

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF MUSOMA**

AT MUSOMA

CIVIL APPLICATION NO. 45 OF 2021

(Arising from Civil Revision No. 08/2020 Originating from *Miscellaneous Civil Application No 21 of 2020 of the Resident Magistrate's Court of Musoma*)

SIMON KILESI SAMWEL.....APPLICANT

Versus

MAIRO MARWA WANSAGO..... RESPONDENT

(T/a MAIRO FILLING STATION)

RULING

14 April & 15th June, 2021

Kahyoza, J.

Simon Kilesi Samwel sued **Mairo Marwa Wansaku** trading as **Mairo Filling Station** for the breach of contract before the court of the resident magistrate of Musoma at Musoma claiming Tzs. **97,295,119/=**. Through **Miscellaneous Civil Application Case No 21 of 2020**, Simon sought and obtained an order for temporary injunction closing **Mairo Filling Station**, restraining Mairo or his agent or anyone working under his instruction from undertaking any form of selling fuel activities, and closing of **Bank Account No. 0150388473300** in the name of **Mairo Filling Station** at **CRDB Bank** pending hearing and final determination of the main suit. The trial court did not only close the bank account but also issued a garnishee for unspecified amount.

Upon receipt of a complaint letter from Mairo, the Court called the

file for inspection and opened revisional proceedings *suo mottu*. It invited the parties to address it whether the balance of conveniences tilted in favour of issuing a temporary injunction.

Finally, this Court found that the trial court did not balance and weigh the mischief or inconvenience before issuing the injunction. Simon stood to suffer no irreparable loss as the process of executing court decrees guaranteed his right, should the trial court determined the suit in his favour. Consequently, this Court quashed the proceedings and set aside the ruling and the subsequent orders closing **Mairo Filling Station** and Bank Account No. **0150388473300** in the name of **Mairo Filling Station** at **CRDB**. **Simon** was not amused. He has approached this Court applying for leave to appeal to the Court of Appeal.

Simon, the applicant adduced two grounds to support his application for leave; **one**, that this Court erred in law to revise the interlocutory order; **two**, that the learned judge erred in law to hear and determine the matter which was filed in the subordinate Court and the same was yet to be determined.

Mairo, the Respondent, filed the counter affidavit opposing the application. He contended that the High Court was right to revise the ruling and order of the court of the resident magistrate.

At the hearing, Mr. Alhaji Majogoro Advocate prayed the affidavit of Simon to be adopted. Citing the case of **Coca Cola Kwanza LTD v Charles Mpunga & 103 Others**, Civ Appl. No. 393/01 of 2017, Mr Majogoro advocate submitted that on application for leave to appeal to

the Court of Appeal, the High Court must consider whether there is a contentious legal point worthy consideration by the Court.

He submitted further, that this Court considered at length whether the trial court's order was interlocutory or otherwise. He contended that it was proper for the Court of Appeal to review the findings of this Court. Mr. Majogoro reproduced the issues raised in the affidavit.

On the other hand, Mr. Motete Makiri advocate, who represented Mairo, prayed to the Court adopt Mairo's counter affidavit. He submitted that the application for leave has no merit. He contended that the High Court when determining an application for leave has one task, that is to ensure baseless appeals do not go to the Court of Appeal (CAT). He supported his contention with the holding in the case of **Nurbhai N. Ratansi V. Ministry of Water, Construction, Energy Land and Environment and Hussein Rajabhali Hirji** [2005] T. L. R 220. He added that this Court examined the records of the Resident Magistrate's Court and ruled out that the same did not amount to interlocutory order and revised it. Mr. Motete contended that it was not true that the Revision proceedings originated from the application which was before the trial court, rather it was initiated *suo mottu* by this Court.

He added that the applicant's contention that he prays for leave so that the Court of Appeal may decide whether the High Court was proper to consider and decide an issue not decided upon by the trial court, was baseless. He submitted that the High Court did not determine the issue not decided upon by the trial court. He prayed the application to be dismissed.

In his rejoinder, Mr. Majogoro reiterated his position that the application for leave has merit. He emphasised his position that the issues raised are worth to be considered by the Court of Appeal as they are legal issues.

It is settled that the party applying for leave to appeal to the CAT has to prove among other things -

*"...that, there is a contentious legal point worth consideration of the Court – see for example the case of **Nation Bank of Commerce V. Maisha Musa Uledi (life Business Centre)**, Civil Application No. 410/07 of 2019 (unreported) and **Nurbhai N. Ratansi V. Ministry of Water, Construction, Energy, Land and Environment and Hussein Rajabhali Hirji** [2005] TLR 220. In the former case, we observed as follows:*

"In an application for leave to appeal, what is required of the court hearing such an application is to determine whether or not the decision sought to be appealed against raises legal points which are worth consideration of the Court of Appeal."

