

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF DAR ES SALAAM)**

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 461 OF 2021

*(Arising from Civil Appeal No. 21 of 2021 High Court of Tanzania, Originating
from Civil Case No. 12 of 2019 Dar es Salaam Resident Magistrate Court at
Kisutu)*

STRATEGIS INSURANCE TANZANIA LTD.....APPLICANT

VERSUS

SALAMAAN HEALTH CENTRE.....RESPONDENT

RULING

Date of last Order: 25th October, 2022

Date of Ruling: 24th February, 2023

POMO, J;

The applicant Strategies Insurance Tanzania Ltd has filed this application under section 5 (1) (c) of the Appellate Jurisdiction Act, Cap 341 R.E. 2019 and Rule 45 (a) of the Court of Appeal Rules 2009 (GN. No. 368 of 2009) as amended by GN. No. 362/2017 and GN. No. 344/2019, seeking for leave to Appeal to the Court of Appeal of Tanzania. The

application is supported by the affidavit deposed by the applicant's advocate, one Jovinson Kagirwa.

The application has been stiffly contested by the respondent and in parallel to that, the respondent's Human resource manager one Aisha Rashid Mchome had filed a Counter affidavit respectively.

Briefly, the parties were under contractual relationship to which the respondent was providing medical services to the applicant's members. It is apparent that, the applicant issued a notice to terminate the contract and she actually effected it. The respondent successfully sued the applicant for breach of contract before the Resident Magistrate Court of Dar es Salaam at Kisutu in Civil case No. 32 of 2019 and among the prayers claimed, the applicant was only ordered to pay TZS. 2,652,500/= as costs for medical treatments provided by the respondent to a person who was not the applicant's member, the claim which the applicant had refused to pay. Besides, the applicant was ordered to pay the respondent TZS. 30,000,000/= as general damages for unlawful termination of contract, she was also ordered to perform specific performance of respecting the contract until both parties mutually reconsider and decide otherwise.

The applicant was aggrieved and decided to appeal to this Court in Civil Appeal No. 129 of 2020 armed with eleven (11) grounds of appeal and on the other hand the respondent lodged a cross-appeal comprising of two (2) grounds. As records depict, the applicant's appeal was futile and was dismissed while the respondent's cross appeal was efficacious as the respondent was awarded costs for the reason that, the trial Court did not grant the same without disclosing reasons for denial, as well the interests as claimed in the plaint before the trial Court were awarded too. From this point, the applicant is eager to seek the intervention of the Court of Appeal in reliance to the following issues which have been indicated under paragraph 11 (a) to (f) which I see apt to reproduce herein under as follows: -

- a) *Whether the Court having confirmed the existence of the applicant's valid grounds for termination of contract was correct to make a finding that the termination was unlawful.*
- b) *Whether the Court was correct to confirm the trial Court's award for specific damages awarded by the trial Court while the same was not pleaded in the plaint or proved during hearing.*
- c) *Whether the Court was correct to raise, formulate and decided on the grounds of appeal/issue suo moto in regards to court*

interest to general damages without affording parties an opportunity to address them.

- d) *Whether the Court was correct to expunge the impugned part of proceedings and decision of the lower Court and went on to confirm a trial Court decision while disregarding the appellant's ground of appeal.*
- e) *Whether the Court was correct to impose on the applicant with the duty to procure witness and or evidence who/which was not known to the applicant*
- f) *Whether the Court was correct to impose the burden of proof to the applicant as the defendant and making the decision on the weakness of defence in the absence of proof by the respondent.*

The matter was agreed to be heard by way of written submissions, and in the course the applicant was represented by the Mr. Mvano M. Mlekano, learned advocate whilst the respondent enjoyed the services of Mr. Juma Nassoro, learned advocate.

Mr. Mlekano's firm submission was preceded with the assurance on the mandate of this Court to grant reliefs sought under the chamber summons and his preposition was backed by the wording of the provisions afore mentioned which he had cited in the Chamber Summons to move

the Court. He also explicated that the applicant had already filed a notice of Appeal as required under rule 46 of the Court of Appeal Rules (*supra*) and that he has attached the impugned decision. It was Mr. Mlekano's submission that, the applicant has adhered to the formalities of lodging this kind of application. To buttress on his compliance argument, he cited the cases of **British Broadcasting Corporation vs. Eric Sikujua Ng'maryo**, Civil Application No. 138 of 2004 CAT at Dar es Salaam, **Bulyanhulu Gold Mine Ltd and 2 others vs. Petrolube (T) Ltd and another**, Civil Application No. 364/16 of 2017 CAT at Dar es Salaam, **Shaban Mkakanze vs. Teresia Judi Mkakanze**, Civil Application No. 135/13 of 2020 CAT at Tanga, **The Registered Trustees of Joy in the Harvest vs. Hamza J. Sungura**, Civil Appeal No. 149 of 2017 CAT at Tabora, **Rweyemamu Constantine & 2 Others vs. Uwamateda Group & Another**, Civil Application No. 563/17 of 2019 CAT at Dar es Salaam, **Ziada Willium Kamanga vs. Amanda Briton Kamanga & Another**, Misc. Civil Application No. 390 of 2021 (HCT) at Dar es Salaam (All Unreported).

On the applicant's underlined issues for intervention, the counsel for the applicant submitted that; *on the first issue*, that the fact that the applicant had already been issued with a notice of termination of the

purported contract, according to him the Court of Appeal be approached to determine whether upon the Court declaring that there was a valid ground of termination, was a valid contract thereafter. *On the second issue*, it was Mr. Mlekano contention that parties are bound by the pleadings as it is a trite law and according to him, the respondent was awarded specific damages to a tune of TZS. 2,652,500/= while the same was never pleaded. To bolster for his argument, he cited the case of **James Funke Gwagilo vs. Attorney General** [2004] T.L.R 161.

On the third issue, the applicant's advocate submitted that the issue of interest to general damages was raised *suo motto* by the High Court Judge at page 16 of the impugned decision without affording parties right to address on it. Thus, according to him this violates the principles of Natural Justice and this issue is worth to be determined by the Court of Appeal. To support his argument, he cited the case of **Mbeya-Rukwa Autoparts & Transport Limited vs. Jestina George Mwakyoma** [2003] T.L.R 253 in which the Court of Appeal insisted on the importance of affording parties right to address on issues raised by the Court *suo moto*.

On the fourth, fifth and sixth issues, Mr. Mlekano opted to submit in their generality that, **one**, the High Court judge's findings were erroneous

on the fact that, it was the burden of the respondent to prove her case and not the applicant as the Court stood, in support to his argument he cited section 110 (1) of the Evidence Act [Cap 6 R.E 2022]. He stressed that, the findings at page 10 and 11 of the typed judgment were incorrect. To cement, he cited the case of **The Registered Trustees of Joy in the Harvest vs. Hamza K. Sungura**, Civil Appeal No. 149 of 2017, CAT at Tabora (Unreported). And *two*, the High Court Judge had expunged the testimonies of all witnesses from the record but yet relied on the same to make a decision in favour of the respondent. He then concluded that, the raised issues are worth consideration by the Court of Appeal, thus the application be granted.

In his rebuttal submission, Mr. Nassoro made it at outset that, leave to appeal is not an automatic right and to succeed in this kind of application, the applicant is duty bound to show that there is sufficient and fit case for determination by the Court of Appeal. He then agreed with the positions made in cases cited by the applicant's counsel however, he contended that the said cases do not save any purpose for the applicant since the applicant has failed to disclose any triable or prima facie case for determination by the Court of Appeal.

In respect to the suggested triable issues, in his brief submission Mr. Nassoro submitted *on first issue* that, there is nowhere in the Judgement his lordship judge did confirm the grounds for termination of the said contract that they were valid. *On the second issue*, he argued that, the parties were afforded opportunity before the trial Court to prove and disapprove on allegations that the respondent had treated a patient with the names of Mussa V. Elias but the applicant failed to disapprove that fact, hence the so amount was awarded. *On the third issue*, it was his contention that the issue of interest was not raised *suo moto* by the Court but rather it was among the grounds raised in cross appeal. *On the fourth, fifth and sixth issues*, in generality Mr. Nassoro succumbed that, the complained record was expunged but still the remained evidence was sufficient for the Court to decide as it did. Furthermore, he stressed that, the respondent had proved her case and that the Court was entitled to make its decision on the available evidence, thus, no triable issue.

On his rejoinder, Mr. Mlekano had no much to say rather than emphasizing what he had submitted in chief and added that there is a need of contractual interpretation of the contract and the burden of proof was shifted to the applicant.

I have examined the court record and the rival submissions by the parties, the central issue for determination is *whether the intended grounds of appeal raised by the applicant are worthy to be considered and adjudicated by the Court of Appeal.*

Without wasting much energy, I am convinced to enlighten the following two (2) observations which will assist me to easily determine the raised grounds

One, it should be firstly noted that, an application for leave to appeal to the Court of Appeal is usually granted if there is good reason, normally on a point of law or on a point of public importance, that calls for the Court's intervention. Principally, the aspect of leave to appeal, the underlying Principle was well articulated by the Court of Appeal in **Harban Haji Mosi and Another vs. Omar Hilal Seif and Another**, Civil Reference No. 19 of 1997 (Unreported) that: -

"Leave is grantable where the proposed appeal stands reasonable chances of success or where, but not necessarily, the proceedings as a whole reveal such disturbing feature as to require the guidance of the Court of Appeal. The purpose of the Provision is therefore to spare the Court the spectre of unmeriting matters and

to enable it to give adequate attention to cases of true public importance. " End of quote

The same principle was restated, and in lucidity expounded by the Court of Appeal of Tanzania in **British Broadcasting Corporation vs. Eric Sikujua Ng'maryo**, Civil Application No. 138 of 2004 (Unreported). In that case, as cited in the case of **Rutagatina C.L vs. The Advocates Committee and Another**, Civil Application No. 98 of 2010 (Unreported), the supreme Court of the land had this to say: -

*"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 the matter of general Principe, 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 case or arguable appeal. (See: **Buckle vs. Holmes** (1926) ALL E.R 90 at page 91). However, where the grounds of appeal are frivolous, vexatious or useless or hypothetical, no leave will be granted." End of quote*

From the forgoing authorities, it is undisputed fact that an applicant to succeed in the instant application, his affidavit in support of his application must show that the grounds of the intended appeal raises

arguable issues in the appeal or in other words the so raised grounds of appeal must suggest commendable appeal before the Court of Appeal.

Besides, the duty of this Court in application of this nature is not to determine the merits or demerits of the intended grounds of appeal raised. Instead, a court has only to consider there is substantive issues raised for the intended appeal. That stance was pronounced by the Court of Appeal in the case of **Regional Manager-TANROADS Lindi vs. DB Shapriya and Company Ltd**, Civil Application No. 29 of 2012 CA (Unreported) where it was held that;

"It is now settled that a Court hearing an application should restrain from considering substantive issues that are to be dealt with by the appellate Court. This is so in order to avoid making decisions on substantive issues before the appeal itself is heard."

End of quote

Two; I have keenly taken time to peruse the suggested grounds of appeal uttered under paragraph 11(a)-(f) of the applicant's affidavit, the arguments from the parties and the record, and I wish to make it clear that; **First,** I took trouble to thorough read the impugned judgment of this Court (Hon. Kulita, J) but in neither part of it, his Lordship had confirmed that there were valid grounds of termination of contract by the

applicant. Thus, I find this complaint not worth to be adjudged by the Upper bench. **Second**, neither in the impugned judgment of the High Court nor the judgment of the trial Court, the respondent was awarded specific damages as complained but rather it was compensation that was awarded which of course principally can be awarded where the Court sees or deem necessary fit to grant as prayed. Again, this point is not worth to seek intervention of the Apex bench.

Third, as records reveal, in Civil Appeal No. 21 of 2021, the respondent herein upon receipt of the memorandum of appeal, also on her part did raise two grounds of appeal namely:

- (1) *That, the trial Court erred in law in deciding the case in favour of the appellant without awarding costs with no reasons.*
- (2) *That, the trial court erred in law and in fact in awarding general damages a minimal amount of Tsh. 30,000,000/= **with no interest.***

It is apt from the above excerpt that, ground two of Cross-appeal did involve the question of interest, thus it is prudent to state *inter alia* that the aspect of interest was never issued *suo moto* by the Court thus, it will not be a substantive point to be fronted to the Court of Appeal.

Fourth, the impugned judgement clearly indicates at page 11 that it was only part of the statement of witnesses which mentioned the non-existing Criminal Case number that were expunged and not whole of their statement as contended. The fact that, what transpires from the face of the impugned judgement is not similar to what the applicant contends, taking into consideration as to the principle of sanctity of records, I find it reasonable to rule out that this complaint also isn't amenable to be under recognizance of the Court of Appeal.

Nevertheless, the applicant has a grievance that the applicant was burdened to prove while the applicant was not the one alleging in the case however, looking at all the 11 grounds of appeal before the 1st appellate Court (High Court), it was never among the grounds. The Court of Appeal being the second appellate Court principally, ought to deal with grounds already determined by the first appellate Court unless it is a matter of law See **Amratlal Damodar Maltaser and Another t/a Zanzibar Silk Stores Vs. A.H Jariwalla t/a Zanzibar Hotel**, [1980] T.L.R 31. Again, the applicant has even failed to elaborate on this issue for the Court to see it's worthiness rather than just remarking it and buttress it with provisions and case laws. Under those premises, technically I don't find the issue worth for adjudication by the Apex bench of the land.

In the event, I am not satisfied that the grounds raised by the applicant raise serious issues which are worth consideration by the Court of Appeal. Therefore, the herein raised issue is addressed negatively and thus the application is hereby dismissed in it's entirely with costs for being devoid of merit.

Order accordingly.

DATED at **DAR ES SALAAM** this 24th day of February, 2023.



MUSA K. POMO

JUDGE

24.02.2023

