

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB - REGISTRY OF MWANZA
AT MWANZA**

MISCELLANEOUS CIVIL APPLICATION NO. 98 OF 2022

(From Appeal Civil Appeal No. 36 of 2021)

CHARLES RICK MULAKI **APPLICANT**

VERSUS

WILLIAM JACKSON MAGERO **RESPONDENT**

RULING

April 25th, & May 2nd, 2023

Morris, J

Mr. Charles Rick Mulaki, has preferred this application moving the court to grant him leave to appeal to the Court of Appeal against its decision of August 5th, 2022. The application is made vide Chamber Summons under rule 45(a) of *the Tanzania Court of Appeal Rules*, 2009 and section 5(1)(c) of *the Appellate Jurisdiction Act*, Cap 141 [R.E. 2019]. The affidavit by **Charles Rick Mulaki** supports the application.

The Applicant advances, among other grounds, that both the trial court and this court erred in law and fact by holding that the Respondent proved his case on balance of probabilities; and by wrongfully awarding general



damages. Essentially, the application was not opposed by the Respondent. Advocate Joseph Kinango, who had initially appeared for the Respondent, later withdrew his representation for want of proper instructions from his client. Although he was served through publication, the Respondent never entered appearance to contest the application and/or to file the appropriate counter affidavit. Therefore, the matter proceeded in his absence.

During hearing the applicant was represented by Advocate Gunda. The counsel first prayed to adopt the affidavit as part of his submissions. He then stated that, the application was filed seeking leave of the court in order to enable his client to exhibit that he demonstrates an arguable case which merits Court of Appeal's attention. According to Mr. Gunda, under paragraph 5 of the affidavit, the Applicant alleges that the Respondent did not discharge his duty of burden of proof. He argued further that, during hearing of the case, there was no evidence to prove terms of the contract. Instead, the burden of proof was shifted from the Respondent to the Applicant. Hence, the matter rests on such an issue whether or not burden-shifting carries with it attendant legal implications.

In addition to the foregoing ground, the Applicant alleges that both the trial and this court applied wrong principle of law in assessing and awarding

excessive and/or inordinate high general damages. Hence, he prayed for the applicant to be given leave to address these matters before the second appellate court. He referred me to the case of ***Simon Kabaka Daniel v Mwita Marwa Nyang'anyi & 11 Others*** [1989] 64.

The Court is, thus, required to determine whether or not the applicant meets the threshold of the law worth granting leave to appeal to the Court of Appeal. In determining this issue application, I am guided by the law under which the application has been made and principles in the cases of ***Suleiman Nchambi v Sunny Auto Works***, Misc. Civil Application No.89 of 2019; and ***Cosmas Anton Itungulu v Timothy M. Irunde***, Misc. Land Application No. 69 of 2021 (both unreported).

Section 5(1)(c) of ***the Appellate Jurisdiction Act***, Cap.141 [RE.2019] provides that:

"5. (1) 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—

(a).....;

(b);

(c) 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."

Principally, the quoted section does not specify factors to be considered by courts in granting or disallowing the application for leave to appeal. However, case law does. For instance, in ***British Broadcasting Corporation v Erick Sikujua Ng'maryo***, Civil Application No. 138 of 2004 (unreported) requisite conditions were set. They are contained in the excerpt below:

"... leave to appeal is not automatic. It is within the discretion of the court to grant or refuse leave. The discretion must, however be judiciously exercised and on the materials before the court...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...However, where the grounds of appeal are frivolous, vexatious or useless or hypothetical, no leave will be granted" (emphasis added).

On the basis of the foregoing pronouncement, leave to appeal is to be granted on sound legal foundation. In circumstances of this matter, I am satisfied that the application is meritorious. It contains issues which are contentious and arguable at the next stage of the matter. I, accordingly,

grant leave to Applicant for him to appeal against the decision of this Court in Civil Appeal No. 36 of 2021. No order as to costs is made. It is so ordered.



C.K.K. Morris

Judge

May 2nd, 2023