Apart from the above, the High Court when granting an application for leave to appeal to the Court of Appeal should ensure that in the intended appeal there is good reason, normally a point of law or point of public importance that calls for the intervention of the Court of Appeal. See the cases of **Rutagatina CL v. the Advocates Committee and Clavery Mtindo Ngalapa** Civ. Application 98/2010. **Harban Haji Moshi and Another v Omar Hilal Seif and Another** Civ. Ref. No. 19/1997 (unreported) where it was held thus-

"Leave is granted where proposed appeal stands reasonable chances of success or where but not necessarily the proceedings as whole reveals 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 spectra of unmeriting matters and to enable it to give adequate attention to cases of true public importance.”

The issue for determination is whether the applicant has demonstrated legal points or disturbing features to be considered by the Court of Appeal. The applicant raised two issues. I will commence with the first issue whether this Court erred in law to revise the interlocutory order.

I will give an account of matter before I determine the first issue. The resident magistrates' court of Musoma (trial court) gave an *ex parte* order attaching the respondent's bank account, issuing a garnishee order and closing the respondent's business until the pending case is determined. Later, it heard the application *inter partes* and confirmed the orders issued *ex parte*. The respondent complained to this Court.

Upon perusing the record, this Court entertained doubts if the ruling and orders of the trial court were justly handed down. After considering the rival arguments raised by both parties, the court found that the orders of closing the bank account and the respondent's business was not interlocutory orders, as an order to qualify as interlocutory order must be made **for the purpose of keeping things in status quo** till rights can be decided.

In other words, the orders given by the trial court was for steering injustice. It is the positions of the law that, the High Court's powers to make interventions and give directions necessary in the interest of justice was not completely taken away. The power to do so is found

under Section 44(1) of the **Magistrate's Court Act**. See also the case of **Tanzania Harbours Authority V. African Liner Agencies Co. Ltd** [2004] TLR 127.

I wish to add that after this Court's order, the trial court determined the suit in Simon's favour. Mairo appealed to this Court. The appeal was allowed, the proceedings quashed and a retrial ordered.

It is from what I have stated above I am called upon to determine whether there is a disturbing feature or a point of law to be determined by the Court of Appeal. It is my firm view that since civil matters are determined on the balance of probabilities, the applicant has established that there is a disturbing feature to be considered by the Court of Appeal. The Court of Appeal will have to consider whether the nature of the order issued by the resident magistrates' court was final and conclusive in effect to invite this Court to call and examine the orders *suo mottu* or whether this Courts' power to supervise subordinate courts under S. 44(1) of the **Magistrate's Courts Act, [Cap.11 R.E.2019]** was taken away by S. 79 of the Civil Procedure Code, [Cap. 33 R. E 2019].

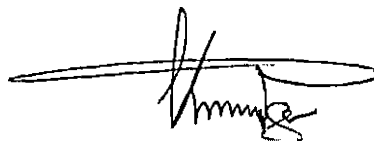
That done, I now consider the second issue whether this Court erred to hear and determine the matter which was filed in the subordinate court and the same was yet to be heard. I will not dwell on this issue. The respondent's counsel submitted and I agree with him that this Court did not hear and determine the application filed in the Resident Magistrate's Court. As the records of the Revision proceedings before this Court bears testimony, this Court commenced revisional

proceedings *suo mottu*. It did not determine the application filed in the trial court. It is possible that the ruling of this Court rendered the application before the trial court meaningless but that should not be construed that this Court determined that application.

In no way did this Court hear the application which was pending before the trial court. Thus, the applicant's contention that this Court determined an application before the trial court is misplaced, baseless and does not qualify to be considered by the Court of Appeal. Leave will not be granted where the grounds of appeal are **frivolous, vexatious, or useless or hypothetical**. See the case of **British Broadcasting Corporation v. Eric Sikujua Ng'maryo**, Civ. Application No.133 of 2004.

Eventually, I am of the view that the applicant has established that there is a disturbing feature to be considered by the Court of Appeal, as shown above. I allow the application and order that costs shall be in due course.

It is ordered accordingly.



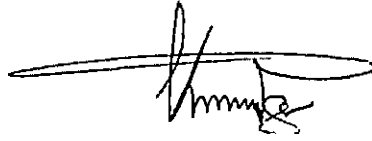
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15/6/2021

Court: Ruling delivered in the virtual presence of Mr. Obwana advocate for the applicant and Mr. Motete advocate for the respondent. B/C

Catherine present.

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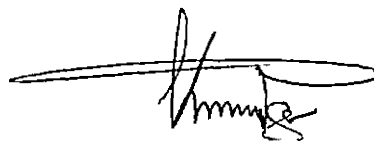
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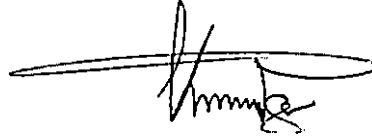
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