

**IN THE COURT OF APPEAL OF TANZANIA**

**AT MBEYA**

**(CORAM: MKUYE, J.A., GALEBA, J.A., And KIHWELO, J.A.)**

**CIVIL APPLICATION NO. 51/6 OF 2021**

**GRACE FREDRICK MWAKAPIKI ..... APPLICANT**

**VERSUS**

**JACKLINE FREDRICK MWAKAPIKI ..... 1<sup>ST</sup> RESPONDENT**

**ASIFIWE FREDRICK MWAKAPIKI [Administrator of the  
Estate of the Late AGATHA FREDRICK MWAKAPIKI] ..... 2<sup>ND</sup> RESPONDENT**

**[Application for Leave to Challenge the Decision of the High Court of Tanzania at  
Mbeya]**

**(Mongella, J.)**

**Dated the 18<sup>th</sup> day of March 2020**

**in**

**Land Appeal No. 34 of 2019**

**.....**

**RULING OF THE COURT**

18<sup>th</sup> & 24<sup>th</sup> February 2022

**GALEBA, J.A.:**

Parties to this application are two sisters and a brother, because according to available records, they share parents, who are unfortunately, both deceased. As for this matter, Jackline Fredrick Mwakapiki, the first respondent instituted Land Application No. 225 of 2018 in the District Land and Housing Tribunal for Mbeya (the DLHT) against the applicant, the second respondent and one Frank Lamsi Mwakapiki, who is not a party to this application, claiming, among other

reliefs, ownership of a house erected on Plot No. 35 Block 13 located at Mwanjelwa area in Mbeya (the disputed property). At the end of that land matter in the DLHT, the first respondent was declared the lawful owner of the disputed property and an order was made that the certificate of occupancy in respect of the property be handed over to her. The applicant was aggrieved by that decision, so she approached the High Court and filed Land Appeal No. 34 of 2019 to challenge the decision of the DLHT. The High Court (Mongella J.), dismissed her appeal on 18<sup>th</sup> March 2020 and upheld the decision of the DLHT on grounds that assessors were properly involved in disposing of the matter at the DLHT. The applicant was aggrieved by the dismissal of her appeal. She therefore, under section 47(2) of the Land Disputes Courts Act [Cap 216 R.E. 2019], lodged Miscellaneous Land Application No. 31 of 2020 moving the High Court to grant her leave to appeal to this Court.

Nonetheless, like the fate of the appeal preceding it, the application for leave was also dismissed by the High Court (Mambi, J.) on 28<sup>th</sup> September 2020, on grounds that there was no valid point of law meriting attention of this Court. Still optimistic and determined to pursue the orders of the High Court, she has lodged this application applying for leave to appeal to the Court as a second bite, on grounds that **first**, she cannot appeal to this Court without

leave of the High Court and **second**, her application for leave to the High Court was dismissed.

Further, according to paragraphs 9 and 10 of her affidavit supporting the notice of motion in this application, the applicant swears that she seeks to challenge the decisions of the High Court and that of DLHT because the decisions are pregnant of serious illegalities and irregularities. She further contends that, the decisions contain problematic and disturbing features. Obviously, the application met strong and unwavering resistance from both respondents.

When this application was called on for hearing before us on 18<sup>th</sup> February 2022, the applicant and the second respondent appeared in person without legal representation whereas Mr. Luka Ngogo, learned advocate appeared for the first respondent.

Before we were to engage into entertaining substantive hearing of arguments of parties for and against the application, we inquired from parties whether the application was compliant with the provisions of Rule 49(3) of the Tanzania Court of Appeal Rules 2009, as amended (the Rules). That Rule requires that an application for leave before the Court must be accompanied

**one**, by a copy of the decision of the High Court to be challenged on appeal and **two**, the order of the High Court refusing leave. We raised that point, because our review of the documentation constituting the application, when preparing for hearing, had revealed that the notice of motion and the applicant's affidavit, in the context of the above Rule, was accompanied with only the decision sought to be appealed against but not the order of the High Court dismissing her application for leave.

Although we explained to the applicant what Rule 49(3) of the Rules entails, and the clear absence of the order in her application coupled with the bare consequences that her application imminently faced, nonetheless, being a lay person in law, she only prayed for adjournment so that she could supply the needed document. She insisted the prayer, even after we had informed her that, as the matter had been raised, it was to be decided first. On his part, Mr. Ngogo submitted that Rule 49(3) of the Rules is couched in mandatory terms, in which case its compliance is not optional. He implored us to strike out the application with costs for failure by the applicant to attach the order of the High Court refusing leave, to this application. The second respondent fully supported the submission of Mr. Ngogo.

To appreciate the issue for discussion before us, we propose to start with Rule 49(3) of the Rules, for which we sought clarification as to its compliance from parties. That rule provides as follows:

*"(3) Every application for leave to appeal shall be accompanied by a copy of the decision against which it is desired to appeal and where application has been made to the High Court for leave to appeal, by **a copy of the order of the High Court.**"*

*[Emphasis Added]*

An application for leave, in terms of Rule 45(b) of the Rules, is one of the matters upon which the High Court and this Court have concurrent jurisdiction. Rule 49(3) of the Rules, quoted above, is directive of which documents should be attached to the affidavit when an application for leave is to be filed in the High Court, and which documents should accompany it, when it is to be made before the Court. If the application is to be filed in the High Court, it must be attached with one document, that is a decision from which an appeal is to be preferred, should leave be granted. Upon refusal of leave by the High Court, in which case, the same has to be made to the Court, the application, should be accompanied with one more document in addition to the decision to be challenged on appeal. That second document, is a copy of the order refusing

grant of the leave by the High Court. In this application, the latter document, is what was missing, hence our inquiry of parties' views in the circumstances.

Admittedly, as indicated above, the application before us is accompanied with the decision of the High Court sought to be challenged on appeal, which is indeed, a legal requirement. The application is also attached with a ruling of the High Court dismissing the applicant's application for leave in the first instance, but the omission which is subject of this ruling is non-inclusion of the order and not the ruling. In any event, the ruling is not one of the documents required to be attached to the application for leave to the Court under Rule 49(3) of the Rules. In our view, a ruling and an order are two different documents which are mutually exclusive, for one cannot be taken to mean the other and *vice versa*. Although the order is extracted from the ruling, still the two are not the same. We wish to observe therefore that, it is immaterial and inconsequential that the application is accompanied with the ruling like in this application. The application was supposed to be accompanied with the order of the High Court refusing leave, which order, we indicated, is missing.

In the case of **Alex Maganga v. The Director Msimbazi Centre**, Civil Application No. 81 of 2001, while interpreting Rule 46(3) of the Court of Appel

Rules 1979 (now revoked) but which is *in pari materia* with rule 49(3) of the present Rules, this Court observed:

*"Apart from the fact that a copy of the decision was not filed along with the notice of motion, the order of the High Court was also not filed. What was filed was a copy of the proceedings in the High Court during the hearing of the application for leave. It was in those proceedings that it was ordered that the application be dismissed for being incompetent. A copy of those proceedings does not satisfy the requirements of Rule 46 (3) of the Court Rules, as amended by GN. No. 157 of 1984. **The words order of the High Court in the sub-rule mean an extracted order of the High Court, which was not filed.** It is apparent, therefore, that the applicant did not comply with Rule 46 (3) at all and the application before me would be incompetent."*  
*[Emphasis added]*

In this matter, like in the above authority of this Court, what was not filed along with the application, was the order of the High Court, a drawn order, so to speak. In the circumstances, we are not hesitant to hold, as we hereby do, that an essential document required by Rule 49(3) of the Rules, to accompany

an application for leave before the Court, was not attached with the application, in which case it is incompetent.

In the event, this application is struck out with costs.

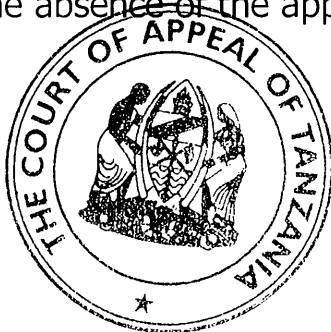
**DATED** at **MBEYA**, this 24<sup>th</sup> day of February, 2022

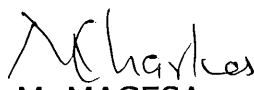
R. K. MKUYE  
**JUSTICE OF APPEAL**

Z. N. GALEBA  
**JUSTICE OF APPEAL**

P. F. KIHWELO  
**JUSTICE OF APPEAL**

The Ruling delivered this 24<sup>th</sup> day of February, 2022 in the presence of Mr. Elisha Serikali, learned advocate holding brief for Mr. Luka Ngogo, learned advocate for 1<sup>st</sup> respondent, in the presence of 2<sup>nd</sup> respondent in person and in the absence of the applicant, is hereby certified as a true copy of the original.



  
C. M. MAGESA  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**