

TANZANIA / JUDGMENT

ibrahim kadushi vs magese nilla

magese 2021 tzhc 3315 31 may 2021

COURT
TZHCDECIDED
31 May 2021

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE DISTRICT REGISTRY OF MUSOMA AT MUSOMA MISCELLANEOUS CIVIL APPLICATION No 02 OF 2021 {Arising from the ruling of the District Registry at Musoma Hon J.R Kahyoza J. dated on 14th December 2020 in (PC) Civil Appeal No 27/2020) IBRAHIM KADUSHI.....
APPLICANT Versus MAGESE NILA MAGESA..... RESPONDENT

RULING

4th & 31st May, 2021 Kahyoza, J. Ibrahim Kadushi applied to this Court for leave to appeal to the Court of Appeal against the Ruling this Court in PC Civil Appeal No. 27 of

2020. Magese Nila Magesa did not resist the application. Magese Nila Magesa's advocate before the hearing commenced, raised two limbs of preliminary objection that-

- 1) Whether the decision of this court is appealable?
- 2) What was the applicant praying for? The parties argued the preliminary objection by way of written

submissions.

What is the application for? The respondent opted not to submit relation to the issue what is the application for? The respondent's act to omit to submit lured the applicant not to address the Court on the issue. That notwithstanding, I find that it is worth determining the issue what is the application for. They parties denied themselves an opportunity to submit on the issue framed and i agreed upon by the Court without leave of this Court. I am alive of the principle of right to heard as stated in Abbas Sherally and Another v. Abdul Fazalboy, Civil Application No. 33 of 2002 (CAT unreported). The Court of Appeal in Abbas Sherally and Another v. Abdul Fazalboy, (supra) emphasized the importance of the right to be heard as follows- "The right of a party to be heard before adverse action or decision is taken against such party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice." In the present

case, the Court called upon the parties upon to submit on the issue as to what is the applicant applying for. They opted not to do so. They cannot be heard to complain that this Court denied them the right to be heard. On that regard, I will proceed to determine the matter. The background of this application is that the applicant lost the appeal in the High Court on a matter, which originated from the primary court. He sought to appeal against the decision of this Court to the Court of Appeal. The applicant instituted an application under section 5(1) (c) of the Appellate Jurisdiction Act, [Cap 141 R.E 2019] (the AJA) praying this court to grant him leave to appeal. The applicant made the following prayers in his application-

1. That, this Honorable Court be pleased to grant leave to enable the applicant to appeal to the Court of Appeal of Tanzania against the ruling of the High Court of Tanzania 2 dated 14th December, 2020 arising from (pc) Civil Appeal No. 27/2020 before Hon. J. R. Kahyoza, J.
2. Cost of the Application be provide for
3. Any other order(s) or relief (s) that this honourable Court may deem it fit to grant It is evident that the dispute was first instituted in the primary court where the applicant won the day. Aggrieved, the respondent appealed to the district court and lost the appeal. Dissatisfied still, the respondent appealed to this Court. The Court found in the respondent's favour. Aggrieved, the applicant intends to apply to the Court of Appeal. The law is settled that a person intending to appeal to the Court of Appeal for matters originating from the primary court, has first to apply and obtain a certificate that there is a point of law involved in the intended appeal from the High Court. This position is clearly stipulated under section 5(2) (c) of the AJA. It stipulates that- 5(2) (c) no appeal shall lie against any decision or order of the High Court in any proceedings under Head (c) of Part III of the Magistrates' Courts Act unless the High Court certifies that a point of law is involved in the decision or order; The intended appeal falls under Head (c) of Part III of the Magistrates' Courts Act, titled "Appellate and Revisional Jurisdiction of the High Court in Relation to Matters Originating in Primary Courts". The Court of Appeal in Abdallah Matata v. Raphael Mwaja, CAT-Criminal Appeal No. 191 of 2013 (Dodoma-unreported), the Court of Appeal held that: "In order to lodge a competent appeal to the Court the intended appellant has to go through the High Court first with an application for a certificate that there is a point of law 3 involved in the intended appeal. It is only when the appellant is armed with the certificate from the High Court, that a competent appeal may be instituted in this Court." The above position was also discussed in the case of Marco Kimiri & Another v. Naishoki Eliau Kimiri, CAT-Civil Appeal No. 39 of 2012 (ARS-unreported), in which it was held: "Section 5 (2) (c) of the Appellate Jurisdiction Act governs a certificate that a point of law is involved in an appeal under the Magistrates' Court Act, Cap. 11 R.E. 2002 originating from a primary court. " It vividly clear that the applicant was required to apply for a certificate that there is a point of law involved in the intended appeal and not leave to appeal. The applicant is applying for leave under Section 5 (1) (c) of the AJA. The cited provision of the AJA refers to the application for a certificate that there is a point of law involved in the intended appeal and not leave to appeal. An application for leave is provided under 5 (2) (c) of the AJA. The issue is what is the

applicant applying for. Is he applying for a certificate that there is a point of law involved in the intended appeal because he moved this Court under section 5 (2) (c) of AJA or is he applying for leave as he category stated in his application? I swiftly reply that the applicant is applying for leave. Parties are bound by their pleadings. The Court of Appeal faced a more or less similar situation in the case of the Managing Director Kenya Commercial Bank (T) Ltd & Another v. Shadrack J. Ndege (CAT), Civil Application No. 7 of 2009 i / (unreported). In that case, the applicant applied for leave but the High 4 Court granted him a certificate there was a point of law involved in the intended appeal. The Court of Appeal had the following to say- "After studying the ruling of the High Court and the extracted order, we have reached the conclusion that the point of preliminary objection...ought to be overruled.....Because the application for leave was not refused. It was not granted either. The learned judge instead of determining the application for leave,.... jettisoned it to the winds only half way in his ruling and proceeded to look for this own points to certify for determination by the Court.../' The Court of Appeal quoted the decision of Messrs Trojan & Co. vs RM N.N. Nagappa Chettiar A.I.R 1953 SC 253 of the Supreme Court of India- "It is well settled that the decision of a case cannot be based on grounds outside the pleadings of the parties and it is the case pleaded that has to be found. Without an amendment to the plaint, the Court was not entitled to grant the relief not asked for and no prayer was even made to amend the plaint so as to incorporate in it an alternative case." (Emphasis added) The applicant prayed for leave instead of praying for a certificate that there is a point of law involved in the intended appeal. This Court is precluded to grant what is not pleaded. It would be wastage of time and energy to go ahead and determine an application which inappropriate. I see no reason to determine the second issue whether the decision of this Court is subject of appeal. 5 For reasons stated above, I strike out the application on the ground that it is an appropriate. If the applicant still wishes, he may file an appropriate application subject to the law of limitation. No order as to costs, as the applicant did not argue the issue he himself raised. It is ordered accordingly. J.R. Kahyoza, Judge 31/5/2021 Court: Ruling delivered in the presence of the parties. B/C Catherine present. J.R. Kahyoza Judge 31/5/2021 6

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