

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**BUKOKA DISTRICT REGISTRY**

**AT BUKOKA**

**CIVIL APPLICATION NO. 73 OF 2021**

*(Arising from Civil Appeal No. 1 of 2020, originating from Civil Case No. 43 of 2017 of the Resident Magistrates' Court of Bukoba at Bukoba)*

**STEVEN MAGANGA.....1<sup>ST</sup> APPLICANT**

**HASSAN SAID.....2<sup>ND</sup> APPLICANT**

**TANZANIA ELECTRIC SUPPLY CO. LTD (TANESCO).....3<sup>RD</sup> APPLICANT**

**VERSUS**

**HANATH RUTHA HASHIM.....RESPONDENT**

**RULING**

21 /03/2022 & 25/03/2022

**NGIGWANA, J.**

The court is being moved by the applicant under section 5 (1) (c) of the Appellate Jurisdiction Act Cap. 141 R: E 2019 to grant leave to appeal to the Court of Appeal of the United Republic of Tanzania against the judgment and decree of this court (**Mgetta, J**) in Civil Appeal No. 1 of 2020 handed down on 30<sup>th</sup> day of November, 2021.

The Application is supported by an affidavit sworn by Ms. Theresia Masangya, learned advocate for the applicants. Upon being served with the chamber summons, the respondent through Mr. Aaron Kabunga filed a counter affidavit opposing the application.

Brief facts antecedent to this application are as follows; sometimes in 2017 the respondent Hanath Ruth Hashim instituted a suit in the resident Magistrate Court of Bukoba at Bukoba to wit; Civil Case No. 43 of 2017 against the applicants claiming specific damages of Tshs. 92, 384,252.72 for the service she performed of offering fraud information to the 3<sup>rd</sup> applicant (TANESCO) in respect of Kyaka to Bugene power line shifting scandal, and that was 10% of TZS. 1,073,842,521.19, the sum recovered by the 3<sup>rd</sup> applicant from China Henan International Cooperation Group (CHICO), TZS. 200,000,000/= being general damages suffered for being maliciously prosecution in Criminal Case No. 219 of 2016, and costs of the suit.

In its decision, the trial court decreed that the respondent be awarded the sum of TZS. 92,384,252.72 being 10% of the recovered sum, TZS. 4,000,000/= being general damages, and costs of the suit. Aggrieved by the trial court decision, the applicants lodged a four grounds memorandum of appeal to this court complaining that.

- 1. The trial court magistrate erred in fact and in law by holding that the respondent had a retainer agreement with TANESCO as an informer of TANESCO.*
- 2. The trial court magistrate misdirected herself in fact and in law in holding that the respondent is entitled to be paid by TANESCO TZS. 92,384,252.72 as special damages as unpaid balance of 10% of money recovered by TANESCO as reward result from information she provided in relation to fraud scandal of shifting power line from Kyaka to Bugene.*

- 3. The trial court magistrate erred in fact and in law by holding that the appellants had maliciously prosecuted the respondent in Criminal Case No. 219 of 2026 due to the statements which were reported to police station by the first and second appellants as a way of stopping her from claiming her balance reward from TANESCO.*
- 4. The trial court magistrate erred in fact and in law by fabricating facts which were never pleaded nor testified by any witness of any party, for purpose of justification of her judgment and decree.*

In the judgment delivered on 30<sup>th</sup> day of November, 2021, this court (Mgetta, J) dismissed the appeal in its entirety upholding the decision of the trial court save only for general damages which were uplifted from **TZS. 4,000,000/= to TZS. 30,000,000/=**. The applicants were further dissatisfied thus intend to appeal to the Court of Appeal of the United Republic of Tanzania.

When the application came for hearing the applicants were represented by Ms. Theresia Masangya, learned advocate while the respondent was represented by Mr. Aaron Kabunga learned advocate. Taking the floor, Ms. Theresia adopted an affidavit supporting the application to form part of her submission. She submitted that paragraph 6 of the affidavit carries the grounds worthy of being considered by the Court of Appeal. She stated that it is trite law that he who alleges must prove, but this court failed to see that the said duty was not discharged by the respondent. She also submitted that the sum awarded by the trial court as general damages was TZS. 4,000,000/= but it was raised by this court to TZS. 30,000,000/= while there was no cross-appeal, and that was not right. That in this case

there was a misjoinder of cases, one relating to malicious prosecution and the other one relating to breach of contract but this court did not decide whether that was right. She ended urging this court to consider the grounds stated in paragraph 6 and grant leave.

On the other side of the coin, Mr. Aaron Kabunga, despite the fact that he filed a counter affidavit strongly contesting the application, when invited to take the floor, he briefly stated that the respondent does not object the application therefore, if the court will find that there is an arguable case, they will have no problem.

I have carefully considered the submissions from both sides, therefore the issue for determination is whether the applicants have been able to satisfy the court that they deserve to be granted leave to Appeal to the court of Appeal of Tanzania against the decision made by this court in the above-mentioned matter. Section 5 (1) (c) of the Appellate Jurisdiction Cap. 141 R: E 2019 provides that;

*"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**".*

It is common understanding that leave to the Court of Appeal is not automatic. It is granted where the court is satisfied that the grounds of appeal raise issues of general importance or where the grounds show that there is an arguable issue of law, facts or mixed facts and law which need to be determined by the Court of Appeal.

In the case of **British Broad Casting Corporation versus Erick Sikusieas Ngimaryo, Civil** Application No. 138 of 2004, CAT at DSM (unreported) cited in the case of **Hamis Mdida and Another versus the Registered Trustees of Islamic Foundation**, CAT at Tabora, Civil Appeal No. 232 of 2018 it was held that;

*“As a matter of general Principle, leave to appeal will be granted where the grounds of appeal raise issue of general importance or a novel point of law or where the grounds show a prima facie case or arguable appeal”.*

Furthermore, 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.”*

However, where the grounds of appeal are frivolous, vexations or useless or hypothetical, no leave will be granted. See the **case of Broad Casting Corporation** (supra).

At this juncture, 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 whether the appeal will succeed or not 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 is real prospect of success, or arguable issues or compelling reasons, or disturbing features,

or point of law or point of public importance requiring the Court of Appeal intervention in the intended **second appeal**.

In the intended appeal, the Court of Appeal of Tanzania will be expected to sit as the second appellate and the Apex Court as beyond it, no other Apex Court in the Hierarchy. It is common understanding that the role of the second appellate court is to determine matters of law only **unless** it is shown that the courts below considered matters, they should not have considered or failed to consider matters they should have considered, or looking at the entire decision, it is perverse. **See Otieno, Ragot & Company Advocates versus Nataiona Bank of Kenya** [2000] e KLR

While being guided by the stated principles stipulated in the herein above cases, I have gone through the judgment of this court as a whole, and the proposed grounds of the intended appeal deposed at paragraph 6 of the affidavit supporting the application and argued by the learned counsel for the applicants and found that the applicants have managed to satisfy the court that there is a prima facie case or arguable appeal which deserve to be determined by the Court of Appeal of Tanzania against the decision of the court in Civil Appeal No. 1 of 2020. For clarity, let paragraph 6 of the affidavit supporting the application speak for itself: -

6. That, the points of law to be referred to the Court of Appeal of Tanzania which the Applicants are seeking leave hereto are: -

- (i) *That, the Hon. Judge of the High court erred in law to decide that the respondent has retainer agreement with 3<sup>rd</sup> Applicant (TANESCO) of to be paid 10% of the money recovered by*

*(TANESCO) as reward in relation to information provided for fraud scandal of shifting power line from Kyaka to Bugene;*

- (ii) That, the learned Judge of the High Court erred in law to dismiss appeal by the Applicants (intended Appellants) as in regards to special damages to the tune of Tshs. 92,384,252.72 awarded by the trial Resident Magistrate's Court of Bukoba while the Respondent failed to prove the same in the trial Resident Magistrate's Court;*
- (iii) That, the honorable judge of the High Court grossly erred in law to decide the appeal basing on suspicious, speculations and biasness and thereby shifting onus of proof from the Respondent to the Applicants.*
- (iv) That, the learned judges of the High court erred in law for failure to note that being sitting in the first appellate court was required to pass through the trial court's proceedings and decide whether the suit before the trial court was properly filed taking into account misjoinder of two course of actions of malicious prosecution and claim of breach of contract/agreement;*
- (v) That, the High court grossly erred in law for failure to hold that the Respondent did not prove her claim for malicious prosecution against the Applicants to the required standards;*
- (vi) That, the Hon. Judge of the High Court grossly erred in law to uplift general damages from Tshs. 4,000,000/= to Tshs.*

*30,000,000/= in favour of the Respondent while there was no cross appeal filed by the respondent challenging decision of the trial Resident Magistrate Court in regards to general damages.*

- (vii) That, the Hon. Judge of High court erred in law and facts to withhold the judgment of the trial court which was built on allegations made against the managing director of the third respondent while the said managing director was not a part to a suit.*

From the herein above paragraph, it is very easy to see the following issues which, in my view constitute *prima facie* case worth to be decided by the Court of Appeal of Tanzania;

- (i) Whether in the absence of cross appeal, this court had mandate to increase the award of general damages. The records of this court show that the award was raised from TZS. 4,000,000/= to TZS. 30,000,000/=.*
- (ii) Whether breach of retainer agreement and malicious prosecution were causes of action which could properly be joined together, and if the answer is in the affirmative, whether each was proved to the required standard.*
- (iii) Whether the burden of proof was shifted from the respondent to the appellants, now applicants.*

In the upshot, I am convinced that the application meets the legal threshold for its grant. Accordingly, I grant it as prayed. Costs to be in the cause.



It is so ordered.

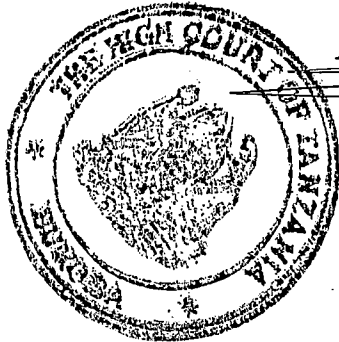


E. L. NGIGWANA

JUDGE

25/03/2022

Ruling delivered this 25<sup>th</sup> day of March, 2022 in the presence of the Respondent in person, Mr. E. M. Kamaleki, Judges Law Assistant, and Ms. Tumaini Hamidu, B/C, but in the absence of the Applicants.



E. L. NGIGWANA

JUDGE

25/03/2022