

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

MISC. CIVIL APPLICATION NO 161 OF 2022

(C/f Civil Appeal No 20 of 2021 Before the High Court Arusha registry; Original Civil case No 26 of 2018 in the Resident Magistrate court of Arusha at Arusha)

DAVID SWAI KITOTI APPLICANT

VERSUS

INSURANCE GROUP OF TANZANIA LIMITED1ST RESPONDENT

ANDREA B. MOLLEL 2ND RESPONDENT

RULING

29th August & 10th October 2023

KAMUZORA, J.

The Applicant brought this application under section 5(1) (c) of the Appellate Jurisdiction Act. 1979 and Rule 45 of the Tanzania Court of Appeal Rules 2009 seeking for leave to appeal against the decision of this court in Civil Appeal No. 20 of 2021 delivered on 18th October 2022. The application is supported by an affidavit sworn by David Swai Kitoti, the Applicant herein. The Respondents contested the application through their sworn counter affidavits.

The brief facts leading to this current application as may easily be gathered from the record is that, the 2nd Respondent herein being the administrator of the estate of the late Simon Andrea Mollel sued the Applicant and the 1st Respondent before the Resident Magistrate court of Arusha at Arusha (the trial court) claiming among other things compensation for death of his son, compensation for mechanical destruction of the motorcycle as well as funeral expenses due to car accident caused by the Applicant herein who was driving a motor vehicle that was insured by the 1st Respondent. The trial court decided in favour of the 2nd Respondent by awarding general damage to the tune of TZS 20,000,000/=. Dissatisfied, the 1st Respondent preferred an appeal to this court, Civil Appeal No. 20 of 2021 in which this court upheld the trial court's decision save that, general damages of TZS 20,000,000 awarded to the 2nd Respondent was ordered to be jointly and severally paid by both the Applicant and the 1st Respondent.

Aggrieved with the decision of this court, the Applicant desires to appeal to the Court of Appeal hence, this application seeking for leave to appeal as required by the law. During oral hearing of the application, the Applicant was represented by Advocate Peter Njau while Mr. George

Njooka appeared for the 1st Respondent and Mr. Elibariki Maeda appeared for the 2nd Respondent.

In the affidavit in support of application the following points were outlined as proposed issues which the Applicant intends to argue before the Court of Appeal that is: -

- i) Whether the Appellate judge erred in law and fact for substituting the 1st Respondent's liability to both the Applicant and the 1st Respondent jointly and severally without advancing reasons for the decision.*
- ii) Whether the Appellate judge erred in law and in fact for dealing with the matter which was neither contested nor among the grounds of Appeal before the High Court.*
- iii) Whether the Appellate court can invoke its revisional powers without declaring the same specifically.*

Submitting in support of application, Mr. Njau adopted the affidavit as part of his submission and added that, the intention of the appeal is to challenge the validity of the decision of this court which shifted the liability of the insurer, the 1st Respondent herein to the Applicant herein. That, the Applicant also intends to assess if this court had powers to invoke its revisionary powers without expressly stating the same.

The Applicant's counsel argued that section 5 (1) (c) of the Appellate jurisdiction Act 1979 as amended read together with Rule 45

of the Tanzania Court of Appeal Rules, requires the Applicant intending to appeal to the Court of Appeal to seek for certification and leave of this court to do so. Based on the argument on right to be heard, the counsel for the Applicant submitted that the Applicant's right to appeal is a constitutional right enshrined under the Constitution of the United Republic of Tanzania Article 13(6) (a). He thus urged this court to grant leave for the Applicant to appeal to the Court of Appeal.

In reply, Mr. Njooka, counsel for the 1st Respondent contested the application. He adopted the affidavit of the 1st Respondent's officer and submitted that the issues to which the appellant intends to be determined by the Court of Appeal were well decided by this court. Referring the first issue that this court made decision without giving reason, the counsel for the first Respondent submitted that the reasons for the decision were well stated by this court at pages 9 to 11 of the judgment of this court.

That on the second issue, he submitted that matters claimed by the Applicant are not featured in the affidavit nor in the submission by the counsel for the Applicant. On the issue of invoking the revisionary powers he submitted that, this court never invoked revisionary powers rather decided the grounds of appeal as raised by the parties.

On the argument based on Article 13 of the Constitution, the counsel for the 1st Respondent submitted that, right to be heard goes with certain conditions which in this matter were not met by the Applicant. The counsel for the 1st Respondent prayed for the application to be dismissed with costs.

The 2nd Respondent also contested the application. The 2nd Respondent's counsel Mr. Maeda adopted the contents of the affidavit of the second Respondent but started by attacking the affidavit of the Applicant. He submitted that paragraph 4, 5 and 6 contained information received from his advocate. That, there is no way such information could come to the knowledge of the Applicant without being informed by his advocate hence, the verification clause is defective for containing a defective verification clause.

Mr. Maeda further submitted that the judge gave the reason for his decision as per paragraph 3, page 12 of the judgment. Regarding the revisional powers, he conceded with the submission by the counsel for the 1st Respondent prayed for the application to be dismissed for want of merit with costs.

In a brief rejoinder, the counsel for the Applicant reiterated his submission in chief and added that the Applicant was part of the case

thus, was aware of the information. He contended that if there was any error the same could have been raised as an objection. He therefore urged this court to disregard that objection and allow the application.

Before I determine on the merit of the application, I find it pertinent to discuss the point raised by the Counsel for the second Respondent on the verification clause of the Applicant's affidavit. Mr. Maeda contended that the verification is defective as the information verified thereto are information that the Applicant obtained from his advocate thus, could not be proper to verify the same without stating the source of information. On the side of the counsel for the Applicant, it was argued that the Applicant being a party to the case, had personal knowledge of all facts he verified.

In my view, the counsel for the Respondent technically raised an issue in form of objection. Basically, whoever thought that there was inconsistency in pleadings was bound to raise the same at the earliest stage before the application was set for hearing and not to raise the same during hearing of the application to avail the Applicant with ample time to respond. Bringing the same at the stage of hearing could be interpreted as taking the other party by surprise which is not the spirit of the law. Since the raised point does not touch the jurisdiction of this

court in determining the application, I will not circumvent myself to the technicalities rather determine the substantive application for substantive justice.

Now reverting to the merit of the application, I have considered the affidavit in support of application, submissions by counsel for both parties and relevant law and case laws. The point for determination is whether the Applicant have demonstrated sufficient grounds for grant of leave to appeal to the Court of Appeal.

It is a settled principle that an application for leave to appeal to the Court of Appeal is not automatic, it may only be granted upon establishing certain conditions. Section 5(1) (c) of the Appellate Jurisdiction Act does not provide for the conditions to be considered by the Court in granting leave to appeal to the Court of Appeal. However, the Court of Appeal in number cases has set clearly the circumstances under which leave to appeal to the Court of Appeal can be granted. In the case of **Harban Haji Mosi and another Vs. Omari Hilal Seif and another**, Civil Reference No 19 of 1997 TZCA 11 reported at Tanzlii it was held 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 features as to require the guidance of the Court of Appeal. The purpose of the provision is therefore to spare the Court the specter of unmeriting matters and to enable it to give adequate attention to cases of true public importance"

The same principle was restated by this Court in **British Broadcasting Corporation Vs. Eric Sikujua Ng'maryo**, Civil Application No. 133 of 2004 (unreported) where it was held that;

*"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 materials before the court. 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 (see: **Buckle v Holmes** (1926) ALL E.R. Rep. 90 at page 91). However, where the grounds of appeal are frivolous, vexatious or useless or hypothetical, no leave will be granted"*

In the present application, three issues were raised as grounds for determination; legality of substitution of liability to parties by this court without advancing reasons, determination or dealing with issue that was not contested by parties and improperly invoking revisionary powers of


this court. In my view, the above issues raise legal and factual issues which need consideration by the Court of Appeal.

In the upshot, I find merit in this application and proceed to allow it. The Applicant is granted leave to appeal to the Court of Appeal of Tanzania and the appeal shall be filed with 30 days from the date of this ruling. No order for costs is made.

Ordered accordingly.

DATED at **ARUSHA** this 10th day of October 2023




D.C. KAMUZORA
JUDGE

