

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

(CORAM: MWAMBEGELE, J.A., KOROSSO, J.A. And MWANDAMBO, J.A.)

CIVIL APPLICATION NO. 514/17 OF 2020

**HENRY JULIUS NYELA APPLICANT
VERSUS**

**SAUDA MTUNGUJA RAJABU RESPONDENT
(Application for leave to appeal to the Court of Appeal from the Judgment
and Order of the High Court of Tanzania, at Dar es Salaam)**

(Mzuna, J.)

dated the 3rd day of August, 2018

in

Land Appeal No. 108 of 2016

RULING OF THE COURT

17th February & 14th March, 2023

MWAMBEGELE, J.A.:

On 03.08.2018, in Land Appeal No. 106 of 2016, the High Court (Mzuna, J.) dismissed an appeal in which the applicant Henry Julius Nyela had sought to assail the decision of the District Land and Housing Tribunal which decided in favour of the respondent Suda Mtunguja Hussein. Dissatisfied, the applicant wished to appeal to this Court against that decision. However, in terms of section 47 (1) of the Land Disputes Courts Act, Cap. 216 of 2019, he could not come to this Court without seeking and obtaining leave of the High Court. He thus lodged Miscellaneous Land Cause

No. 578 of 2018 for that purpose. That application was refused by the High Court (Mgonya, J.). Undeterred, the applicant has knocked the door of this Court to try his luck by a second bite of the cherry. That course of action, for the avoidance of doubt, is permissible by section 47 (1) of the Act as amended by the Written Laws (Miscellaneous Amendments) (No.3) Act, 2018 - Act No. 8 of 2018. Before that amendment, it was only the High Court that had jurisdiction to grant leave to appeal to the Court – see: **Twaha Michael Gujwile v. Kagera Farmers Cooperative Bank**, Civil Application No. 352/04 of 2021 (unreported), the decision of the Court.

When the application was placed before us for hearing on 17.02.2023, Mr. Stephen Ndila Mboje, learned counsel and Mr. Japhet Mmuru, also learned counsel, joined forces to represent the applicant. The respondent did not enter appearance. It was brought to our attention that she was served by publication through the Mwananchi Newspaper of 08.02.2023 pursuant to our order dated 08.11.2022 but defaulted appearance. Given that state of affairs, Mr. Mboje prayed and was granted leave to proceed in her absence in terms of rule 63 (2) of the Tanzania Court of Appeal Rules, 2009.

The learned counsel was very brief in his submissions. Having adopted the contents of the founding affidavit that was deposed in support of the application by Henry Julius Nyela, the applicant, he submitted that the applicant has successfully shown that the intended appeal has arguable issues worth determination by the Court. He added that the High Court (Mzuna, J.) strayed into error when it held that the suit the genesis of this application was *res judicata* the one filed by the applicant's relative, a certain Salome Kimaro Alphonse, in the Ward Tribunal. The learned advocate contended that the High Court slipped into error in so holding because the conditions precedent for the application of the doctrine of *res judicata* were not met. He thus implored us to grant the application. He did not press for costs.

We have considered the notice of motion and the founding affidavit as well as carefully listened to the submissions of the learned advocate for the applicant. We start our determination by stating the law applicable in applications of this nature. As good luck would have it, the law on this area is fairly settled in this jurisdiction. In applications for leave to appeal to the Court, what the court confronted with that application is supposed to do is to see if the intended appeal, *prima facie*, has some merits, whether factual

or legal. In applications of this nature, the courts have all along been wary to withhold leave to appeal to a superior court if there are grounds meriting the attention of that superior court. Put differently, leave to appeal from an order in civil proceedings will be granted where, *prima facie*, it appears to the court seized with that application that there are grounds of appeal which merit serious judicial consideration - see: **Wambele Mtumwa Shahame v. Asha Juma**, Civil Application No. 45 of 1999, **Gaudensia Mzungu v. IDM Mzumbe**, Civil Application No. 94 of 1994, **British Broadcasting Corporation v. Eric Sikujua Ng'maryo**, Civil Application No. 133 of 2004 and **Rutagatina C. L. v. The Advocates Committee & Another**, Civil Application No. 98 of 2010 (all unreported). In **Wambele Mtumwa Shahame** (supra), for instance, the Court stated:

"Unfortunately, it is not provided what factors are to be taken into account when considering whether or not to grant leave whether or not to appeal to this court. However, it is obvious that leave will only be granted if the intended appeal has some merits whether factual or legal."

In **Rutagatina C. L.**, we stated in no uncertain terms that an application of this nature will be granted upon an applicant showing good reason, normally on a point of law or on a point of public importance, that

calls for intervention of the Court. In that application, we cited the following excerpt from our previous decision in **Harban Haji Mosi & Another v. Omar Hilal Seif and Another**, Civil Reference No. 19 of 1997 (unreported) which underlies the principle in applications of this nature and, we strongly feel, it is worth recitation here:

"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 spectre of unmeriting matters and to enable it to give adequate attention to cases of true public importance."

The foregoing principle was reiterated by a single justice of the Court (Nsekela, J.A) in **British Broadcasting Corporation** as follows:

"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 raise 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 (1926) ALL ER. Rep. 90 at page 91). However, where the grounds of appeal are frivolous, vexatious or useless or hypothetical, no leave will be granted."

It may be not irrelevant to add here that, an applicant who intends to challenge an order which was made in exercise of the court's discretion, will not easily succeed in an application for leave to appeal to an appellate court. To succeed, he will have to make out a rather stronger case. This was stated in **Sango Bay Estates Ltd and others v. Dresdner Bank A G** [1971] 1 EA 17, the decision of the erstwhile Court of Appeal for East Africa. It held:

"... leave to appeal from an order in civil proceedings will normally be granted where prima facie it appears that there are grounds of appeal which merit serious judicial consideration but where, as in the present case, the order from which it is sought to appeal was made in the exercise of a judicial discretion, a rather stronger case will have to be made out." (emphasis added).

We are guided by our previous decisions above and subscribe to the decision of the defunct Court of Appeal for East Africa in **Sango Bay Estates Ltd and others**.

The above authorities underscore the rule that a person aggrieved by a decision of the High Court, and we may add, or the Court of the Resident Magistrate exercising extended jurisdiction, has a right to assail that decision to the Court. However, that right is not automatic. It is conditional upon that person showing that the intended appeal has some merit whether factual or legal or that there are grounds of appeal which merit serious judicial consideration. Where the order from which it is sought to appeal was made in the exercise of a judicial discretion, a rather stronger case will have to be made out for an applicant to succeed.

In the application before us, the applicant seeks to assail the decision of the High Court on the application of the doctrine of *res judicata* embodied in section 9 of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2019 (the CPC). Our duty, at this stage, is not to go into the merits of the intended appeal. It is enough if the application before us shows that the intended appeal, *prima facie*, has some merit by raising arguable grounds or a point of law that merit the attention of the Court. We are satisfied that the applicant has sufficiently demonstrated that there is a serious question that merits the attention of the Court. That question is, as already alluded to above, whether the doctrine of *res judicata* was correctly applied in terms of

section 9 of the CPC. We would therefore grant this application. For the avoidance of doubt, we have not made any reference to the reasoning of Mgonya, J. in her decision refusing leave to appeal to the Court. This is because, though a second bite of the cherry, this is an original application to this Court, not an appeal from the decision of the judge who refused leave in the first bite, so to speak.

On the whole, on account of what we have endeavoured to discuss hereinabove, we find merit in this application and allow it. As the applicant did not press for costs, we make no order in that regard.

We so order.

DATED at DAR ES SALAAM this 8th day of March, 2023.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

W. B. KOROSSAO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The Ruling delivered this 14th day of March, 2023 in the presence of Ms. Salma Mohamed, learned counsel for the applicant and in absence of Respondent is hereby certified as a true copy of the original.



R. W. Chaungu
R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL