteria set above. That can be possible where the intended grounds of appeal are annexed to the application in order to help the court satisfy itself on the existence of the three ingredients singled out in the above cited case law. Unfortunately, this was not done by the applicants. They did not attach those grounds of appeal. However, in the affidavit sworn by Thomas Mihayo Sipemba at paragraph 10 there are six listed intended grounds to be considered by

the court of appeal in case this application is granted. If I may reproduce the said paragraph, it provides:

(a) Having held that there was no evidence that the applicants illegally imported vaccines in Tanzania and were responsible for fraudulent vaccinations; whether the appellate court was correct to hold that the respondent was justified to make his statements that were defamatory to the applicants.

(b) Having held that although there was evidence showing illegal vaccination and death of some cattle and there was no evidence proving illegal the number of cattle, and that there was no evidence proving illegal importation of vaccine by the respondent and that there was also no evidence showing how those non trained vaccinators or young Masai vaccinators were connected to the applicants. Whether it was correct for the appellate court to rely on extraneous matters and hold that the applicants were connected with illegal vaccination and death of some cattle with no proof to that effect.

(c) Having held that there was no evidence that was tendered by the respondent before the trial court proving that the applicants illegally sold ILRI08 for purposes of promoting fraudulent

vaccinations and that the 1st applicant allowed illegal importation of vaccination in Tanzania hence no justification of the statement by the respondent. Whether it was correct for the appellate court to rely on extraneous matters and hold that the applicants illegally sold the vaccine.

(d) Having held that there was no evidence that proves that the vaccination was done under the supervision of the applicants and that there was no evidence of importation of vaccines by the applicants tendered. Whether it was correct for the appellate court to hold that the 2nd applicant was responsible for supervision of the vaccination with no evidence.

(e) Having held that there was no evidence tendered by the respondent to prove his allegation against the applicants. Whether it was correct for the appellate court to hold that the respondent's statements were true with the defence of fair comment, qualified privilege and justification against the applicants.

(f) Whether it was correct for the appellate court to make a finding that there was no evidence that the respondent was de-registered as veterinary practitioner because of the defamatory

statements while in fact there was evidence by PW3 to the contrary.

Despite the fact that Ms. Patricia counteracted all those facts as of not establishing arguable appeal, in my view, they do. They have something to be considered in appeal. The issue as to whether they will be determined in favour of the applicants or respondent is immaterial to this court at this stage. This is because, this court is not sitting as the appellate court to determine the fate of the intended appeal, but it needs to confines its findings in considering the grounds of the intended appeal in view of granting leave to appeal to the Court of Appeal.

Having said so, I hold that the application has merit. It is hereby granted within the context of Section 5(1)(c) of the Appellate Jurisdiction Act, [Cap. 141 R.E 2019].

It is accordingly ordered.

DATED at **ARUSHA** this 25th day of November 2022

J.C TIGANGA

JUDGE