

**IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM**

MISCL. CIVIL APPLICATION NO. 374 OF 2021

SALEHE ATHUMANI MWENDI ----- APPELLANT

Versus

HAWA SALEHE LUBIKI ----- 1ST RESPONDENT

FRANK PETRO MATAYA ----- 2ND RESPONDENT

R U L I N G

Date of the last Order: 21/09/2022

Date of Judgement: 7/3/2023

MGONYA, J:

Through **section 5(2) (c) of the Appellate Jurisdiction Act Cap. 141 [R. E. 2019]** the Applicant herein filed this application praying among others leave to appeal the Court of Appeal and be granted cost of the application.

The application is supported by an affidavit of **Salehe Athumani Mwendi**, the Applicant herein and opposed by the Counter Affidavit of one **Hawa Salehe Lubiki**, the Respondent herein.

By consent of the Parties and their respective Advocates, this application was disposed of through written submissions and all parties complied to the scheduling order. The Applicant was represented by **Godfrey Wasonga**, Learned Advocate while the Respondent was funded by **Mr. Faraji Mangula**, Learned Advocate.

Arguing for the application, Mr. Wasonga, learned Advocate, at its inception adopted the Applicant's affidavit and submitted that, under paragraph 1, 2, 3, 4, 5 and 6 of the said affidavit, elaborates that the suit which was filed was pre mature as there has never been final report of the doctor examined the 1st Respondent after accident which supported her claim. That the Respondent failed to prove involvement of the applicant in the Original **Civil Case No. 22 of 2018** as required in the principle of vicarious liability. He insisted that the Applicant intends to challenge the decision of the High Court in **Civil Case No. 22 of 2018** to the Court of Appeal. He prayed the applicant be provided with prayers which are in paragraph 7 of the affidavits.

Responding to the submission above **Mr Mangula**, learned Advocate for the 1st Respondent averred that the applicant was jointly sued with the 2nd Respondent herein and the Insurance Company at Ifakara in original **Civil Case No. 22 of 2018**. But

the Insurance Company was found not liable as the Tractor was not insured at the time when it caused accident. That the applicant is the lawful owner of the tractor which was not insured and negligently and recklessly caused accident which caused the 1st Respondent to suffer severe body injuries. That due to that accident, the 1st Respondent lost her husband and she has become dependent as she cannot move her left leg. That the Applicant was liable under the principle of Vicarious liability.

He pointed that, the Applicant's submissions are focused only on the fact that civil suit was premature as was brought before final report of the doctor and that the Respondent has failed to show involvement of the applicant as required in the principle of vicarious liability.

Mr. Mangula, pointed that, it is a settled principle that in praying for a leave to appeal to the Court of Appeal. However, the Applicant ought to show that the ground of appeal raises issues of general importance or points of law or the grounds which show ***prima facie*** or arguable appeal. That the Applicant herein has not shown any or has raised any issue of general importance or any points of law to this court that he has a ***prima facie*** or arguable appeal that is likely to succeed at the Court of Appeal.

He insisted that the applicant has not even shown any point of public importance that this court can warrant leave for him to appeal to the Court of Appeal. He added that issues which has been raised in paragraph 6 of the Applicant's affidavit are not matters of law nor any point of public importance that can be ground for leave to appeal to the Court of Appeal. He substantiated his application by referring to the case of **ROBERT RUGAMBWA VERSUS TANICA LTD & MERCHIRY ERNEST KAREGA**, Civil Application No. 53 of the 2019, HC ta Bukoba and that of **HARBAN HAJI MOSI & ANOTHER VS OMARY HILARY SEIF AND ANOTHER, CIVIL REFERENCE NO. 19 OF 1997**. He insisted that the application be denied as the applicant has not raised any good reason as stated in the case of **RUTAGATINA CL V THE ADVOCATE COMMITTEE AND CLEVERLY MTINDO NGALAPA**, Civil Application No. 98 of 2010.

