

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 7 OF 2003

TANZANIA SEWING MACHINES CO. LTD.....APPLICANT

VERSUS

NJAKE ENTERPRISES LTD.....RESPONDENT

RULING

Date of last Submission: 18 November, 2011

Date of Ruling: 04 March, 2011

Bukuku, J.

Following a Ruling of Hon. Makaramba, J. dated 01st September, 2010 in which he dismissed the applicants' application for restitution, the applicant filed an application for leave to appeal to the Court of Appeal. The mainstay of this application is, the applicant be granted leave to appeal to the Court of Appeal on points of law.

When the matter came before me on 3rd November, 2010, Mr. Zake, counsel for the applicant was present. He also held brief for Mr. Mwaluko, counsel for the respondent. Mr. Zake submitted that, Mr. Mwaluko was bereaved and he had to travel to Dodoma to attend the burial ceremony of his brother. He further informed this court that, both counsels agreed to pray to this Court that, the issue be disposed of by way of written submissions, to which their prayer was granted.

I ordered counsels to file their written submissions latest by 10th December, 2010. Applicant duly filed his written submission on 18 November, 2010 as ordered. Respondent did not comply with the order nor sought extension of time within which to file the same. I am entitled to assume that the respondent was not interested in responding by way of written submission. However, that does not mean that I would, as a matter of course, allow the application. My duty is to consider the merits of the application even without the assistance of the respondent.

This application is filed under Section 5(1)(c) of the Appellate jurisdiction Act, Cap 141 Cap 33 RE 2002 and Rule 47 of the Court of Appeal Rules, 2009, and has been taken up by M/S Rweyongeza & Co. Advocates, and is supported by the affidavit of one Job Mpingwa, the Managing Director of the applicant.

The material facts which constitute the background to the application are not complex. In the interest of brevity, I shall state them as follows. The applicant lost his case in the High Court of Tanzania Commercial

Division in Commercial Case No 7 of 2003. He then appealed to the Court of Appeal as Civil Appeal No. 28 of 2004, which was on 05/06/2006 struck out with costs on technical grounds. Following the striking out of the appeal, the respondent filed for execution to enforce the decree by eviction of the applicant from the suit premises.

Considering that an application for stay of execution of the decree had been withdrawn in the Court of Appeal on 12/04/2004 before Mrosso, J, (Civil application No. 1/2004), Massati, J. ordered the execution to proceed as prayed by respondent. The order was complied with, and applicant was evicted for the suit premises. The applicant then successfully lodged an appeal to the Court of Appeal, against the judgment of the High Court, Commercial Division in Commercial Case No. 7 of 2003, The appeal was allowed by Court of Appeal nullifying the proceedings and judgment of the High Court, Commercial Division in Commercial Case No. 7 of 2003, quashing the proceedings and rejecting the plaint for not having a cause of action amenable to judgment on a summary suit.

On the strength of the decision of the Court of Appeal, the applicant applied to this Court for restitution under the provisions of Sec 89(1) and (2) of the Civil procedure Code Cap 33 R:E 2002. The application for restitution was dismissed with costs. Aggrieved by that decision, applicant is now seeking leave of this court to appeal to the Court of Appeal.

Submitting in support of the application, Counsel for applicant urged that, the central point in this application is the consequence of the decision

of the Court of Appeal as regards the rights of the parties following the nullification of the decision of the High Court, Commercial Division in Commercial Case No. 7 of 2003. Either, he intends to call upon the Court of Appeal to decide on the validity of the respondents' right who lost on appeal and is no longer a decree holder, but has continued to enjoy fruits of a judgment that never was .

Further to that, the applicant submitted that, issues raised in paragraph 6 of the affidavit of Mr. Mpingwa in support of this application, raises very fundamental points which need consideration by the Court of Appeal particularly the application and interpretation of Sec 89 (1) and (2) of the CPC and therefore he humbly submits that this application is meritorious and prays that it be granted and costs be in the cause.

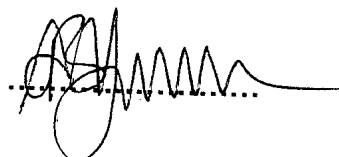
This application is made under Sec. 5 (1) (c) of the Appellate jurisdiction Act (Cap 114). This section require that, before an appeal can lie to the Court of appeal against a decision or order of the High Court, a certificate has to be issued by the High Court to indicate that there is a point of law which is involved. The issue before me is to determine whether there is a point of law involved worthy of taking to the Court of Appeal.

I have carefully gone through the Ruling which was delivered by my learned brother Hon. Makaramba, J. dated 01 September, 2010. I have also considered the arguments raised by Counsel for applicant in his written submission. In my opinion, the issues raised by applicant under

paragraph 6 of the affidavit of one, Job Mpingwa in support of this application are points of law and therefore, meritorious.

I certify the above for consideration by the Court of Appeal and for that reason, leave for the applicant to appeal to the Court of Appeal is accordingly granted. Costs will be in the cause. Appeal to be filed within 14 days from the date of this ruling.

I accordingly order.



BUKUKU, J.

JUDGE

04 March, 2011

Delivered this 04th March, 2011.....in the presence ofCounsel for the Applicant and Counsel for Respondent.

Word count: 1,011.

