

IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

(CORAM: MKUYE, J.A., MWANDAMBO, J.A. And RUMANYIKA, J.A.)

CIVIL APPLICATION NO. 07/07 OF 2022

HASHIMU JUMA NAPEPA APPLICANT

VERSUS

**BAKARI AHMADI NG'ITU (Administrator
of the Estate of the late Galus Polipili)..... 1ST RESPONDENT**

MIC TANZANIA LIMITED 2ND RESPONDENT

**(Application for leave to appeal from the ruling of the High Court of
Tanzania at Mtwara)**

(Dyansobera, J.)

dated the 13th day of April, 2020

in

Miscellaneous Land Application No. 21 of 2020

RULING OF THE COURT

20th & 28th March, 2023

MWANDAMBO, J.A.:

The applicant was aggrieved by the ruling of the High Court (Dyansobera, J) sitting at Mtwara in an application for setting aside a dismissal order in Land Appeal No. 13 of 2015 in which he was the appellant. That appeal had been dismissed by the High Court for default of appearance on the date set for hearing. Accordingly, the applicant lodged a notice of appeal to this Court with a view to challenging the ruling which refused to set aside its order dismissing his appeal.

Considering that the impugned ruling could not be appealed without leave of the High Court or the Court, the applicant applied for leave to appeal before the High Court but, Muruke, J. dismissed that application on the ground that the intended appeal did not involve any point of law for consideration and determination by the Court. Whether that reasoning was correct or not is irrelevant for the purpose of this ruling. The applicant is now before us for a second bite of the cherry sanctioned by rule 45 (b) of the Tanzania Court of Appeal Rules, 2009 (the Rules) by way of notice of motion supported by the applicant's own affidavit. While the first respondent filed an affidavit in reply opposing the application, the second respondent did not file hers but had her advocate appear to resist it during the hearing.

Prior to the hearing of the application, the applicant lodged his written submissions in pursuance of rule 106 (1) of the Rules. The written submissions are, by and large, a narration of what transpired before the High Court prior to and after the order dismissing the applicant's appeal on 12/05/2017. Of particular emphasis from the submissions is the claim that, in refusing to set aside the dismissal order, the High Court did not take into account that his non-appearance at the hearing of the appeal,

was caused by the court clerk who misled him regarding the date of hearing to the respondents' advantage.

At the hearing of the application, the applicant appeared in person and repeated the same claims in his oral submissions urging the Court to grant the leave sought. Similarly, the first respondent appeared in person at the hearing. He was stout against the grant of the leave sought urging us to dismiss the application. The second respondent had the services of Mr. Ndanu Emmanuel, learned advocate who was allowed to address the Court on matters of law only by reason of the second respondent's failure to file an affidavit in reply. The learned advocate pointed out that the application ought to be dismissed due to the applicant's failure to satisfy the Court that there exist arguable grounds meriting the attention of the Court for its determination on appeal. Reinforcing his stand point, he cited one of the Court's unreported decisions in **British Broadcasting Corporation v. Eirc Sikujua Ng'maryo**, Civil Application No. 138 of 2004 which discussed factors to be considered in granting leave to appeal, that is to say; existence of grounds of general importance or a novel point of law or prima facie or arguable appeal as opposed to frivolous, vexatious, useless or hypothetical matters.

Elaborating, the learned advocate contended that, as found by High Court in the impugned ruling, the applicant was negligent in prosecuting his appeal. That notwithstanding, Mr. Emmanuel argued, there is nothing in the affidavit justifying the grant of leave based on the principles guiding courts in determining applications for leave. He invited the Court to dismiss the application. In rejoinder, the applicant had nothing useful but solicited our sympathy towards favourable consideration of the application.

We shall begin our discussion with the obvious. In any application for leave to appeal such as this one, the crucial issue the court has to consider is whether there exist grounds warranting exercise of discretion in the applicant's and ultimately granting the application. It is trite that in exercising such discretion, sympathy is not one of the factors to be taken into consideration. It is imperative that grounds are to set out in the notice of motion supported by an affidavit, as a matter of law. It is equally significant that, an application for leave before the Court christened as second bite is not an appeal from the refusal to grant leave by the High Court. The Court considers an application afresh, ideally, on the same grounds placed before the High Court to give credence to the phrase; second bite of the cherry.

The only ground set out in the notice of motion is that, the applicant seeks leave to appeal following the High Court's refusal to grant an application for leave in Misc. Land Application No. 12 of 2021. The affidavit comprises six paragraphs which are largely a narration of what transpired before the High Court. Paragraph 5 raises two issues thus:

- i. Whether or not mishearing of the date of the case by the Applicant leading to non-appearance on the next hearing date of hearing of the case amounts to negligence lack of seriousness in following up of the case.*
- ii. Whether or not mishearing or misapprehension of the date of hearing of the case could not in circumstances of the material application constitute sufficient reason within the purview of Order IX, Rule 9 of the Civil Procedure Code [Cap. 33 R.E. 2019]."*

In summary, what the applicant intends to argue before the Court should leave be granted is whether, 'mishearing' of the date of hearing constituted negligence on his part warranting dismissal of his application for setting aside the dismissal order. Mr. Emmanuel thinks otherwise and rightly so in our view.

Mindful of the principles governing the grant of leave to appeal, we agree that the applicant has not demonstrated existence of any arguable

ground be it of fact or law or mixed fact and law meriting the consideration and determination of the Court on appeal in line with the established principles set out in various decisions including, **British Broadcasting Corporation** (supra), **Rutagatina C.L. v. The Advocates Committee & Another**, Civil Application No. 98 of 2010, **Ms. Airport Properties Ltd v. The Registrar of Titles & Another**, Civil Application No. 389/17 of 2020 (both unreported) to mention just a few of them. In **Ms. Airport Properties Ltd** the Court stated: -

*"It is trite law that in an application for leave the applicant must demonstrate that there are some arguable points of law or matters of general importance emanating from the impugned decision to convince the Court exercise its judicious discretion to grant it. Basically, as we stated in **Kadiri Zahoro and Another v. Mwanahawa Selemani** (supra), in an application for leave to appeal: - "questions such as the nature or significance of the intended point of law or fact to warrant the decision of the Court of Appeal should prima facie be stated in the applicant's application." [At pages 6 and 7]*

One may appreciate the issues the applicant has formulated in para 5 (i) and (ii) of the affidavit but there is nothing in the entire affidavit from which the Court can deduce such issues. Plain as they are, the issues have

been extracted from an abstract and this can only fall into the category of hypothetical issues which were held by the Court as irrelevant in granting leave in **British Broadcasting Corporation** case (supra) citing its earlier decision in **Harban Haji Mosi & Another v. Omar Hilal Seif & Another**, Civil Reference No. 19 of 1997 (unreported) where it aptly stated: -

"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."

As hinted earlier on, there is no material in the affidavit upon which one can express an opinion pointing towards failure by the High Court to appreciate the applicant's complaint regarding mishearing of the date of hearing as a reason for his inability to appear for the hearing of his appeal. In the absence of such material, it will be expecting too much from the Court to grant leave based on hypothetical grounds set out in para 5 (i) and (ii) of the affidavit. Neither do the two formulated grounds qualify as

grounds under matters of true public importance attracting the Court's attention.

In the event, we are constrained to decline exercising our discretion in the applicant's favour. The application is accordingly dismissed with costs.

It is so ordered.

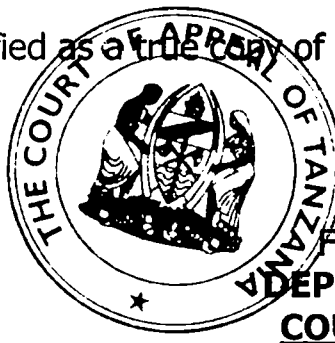
DATED at MTWARA this 24th day of March, 2023.

R. K. MKUYE
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

This Ruling delivered this 28th day of March, 2023 in the presence of the Applicant in person, the 1st Respondent in person and Mr. Issa Chiputula holding brief for Mr. Ndanu Emmanuel for the 2nd Respondent, is hereby certified as a true copy of the original.

The seal of the Court of Appeal of Tanzania is circular. It features a central emblem with a shield, a book, and a scale of justice, surrounded by the text 'THE COURT OF APPEAL OF TANZANIA'. A star is positioned at the bottom center of the seal.
F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL