

IN THE HIGH COURT OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

MISC. LAND APPLICATION NO. 56 OF 2022

(Arising from the Consolidated Civil Appeal No. 22 and 24 of 2021 at High Court of Tanzania at Musoma Originating from Civil Case No. 28 of 2020 at Resident Magistrate Court of Musoma)

BWETWEEN

ABAA RAMOGI 1ST APPLICANT

ABAA LUKA 2ND APPLLCANT

VERSUS

ELIAKIM OWINO RESPONDENT

RULING

14th & 29th September, 2023

M. L. KOMBA, J.

Before this Court, the applicants above mentioned has filed the present application seeking for the following orders;

- 1. That applicants be granted leave to appeal to the Court of Appeal of Tanzania.*
- 2. Costs be provided for.*

The application is brought by way of chamber summons made under S.5

(1) (c) of Appellate Jurisdiction Act, CAP 141 R.E 2019. Application is

accompanied by an affidavit deposed by both applicants. Upon being served with application, the respondent did file a counter affidavit and raised the Preliminary Objection which was determined by this court.

A brief fact giving rise to the present application can be summarized as follows; Applicants and respondent (plaintiffs and defendant respectively) had a Civil Case No. 28 of 2020 at the Resident Magistrate Court OF Musoma (the trial court) where applicants filed a suit under malicious prosecution against respondent herein after they have been acquitted from criminal charge. They claimed Tshs. 80,000,000/= for compensation for malicious prosecution and costs of the case. Upon full trial for want of establishment the trial Magistrate awarded only two million shillings (Tsh. 2,000,000/). The decision of the trial court aggrieves both applicants and respondents herein hence appeals No. 22 of 2020 and 24 of 2020.

The appeal was consolidated and assigned to Hon. Mahimbali, J. where the applicants herein were claiming the award is too minimal while the respondent claimed that malicious prosecution was not established as per law and thus the award is baseless and unfounded. At the end the appeal by respondent was successful and cross appeal by the applicants was

dismissed. Applicants were aggrieved again by the decision of the appellate court hence this application.

When the matter fixed for hearing, applicants appeared in person without any representation while the respondent decided not to make appearance at all regardless the fact that he was aware of the hearing schedule. Upon satisfaction of the hearing date on the side of respondent and that he did file his counter affidavit, the matter was heard exparte against the respondent.

Submitting in support of the application, the 1st applicant was of the submission that the first appellate court did not consider the fact as submitted that applicants were unlawful sentenced. He complained of technicality as raised and discussed by the High Court on format of document submitted while appealing from Resident Magistrate court must be memorandum of appeal and not petition of appeal. He argues that the High Court took advantage of them being lay persons and decide not on their favour. Abaa Ramogi prayed their application to succeed so that the Court of Appeal can analyse if malicious was not proved.

Second applicant had similar submission that it was not true that the trial court did not prove that they were unlawfully sentenced. To him, the appellate court erred by failure to consider decision of the District Court which found they were unlawfully sentenced hence eligible for the compensation. He prays to be given another opportunity to appeal to the Court of Appeal for that reason. In paragraph 6 of their affidavit applicants adduced that there was a Criminal Case No 31 of 2020 where they were acquitted and malicious prosecution should be seen to be proved.

In his counter affidavit, specifically at paragraph 4, respondent adduced that facts deposed by applicants in their affidavit was not subject of appeal in Civil Case no. 28 of 2020 at Resident Magistrate Court.

Having keenly considered the application and submission by parties, I am moved to determine whether or not this application for leave to the Court of Appeal of Tanzania has merit. I am alive that in our jurisdiction there are unlegislated principles which guide grant of leave to the Court of Appeal. However, the Court of Appeal and also this court have strived to make the guiding principles which this court or the Court of Appeal vide a second bite may exercise its discretion of either to grant or refuse to grant leave to appeal to the Court of Appeal of Tanzania.

The above principles may be gleaned from a plethora of case law include the following; one, leave may be granted where there is a point of law, or there is a point of public importance to be determined by the Court of Appeal. See, **Rugatina CL vs. The Advocates Committed and Mtindo Ngalapa**, Civil Application 98 of 2010) [2011] TZCA 143.

Also, the same principle was articulated in the case of **British Broadcasting Corporation vs. Erick Sikujua Ng'amaryo**, Civil Application No. 138 of 2004 thus: -

'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, be judiciously exercised on the material before the Court. As a matter of general importance, leave to appeal will be granted where the grounds of appeal raise issues of general importance or a novel of law or where the grounds show prima facie or arguable appeal.'

Again, this court (Commercial Division), in the case of **Citibank Tanzania Limited vs. Tanzania Telecommunications Company Ltd and 5 others**, Misc. Commercial Cause No. 6 of 2003, at Dar es Salaam (unreported) Hon Massati, J. (As he then was) observed that;

'I think it is now settled that, for an application for leave to appeal to succeed, the applicant must demonstrate that the proposed appeal raises contentious issues worth taking to the Court of Appeal or are of such public importance, or contain serious issues of misdirection or non-direction likely to result in a failure of justice and worth consideration by the Court of Appeal....In an application of this nature, all that the Court needs to be addressed on, is whether or not the issues raised are contentious....the Court cannot look at nor decide either way on the merits or otherwise of the proposed grounds of appeal.'

In 6th paragraph of the affidavit applicants herein deposed that;

'This court is asked to give leave to the applicants so that the court of appeal could discuss among other issues, whether the applicants were not proved the suit no. 28 of 2020 at RM Court on malicious prosecution while the criminal case No. 31 of 2020 applicants were punished on matter which they had no knowledge which originate from the land matter which applicants were not a party....'

I have carefully analysed the reasons advanced BY applicants in pursuing their application and in conjunction with the grounds advanced by the applicants as seen in their affidavit under paragraph 6, based on such reasons and the position of the law stated above, I am fortified that the

reasons pinpointed have-shown arguable appeal on point of law which needs intervention of the Court of Appeal.

I will not go into the details of the reasons but I consider it prudent to pinpoint an issue or two that have captured my attention and, in my humble opinion, need intervention by the highest court of our land. For example, paragraph 3 that applicants were acquitted in Criminal Case No. 36 of 2020 at District Court of Musoma when the trial Magistrate reasoned that, applicants had no knowledge of the matter convicted. Further, at paragraph 6 of affidavit applicants deponed that the matter was originated as land matter which applicants were not party and the criminal case was decided in their favour.

I find this and many others are points need attention of the higher authority.

In the upshot, I hereby grant the application with no order as to costs.

DATED at **MUSOMA** this 29th day of September, 2023.



Nk
M. L. KOMBA
Judge