With regard to the submission that, the 1st Respondent has failed to prove the Applicant's involvement under vicarious principle, it was alleged that the ground was never raised at the High Court nor at the subordinate court. Therefore, it cannot be raised at this stage. He referred to the case **EMMANUEL JOSEPH VERUS REPUBLIC, CRIMINAL APPEAL NO. 323 OF 2016**

PAGE 16. Concluding his submission, the Counsel insisted that the application is devoid of merits.

Having heard from the parties, I found it necessary to say at this very beginning, that leave to appeal is not automatic. It is within the discretion of the court to grant or refuse. 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**. This principle has been echoed in different cases among of them cited by the Mr Mangula, to wit **BRITISH BROADCASTING CORPORATION VS SIKUJUA NG'MARYO, CIVIL APPLICATION NO. 138 OF 2004 (CAT)**, others are **BUCKLE V. HOLMES (1926) ALL ER REP. 90** at page 91, **TANZANIA MILLING CO. LTD VS THE ATTORNEY GENERAL & ANOTHER (MISC. LAND APPL. NO.470 OF 2017) [2018] TZHC LAND D 414; (16 JULY 2018)**, **RUTAGATINA C. L. VS THE ADVOCATES COMMITTEE AND ANOTHER, CIVIL APPLICATION NO. 98 OF 2010,CAT, BULYANHULU GOLD MINE LTD & 2 OTHER VS ISA LTD & ANOTHER (MISCELLANEOUS COMM REVIEW NO.01 OF 2018) [2018] TZHC COMD 45; (05 APRIL 2018)** all reported on Tanzlii.

The later case was cited with approval in **CIVIL REFERENCE NO. 19 OF 1997, HARBAN HAJI MOSI AND SHAURI HAJI MOSI V. (I) OMAR HILAL SEIF AND SEIF OMAR (unreported)**, in which the Court of Appeal held that, I quote:

"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 features 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."

However, I will not go far in determining the reasonable chances of success of the Appeal as it will mean going to the merits of the Appeal as there is the thin line separating the two. I opted to stride along the road passed by the Court of Appeal in the case of **THE COMPANY FOR HABITAT AND HOUSING IN AFRICA (SHELTER AFRIQUE) VS. INTEGRATED PROPERTY INVESTMENT (T) AND 2 OTHERS (MISC. COMMERCIAL APPLICATION 91 OF 2021) [2022] TZHCCOMD 2 (11 JANUARY 2022); reported in www.tanzlii.go.tz at page 7 and 8 citing with approval the case of **THE REGIONAL MANAGER-TAN ROADS LINDI VS DB SHAPRIYA AND****

COMPANY LTD, CIVIL APPLICATION NO. 29 OF 2012 CA (unreported) in which in the later case 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..."

Others are **MURTAZA MOHAMED RAZA VIRANI VS MEHBOOB HASSANALI VERSI, CIVIL APPLICATION NO. 168 OF 2014 AND VICTORIA REAL ESTATE DEVELOPMENT LIMITED VS TANZANIA INVESTMENT BANK AND THREE OTHERS, CIVIL APPLICATION NO. 225 OF 2014 (both unreported)**.

Having that in mind, and referring to the guiding principles of granting leave as chaunted herein, and going through the records before me, I find that the main issue for determination which is a main root of this application is whether the applicant herein is vicariously liable for the negligence driving of his employee (driver).

I have carefully examined paragraph 1, 2, 3, 4, 5 and 6 of the Applicant's affidavit, and found that there is no disturbing feature to be delt with by the Court of Appeal as the paragraph 1,

contains the introduction of the applicant, paragraph 2 described the intended impugned judgement, paragraph 3 provides for brief narration of events after the intended impugned judgement was delivered, paragraph 4, 5 and 6 indicates his intended grounds of appeal which are centered on the fact that the Applicant cannot be liable for the acts of his Employee committed in the course of his employment. Matters raised in paragraph 4 and 5 and 6 are already settled in principles of common law on vicarious liability which need not to go and draw the attention and disturb the busy Court of the Land.

Therefore, in the circumstance, I find no arguable case or disturbing feature raise by the applicant herein which requires the attention of the Court of Appeal of Tanzania to be determined.

Toward that end,

It is so ordered.



L. E. MGONYA

JUDGE

10/3/2023

ORIGINAL