

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

(CORAM: KWARIKO, J.A., MWANDAMBO, J.A. And KENTE, J.A.)

CIVIL APPLICATION NO. 247/01 OF 2021

BENEZETH RWEYEMAMU APPLICANT

VERSUS

CYPRIAN ALEXANDER MLAY 1ST RESPONDENT

SALVATORY SOKA 2ND RESPONDENT

M. M. AUCTIONEERS 3RD RESPONDENT

**(Application for leave to appeal from the decision of the High Court of
Tanzania**

At

Dar es salaam)

(Masabo, J)

dated the 11th day of February, 2020

in

Civil Appeal No. 109 of 2016

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RULING OF THE COURT

16th & 24th August, 2022

MWANDAMBO, J.A.:

The applicant Benezeth Rweyemamu is before us in an application for leave to appeal to this Court on a second bite after the dismissal of Misc. Civil Application No. 130 of 2020 by the High Court (Kulita, J)

31/5/2021. The High Court dismissed that application having taken the view that there was no point of law for determination by the Court.

The facts as disclosed by the affidavit are straight forward. The applicant and the second respondent Salvatory Soka were defendants in Civil Case No. 212 of 2012 instituted by Cyprian Alexander Mlay (first respondent) before the Resident Magistrate's Court of Dar es Salaam at Kisutu. It transpired that the applicant and the second respondent defaulted appearance when the suit was called on for hearing culminating into an order for *ex parte* hearing followed by an *ex parte* judgment for monetary reliefs. The trial court appointed the third respondent to carry out the execution by way of attachment and sale of the applicant's house. The applicant's application to set aside the *ex parte* decree was dismissed by the trial court so was his appeal before the High Court at Dar es Salaam in Civil Appeal No. 109 of 2016.

The High Court (Masabo, J) dismissed the applicant's complaint faulting the trial court for wrongly entering the *ex parte* judgment premised on the argument that there was no proof of service on him by registered mail through a postal address on the basis of which it ruled that he defaulted appearance.

Against that decision, the applicant lodged a notice of appeal to this Court followed by an unsuccessful application for leave to appeal before the High Court predicated upon rule 45(a) of the Tanzania Court of Appeal Rules, 2009 (the Rules). Notwithstanding the notice of motion indicating that the application is premised on the ruling dismissing the application for leave to appeal made on 31/5/2021, the application is, for all intents and purposes, predicated on the first appellate court's decision dismissing the applicant's first appeal. That should be obvious because the notice of appeal says as much that it is from the decision of the High Court in Civil Appeal No. 109 of 2016 dated 11/2/2020. There is no notice of appeal from Kulita, J's decision neither is that decision appealable.

Both in the notice of motion and the affidavit, the applicant's complaint revolves around the propriety of the *ex parte* judgment allegedly because there was no proof of service on him. This appears to be the only ground the applicant thinks merits the Court's determination if leave to appeal is granted.

None of the respondents filed any affidavit in reply. The second respondent in particular, does not appear to have taken part in the trial court challenging the *ex parte* judgment against him and the applicant.

Neither does the impugned judgment of the first appellate court indicate that he participated in the proceedings. This explains his absence during the hearing of the application.

At the hearing of the application, the applicant who had no legal representation urged the Court to grant him leave to appeal on the strength of the grounds stated in the notice of motion and the affidavit annexed thereto, viz. entering *ex parte* judgment on the basis of an erroneous proof of service on him through a postal address alien to him.

The first respondent who was equally unrepresented, resisted the application by simply saying that the Court should not grant it without more. For his part, Mr. Benson Swai who introduced himself as a director of the third respondent intimated to the Court that as a Court Broker who was assigned to execute the decree, he was ready for any order the Court may make in the application.

As alluded to earlier, the applicant intends to challenge the decision of the first appellate court for sustaining the ruling of the trial court in an application for setting aside the *ex parte* judgment despite lack of proof of service of the notice of hearing served by registered mail through a postal address which did not belong to him. The correctness

of the applicant's assertion is beyond our concern in this application. Our preoccupation in this application is to gauge whether the intended appeal is arguable be it on issues of fact or law or both. Unlike appeals emanating from primary courts which must be on points of law certified by the High Court, the intended appeal need not be on points of law which appears to be the view taken by the High Court in dismissing the first application. Even though we are not sitting as an appellate court from that decision, we wish to point out that the law on such applications has been that and it is still the same that is, leave to appeal should only be granted if, *prima facie*, there are grounds meriting the attention and decision of the Court. See for instance; **Gaudensia Mzungu v. IDM Mzumbe**, Civil Application No. 1994 (unreported).

Against the above, since the applicant's contention is that the first appellate court's decision was premised on erroneous finding in relation to service of notice of hearing of the suit before the trial court, we are satisfied that such a contention raises a ground meriting the attention and decision of this Court.

That said, we find merit in the application and grant leave to the applicant to appeal against the decision of the High Court in Civil Appeal

No. 109 of 2016 made on 11/02/2020. Costs shall abide the outcome of the intended appeal.

It is so ordered.

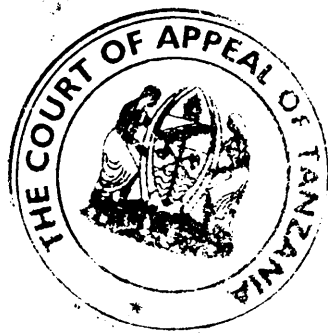
DATED at DAR ES SALAAM this 22nd day of August, 2022.

M. A. KWARIKO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The ruling delivered on this 24th day of August, 2022 in the presence of Applicant in person, 1st respondent in person and in the absence of the 2nd and 3rd respondents, is hereby certified as a true copy of the original.




D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL