

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB- REGISTRY OF DAR ES SALAAM**

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 22 OF 2022

RASHID ABDALLAH KIVUMBI APPLICANT

VERSUS

ENGINEERING CORPORATION LTD 1ST RESPONDENT

GOLDEN CRESCENT ASSURANCE (T) LIMITED

(now MO ASSURANCE COMPANY LIMITED) 2ND RESPONDENT

ABDUL KASSIM 3RD RESPONDENT

**[Arising from the decision of this Court (Hon. De-Melo, J.)
in Civil Appeal No. 27 of 2019]**

RULING

29th April & 11th May 2022

KISANYA, J.:

In the Resident Magistrate's Court of Dar es Salaam at Kisutu, the appellant unsuccessfully sued the respondents claiming for damages arising from a car accident. In that case, the appellant had prayed, among others, for the refund of Tshs. 21,250,000/= being costs used to repair the vehicle, refund of Tshs. 6, 570,000/= being costs for recovery measures, payment of Tshs. 12, 000,000 being profit loss, and general damages.

It was the appellant's case that, on the 23rd July, 2013, his vehicle with Reg. No. T.538 AEB was pranged by the 1st respondent's vehicle with

Reg. No. T37 BRN which was being driven by the 3rd respondent and insured by the 2nd respondent. As the 3rd respondent was found guilty of the offence of reckless driving, the appellant sued the respondents claiming for the above stated reliefs.

One of the issues framed for determination of the suit was whether the appellant was the owner of the motor vehicle which was involved in an accident. At the end of the trial, this issue was answered not in affirmative. As a result, the trial court held the view that the appellant was not entitled to reliefs sought for and it went on to dismiss the suit.

Dissatisfied, the appellant preferred an appeal to this Court in Civil Appeal No. 27 of 2019. He again, lost in a judgment in appeal that was delivered 14th December, 2021.

Still displeased, the appellant filed the present application seeking leave to appeal to the Court of Appeal. The application is made by way of Chamber Summons which was taken out under section 5(1)(c) of the Appellate Jurisdiction Act [Cap. 141, R.E. 2019]. It is supported by an affidavit affirmed by the appellant on 12th January, 2022.

The application is being challenged by the 1st respondent who filed a counter-affidavit affirmed by her advocate one, Maryam Saleh Msean.

When the application came up for hearing on 19th April, 2022, the appellant was represented by Barnaba Luguwa, learned advocate. He informed the Court that he was holding brief of Ms. Mseal for all respondents. With leave of the court, this matter was disposed of by way of written submissions. However, it is worth noting that, Ms. Raya Nassir, learned advocate filed the written submissions on behalf of the 1st respondent only. Thus, other respondents did not file their respective written submissions.

Submitting in support of the application, Mr. Luguwa contended the fact that the applicant owned the motor vehicle was established by the TRA's information supplied to the 2nd respondent's surveyor. He further argued that the appellant's testimony was to the effect that he had bought the vehicle from the original owner whose name appears in the information supplied to the 2nd respondent.

The learned counsel went on to submit that the trial court did not consider the fact that the applicant was not a party to the insurance policy.

However, he contended that the suit was filed when the TRA's record was showing the applicant as a *bonafide* owner of the vehicle in question.

Mr. Luguwa further submitted that although the issue whether the motor vehicle was insured by the 2nd respondent was answered in affirmative, it was not stated whether the said insurance cover was valid. He was of the view that, the vehicle in question shifted to the applicant when he bought the same. That being the case, Mr. Luguwa pointed out that the grounds to be considered by the Court of Appeal are as follows:-

- 1. Whether courts below did went (sic) wrong in overlooking evidence from the only witness for the defence that the extract from TRA WHICH they did not produce in court said witness admitted that Rashid Kivumbi was strangely reading as the owner in TRA records that it is supported and proved that at the time of filing the suit RASHID KIVUMBI was reading as the owner of the motor vehicle in issue.*
- 2. That the High Court erred in law in not considering the fact that liability of the 2nd respondent to the appellant does not fall under the contract of insurance. The mere fact that the action of the 2nd defendant halted the economic ventures of the appellant with the said vehicles*

was enough to give the cause of action under the tort of trespass to the said grounds.

- 3. That the High Court erred in law in overlooking that the fact that the said accident was inspected by the surveyor who was nor (sic) arraigned to testify though the report proved that the lawyer of the appellant provided the said surveyor a Registration card which was in the name of RASHID KIVUMBI.*
- 4. That the High Court erred in law in not allowing the appeal and order tortfeasor who is proved on the balance of probabilities that he is the owner to recover damages claimed against the tortfeasor.*
- 5. That the High Court as did the lower court failed to analyze evidence and ended up in the wrong decision as they were supposed to order the appellant to be paid by the 2nd defendant.*

Responding, Ms. Nassir commenced by praying to adopt the counter affidavit filed by the 1st respondent to form part of her submission. She went on to submit that the issue whether to grant or refuse to grant leave to appeal is determined by looking at a number of factors. According to her, the applicant was required to prove, among other, that there is an arguable case or ground in the intended appeal; that the intended appeal involves a

substantial question of law of general importance; and that there is reasonable prospect of success in the intended appeal.

On the requirement to prove an arguable case, Ms. Nasra cited the cases of **Sango Bay Estate Ltd and Others vs Dresdner Bank A.G** (1971) E.A 17 in which his Lordship Spry, V.P (as he then was) held:

"... As I understand it, leave to appeal from an order in civil proceedings will normally be granted where prima facie it appears there are grounds of appeal which meet judicial consideration."

It was the learned counsel's argument that there is no arguable ground in the case at hand. Her argument was based on the reason that the appellant has failed to show that he was the real owner of the motor vehicle for him to be indemnified.

As to the second factor whether the intended appeal involved a substantial question of law of general importance, Ms. Nasra argued that leave to appeal is granted when there is good reason, normally on a point of law or on a point of public importance for determination by the Court Appeal. She cemented her argument by making reference to the case of **Rugatina vs The Advocates Committee and Another**, Civil Application

No. 98 of 2010 (unreported). The learned counsel further cited **Mulla Code of Civil Procedure**, Vol. 1 at page that:-

“An appeal shall lie to the Supreme Court from any judgment, decree or final order in a civil proceedings of a High Court... if the High Court certifies:

- (a) That the case involved a substantial question of law of general importance; and*
- (b) That in the opinion of the High Court the said question needs to be decided by the Supreme Court.”*

With regard to the factor whether the intended appeal raises a reasonable prospects of success, the learned advocate submitted that the said issue is answered negatively. Therefore, she implored me to dismiss the application for want of merits.

I have dispassionately considered the contending submission made by the learned counsel for both parties. The main issue for determination is whether this Court should grant the leave to appeal to the Court of Appeal.

At the outset, I entirely agree with Ms. Nasra that leave to appeal is granted upon this Court being satisfied that the intended appeal raises issue of general importance or a novel point of law or where the grounds show a

prima facie case or arguable appeal. [See also the case of **Rugatina, C.L.** (supra)].

In terms of the supporting affidavit, the applicant advanced, the ground of appeal deposed in paragraph 10 which reads as follows:-

*"That according to the information from my advocate Mr. Barnabas Luguwa which information I verily believe to be true that **the decision of the trial Judge is lacking on point of law that oral evidence on record and report from the respondent which is an expert had enough weight for the Court to rule in my favour even in the absence of the said documentary exhibits that is Registration Car and other documents from TRA.**"*

The bolded expression shows that the applicant's intended appeal is premised on the issue whether that this Court failed to consider his oral evidence and the expert report from the respondent. As indicated earlier, this Court and the trial court held that the applicant had failed to prove that he was the lawful owner of the vehicle involved in the accident. Pursuant to the record, the applicant testified in chief that he was the driver and owner the said vehicle. He also told the court that the transfer had been effected.

It is the stance of law that oral evidence can prove the case in absence

of documentary evidence (See the case of **Simon Shauri Awaki @Dawi vs R**, Criminal Appeal No. 62 of 2020, [2002] TZCA 51). Now that the applicant contends that his oral evidence on ownership of the vehicle in question was not considered, I am satisfied that there is an arguable ground in the intended appeal and that, the issue raised by the applicant cannot be branded as frivolous, useless or vexatious.

In the upshot, I find merit in this application and grant leave to appeal to the Court of Appeal as sought. Costs shall follow the events.

DATED at DAR ES SALAAM this 11th day May, 2022.



S.E. Kisanya
JUDGE
11/05/2022

Court: Ruling delivered this 11th day of May, 2022 in the presence of Mr. Barnaba Luguwa, learned advocate for the applicant and holding brief for Ms Nasri, learned advocate for the 1st respondent, Ms. Neema Mahunga, learned advocate for the 2nd respondent and in the absence of the 3rd respondent. B/C Zawadi present.



S.E. Kisanya
JUDGE
11/05/2022