

TANZANIA / JUDGMENT

samwel nyakarege vs maleki chamkaga

2022 tzhc 14415 31 october 2022

COURT
TZHCDECIDED
31 October 2022

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IN THE HIGH COURT OF TANZANIA (MWANZA DISTRICT REGISTRY) AT MWANZA MISC. CIVIL APPLICATION NO. 92 OF 2022 (Arising from the decision of this Court (Hon. Kahyoza, J) in Civil Appeal No. 60 of 2021) SAMWEL NYAKAREGE.....APPLICANT
VERSUS MALEKI CHAMKAGA.....RESPONDENT

RULING

Date of Last Order: 26/10/2022 Date of Ruling: 31/10/2022 KAMANA, J: Aggrieved by the decision of this Court in Civil Appeal No. 60 of 2021, the Applicant one Samwel Nyakarege has knocked the doors of this Court seeking a leave to appeal to the Court of Appeal against such a decision in which Maleki Chamkaga, the Respondent triumphed him. The Application was made under section 5(l)(c) of the Appellate Jurisdiction Act, Cap. 141 [RE.2019] and Rule 45(a) of the Tanzania Court of Appeal Rules, 2009 as amended several times. The same was supported by an affidavit taken by Mr. Vedastus Laurean, Advocate. On the other hand, there was a counter affidavit sworn by the Respondent. i Briefly, as deponed by Mr. Laurean in his affidavit, the Application has been precipitated by the Applicant's quest for justice after being dissatisfied with the decision of this Court in the above mentioned Civil Appeal. That being the case, this Application has been brought before this Court for it to determine whether the proposed grounds of appeal form an arguable issue before the Court of Appeal. Succinctly, paragraph 6 of the Affidavit identifies the proposed grounds of appeal as follows: 1 . Whether the Court properly analyzed evidence with regard to seizure of the fishing gears. 2 .Whether the Court properly analyzed evidence as to the Applicant's claims against the Respondent particularly its failure to take judicial notice of the decision of Ukara Primary Court. 3 .Whether the High Court properly evaluated the evidence as a whole in arriving at its decision. It was the position of the Applicant that the Application be granted as the said grounds form arguable case in the Court of Appeal. Countering, the Respondent averred in his affidavit that the High Court as the first appellate Court properly evaluated the whole evidence in the record. The Respondent further averred that there was no supporting evidence in the record for the High Court to take a judicial notice of the decision on the civil case at Ukara Primary Court. He 2 testified that the issue with regard to the decision of the said Primary Court is a new issue not pleaded by the parties at the trial Court. He prayed this Court to dismiss the Application for lack of merit. At this juncture, I think it is pertinent to, albeit

succinctly, provide background to the said appeal. The Respondent sued the Applicant in the District Court of Ukerewe (Civil Case No.1 of 2021) claiming for specific damages for loss of business, value of fishing gears, general damages and compensation to the tune of Tshs. 38,400,000/-, Tshs. 10, 497,000/-, Tshs. 30,000,000 and Tshs. 7,200,000 respectively. It was the case of the Respondent that on 20th February, 2020 the Applicant took his fishing gears. The Applicant did not dispute that allegation. However, he contended before the trial Court that he took possession of the Respondent's fishing gears as a lien since the Respondent had disappeared with Tshs.4,976,600/- given by the Applicant to pay his (the Applicant's) workers. The Applicant submitted that the Respondent was working with him as a supervisor in his business. After hearing both parties, the trial Court entered judgment in favour of the Applicant on the ground that the Respondent failed to prove his claims on a balance of preponderance. Aggrieved by such decision, the Respondent appealed to the High Court where he partly 3 won the appeal. It is that decision of the High Court, the Applicant is now seeking a leave of this Court to challenge. Reverting to the Application, when the same was called on for hearing, the Applicant was represented by Mr. Sylvester Emmanuel, Advocate. The Respondent appeared in person. In his brief submission, Mr. Emmanuel, learned Counsel prefaced by adopting the contents of the affidavit in support of the Application. He submitted that the High Court failed to analyze and appreciate the evidence that the Applicant had bonafide right to seize the Respondent's fishing gears since he had a claim against the Respondent. Further, the learned Counsel submitted that this Court failed to take judicial notice of the decision of the Ukara Primary Court which had already decided the subject matter with regard to the fishing gears owned and seized by the Respondent and the Applicant respectively. To buttress his argument, Mr. Emmanuel referred this Court to the provisions of section 59(1) of the Tanzania Evidence Act, Cap. 6 [RE.2019] which itemized courts decisions as amongst the issues which courts ought to take judicial notice. It was his submission that the High Court misdirected itself by failing to consider the evidence of the Applicant. The learned Counsel averred that out of such misdirection, the Court entered judgment in 4 favour of the Respondent. In summing up, he prayed this Court to grant the Application with costs basing on the decision of the Court of Appeal in the case of British Broadcasting Corporation v. Eric Sikujua Ng'maryo, Civil Application No. 138 of 2004. Responding to the Applicant's submission, the Respondent reiterated the position in his counter affidavit. He contended further that the High Court analyzed the evidence adduced before the trial Court. The Respondent submitted that the decision of the Ukara Primary Court was not part of the matters heard in the Appeal before this Court. It was his submission that the Application is baseless and be dismissed. Rejoining, the learned Counsel for the Applicant stated that the judgment of the Ukara Primary Court was discussed in the judgment of the trial Court (Ukerewe District Court). In view of that, the High Court was supposed to take judicial notice of the same without requiring evidence as to its existence. Having gone through the rival pleadings, the issue for my determination is whether the Application is meritorious. In determining that issue, the guiding principle is whether the proposed grounds of appeal form a point of law, have arguable points or disturbing feature worthy consideration of the highest Court of the land. In this regard, I 5 invite the Court of Appeal in the case of British Broadcasting Corporation (Supra) where the Court stated: '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, judiciously exercised and 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.' Reading between the lines, one may find that the proposed grounds of appeal revolve around one issue that the first appellate Court failed to properly analyze the evidence. Likewise, the Respondent's arguments focus on establishing that the said Court did properly evaluate the evidence adduced before the trial Court. That being the case, I am mindful of the fact that determination of the issue in question is the domain of the Court of Appeal. In other words, this Court has no power to determine in merits on whether the evidence adduced in the trial Court was properly analyzed in the first appellate Court or otherwise. This has been the position in this jurisdiction as stated in various case laws including the case of The Regional Manager- 6 TANROADS Lindi vs DB Shapriya and Company Ltd, Civil Application No. 29 of 2012 in which the Court of Appeal stated that: 'It is now settled that a Court hearing an application should restrain from considering substantive issues that are to be dealt with by the appellate Court. This is so in order to avoid making decisions on substantive issues before the appeal itself is heard...' That being the position, I am of the view that the question as regards to analysis of the evidence in the first appellate Court is an arguable issue worthy consideration of the Court of Appeal. Accordingly, I exercise my discretion by granting a leave to appeal to the Court of Appeal. It is so ordered. KS Kamana JUDGE 31/10/2022 Court: Ruling delivered on 31st day of October, 2022 in the presence of 7

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