

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: MUGASHA, J.A., WAMBALI, J.A. And KWARIKO, J.A.)

CIVIL APPLICATION NO. 137/01 OF 2019

KADILI ZAHORO (Administrator of the
Estate of the late BAHATI RAMADHANI MPONDA.....**1ST APPLICANT**
SAUDA BAHATI MPONDA (Administratrix of the
Estate of the late BAHATI RAMADHANI MPONDA**2ND APPLICANT**
VERSUS
MWANAHAWA SELEMANI..... **RESPONDENT**

[Application for leave to appeal from the decision of the High
Court of Tanzania at Dar es Salaam]

(Mutungi, J.)

Dated the 23rd day of August, 2018

in

Miscellaneous Civil Application No. 795 of 2017

RULING OF THE COURT

20th October & 13th November, 2020

WAMBALI, J. A.:

The applicants' desire to appeal against the decision of the District Court of Morogoro in Civil Case No.26 of 2016 which was handed down on 5th July, 2017 was greeted by an obstacle after the High Court (Mutungi, J) dismissed Miscellaneous Civil Application No. 795 of 2017. In that application the applicants had sought extension of time within which to lodge an appeal to challenge the trial District Court judgment and decree.

Essentially, in its ruling, the High Court after objective perusal of the record of the application before it, held the opinion that the reason of delay to appeal advanced by the applicants, that is, sickness of the second applicant was not substantiated as required by law. The High Court, therefore, came to the conclusion that the applicants had demonstrated sloppiness in the prosecution of the intended appeal. Ultimately, it dismissed the applicants' application with no order as to costs.

The decision of the High Court seriously aggrieved the applicants and thus they sought to appeal to this Court. However, as the ruling of the High Court in Miscellaneous Civil Application No.795 of 2017 is appealable with leave of the High Court or this Court, they lodged Miscellaneous Civil Application No. 573 of 2018 before the same court (Luvanda, J) seeking leave to appeal. Unfortunately, their application was equally dismissed for lacking merit.

Still dissatisfied they have approached the Court under Rule 45A (1) (b) of the Tanzania Court of Appeal Rules, 2009 (the Rules) seeking leave to appeal as a second bite after the refusal of a similar application by the High Court. The application has been preferred through a notice of motion supported by the joint affidavit of Kadili Zahoro and Sauda

Bahati Mponda, the applicants. They also lodged written submissions to support the application.

The application is strongly contested by the Mwanahawa Selemani, the respondent who lodged an affidavit in reply and a written submission to vindicate her opposition to the application.

At the hearing of the application before us, the applicants and the respondent respectively appeared in persons, unrepresented. Noteworthy, both sides urged us to consider their respective affidavits and written submissions and determine the application in their favour. They did not wish to elaborate further on the written submissions which they had earlier on lodged in Court.

At this juncture, the main issue for our determination is whether the application has merit.

Our close scrutiny of the notice of motion lodged by the applicants indicate that the major ground for seeking leave to appeal is that if the application is not granted it will render the intended appeal nugatory. It is further contended by the applicants that the refusal of leave by this Court will make the non-executable and defective decisions of the lower courts executable leaving the legal heirs empty handed by losing their

entitled shares in the houses and 6 acres of 'shamba' stated in the judgment of the District Court of Morogoro.

On the other hand, we note that out of the eight paragraphs of their joint affidavit which supports the application, it is only in paragraph 6, where the applicants simply attack the decision of the High Court judge (Mutungi, J) for dismissing the application for extension of time. Basically, they have generally criticized the conclusion reached by the High Court that they did not deserve extension of time because they demonstrated sloppiness in the prosecution of their intended appeal to challenge the decision of the District Court. It is further generally averred in the said paragraph that in reaching at the decision to dismiss their application, the High Court did not consider other reasons such as the illegalities of the decision sought to be challenged. Unfortunately, they have not indicated the nature of the stated illegality.

However, it is interesting to note that in their written submissions, the applicants have fronted the following issues which they intend to put before the Court as the intended grounds of appeal to challenge the decision of the High Court if leave is granted thus: -

- 1. "Whether the trial judge madam B. R. Mutungi, was not bound as a matter of law and facts to re-evaluate the illegal and non-executable judgment*

of Morogoro District Court that sought to be challenged as other sufficient reasons for grant of leave for extension of time to the applicants to appeal out of time.

2. Whether the intended appeal has some factual or legal grounds to be considered in granting leave to appeal for the applicants”.

From the strength of the stated issues the applicants have strongly implored us to grant the application with costs.

On her part, the respondent both in her affidavit in reply and the written submissions has generally forcefully submitted that the applicants have not seriously advanced any point of law or fact to warrant the Court to grant them leave to appeal against the decision of the High Court which refused them extension of time. The respondent maintains that the application is devoid of merit and thus we should dismiss it with costs.

We must emphasize that in an application for leave to appeal, the applicant must demonstrate that he has some arguable points of law or of general importance for consideration by the Court. This position is consistent with the holding of the Court in the case of **British Broadcasting Corporation v. Eric Sikujua Ng'maryo**, Civil Application No.133 of 2004 (unreported) where it was stated 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 raises 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 (1992)** ALL E.R. Rep 90 at page 91). However, where the grounds of appeal are frivolous, vexatious or hypothetical, no leave will be granted".*

Similarly, in **Harban Haji Mosi and Another v. Omar Hilal Seif and Another**, Civil Reference No.19 of 1997 (unreported) the Court stated 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 spectra of unmeriting matters and to enable it to give adequate attention to cases of true public importance".

In that regard, in the present application, upon our close scrutiny of the applicants' "intended grounds of appeal" to be placed before the Court, which we have pointed out above, we do not see any novel point of law for consideration on appeal. As we have intimated above, the applicants' notice of motion contain a mere statement of complaint with regard to the ruling of the High Court, without indicating any serious matter which they intend to raise as a ground of appeal against it on appeal.

More importantly, what is stated in paragraph 6 of their joint affidavit does not support what is contained in the notice of motion as we have demonstrated above. Overall, the contents of paragraph 6 do not show any crucial issue of law which is intended to be placed before the Court against the decision of the High Court which refused the applicants' application for extension of time. We are however, mindful of the fact that the basis of the decision of the High Court was that the reason of sickness of the second applicant was not sufficient cause of delay to be allowed to lodge an appeal against the decision of the District Court of Morogoro beyond the prescribed period of limitation.

Unfortunately, what is apparent is that the rest of the information contained in the joint affidavit mostly concern the story of what transpired at the trial District Court and the High Court with regard to the

handling of the dispute between the parties and steps taken before lodging the current application to the Court. Equally important, the same story and information are repeated in the written submissions in support of the application without clearly indicating the real issues of law or of general importance emanating from the ruling of the High Court which the applicants intend to put forward before the Court for consideration. Moreover, in our considered opinion, even the issues stated in the applicants' written submissions as being the "intended grounds of appeal" cannot, with respect, move this Court to grant the application for leave as the same are not backed by what is stated in the applicants' notice of motion and the joint affidavit.

In the premises, the circumstances of this application entitles us to state that the notice of motion and the joint affidavit is crafted in such a way as it leaves us unable to discern from the notice of motion and joint affidavit any relevant matters or issues of law and fact which are intended to be placed before the Court on appeal against the ruling of the High Court. Besides, the applicants have not, for the purpose of the application for leave to appeal, identified the real question of law or fact that is a subject matter of the intended appeal against the said ruling. On the contrary, they have simply and generally criticized the ruling of

the High Court without necessarily pointing out the nature and substance of serious issues for consideration by the Court on appeal.

At this juncture, we need to emphasize that when seeking leave to appeal, it is important to craft the intended grounds of appeal with due care and consideration by pointing out briefly the real issues arising from the decision to be impugned. It is therefore pertinent to state in the intended grounds of appeal if there is any issue of principle of law or a question of general public importance or an injustice which is reasonably clear in the decision to be challenged in the intended appeal. In short, questions such as to the nature or significance of the intended point of law or fact to warrant the decision by the Court of Appeal should prima facie be stated in the applicant's application. To this end, we hasten to state that it is not enough for a party to simply allege that the lower court is wrong and therefore he deserves a hearing of the intended appeal by the Court. He must clearly show those matters to enable the Court consider them judiciously based on the relevant material placed before it.

In the end, based on the deliberation we have made with regard to the merit of this application, and considering the insufficient material placed before the Court by the applicants, we have no hesitation to state that this application is bound to fail. Consequently, the application for

leave should therefore be dismissed as we hereby do. Nevertheless, in the circumstances of this application, we make no order as to costs.

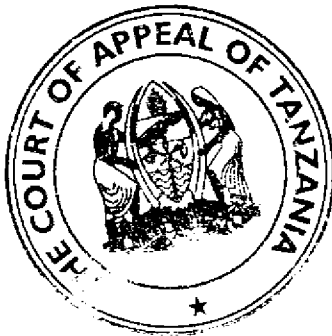
DATED at DAR ES SALAAM this 30th day of October, 2020

S. E. A. MUGASHA
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

The Ruling delivered this 13th day of November, 2020 in the Presence of the 2nd Applicant in person and Respondent in person and in absence of the 1st applicant while duly notified, is hereby certified as a true copy of the original.




G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL