

**IN THE HIGH COURT OF TANZANIA**  
**(DAR ES SALAAM DISTRICT REGISTRY)**  
**AT DAR ES SALAAM**

**MISCELLANEOUS CIVIL APPLICATION NO. 149 OF 2016**  
*(Originating in Land Case No. 71 of 2011)*

**ABDI ALLI SALEHE ----- APPLICANT**

*VERSUS*

**ASAC CARE UNIT LIMITED ----- 1<sup>ST</sup> RESPONDENT**

**AYOUB SALEH CHAMSHAMA ----- 2<sup>ND</sup> RESPONDENT**

**KENYA COMMERCIAL BANK LTD**

**(NOW KCB (TANZANIA) LTD ----- 3<sup>RD</sup> RESPONDENT**

**RULING**

**MUTUNGI, J.**

The applicant through the legal services of Mr. Denis Msafiri learned Counsel is seeking for the following orders against the decision of this Court in Land Case No. 71 of 2011:

-

- I. That the Honourable Court be pleased to grant leave to the Applicant to appeal to the Court of*

*Appeal of Tanzania against the decision of the High Court (Hon. E.M. Feleshi, J) in Land Case No. 71 of 2011 delivered on 28<sup>th</sup> November 2016.*

*II. Costs of this application be provided for.*

The application has been brought by a chamber summons made under **section 47 (1) of the Land Disputes Courts Act [Cap. 216 R.E 2002]**. The same is supported by an Affidavit dully sworn by Mr. Denis Msafiri the applicant's Counsel. As per the said Affidavit, the applicant is aggrieved by the decision of this court (Land Case No. 71 of 2011) hence intends to appeal to the Court of Appeal against the said decision. The applicant has raised seven (7) grounds sought to be considered by the superior Court.

The grounds are provided for under paragraphs 4 (a)-(g) of the said Affidavit. For the sake of clarity, the same are as follows: -

- a) Whether it was proper for the High Court to apply the provisions of the Land Act enacted in 1999 and which came into force in 2001 to impeach and*

invalidate a Certificate of Occupancy that was registered way back in 1982.

- b) Whether, having found and decided that the mortgage over the suit proper was null and void ab initio, the otherwise purported mortgagee had no powers of sale under the void mortgage and as such could pass any good title to a purchaser in the purported exercise of power of sale conferred by the void mortgage.
- c) Whether it was proper for the High Court to hold that the Certificate of Occupancy was granted to an anonymous person while evidence pointed to a fact that the Applicant was the person named in the said Certificate of Occupancy despite being while his parent was the one who acquired the property so registered.
- d) Whether it was proper for the High Court to act on word of mouth of DWI's testimony that the plaintiff's father had consented to the impugned mortgage without any documentary evidence to that effect.

- e) *Whether it was proper for the High Court to make a finding that the Certificate of Occupancy was fraudulently granted to the plaintiff in absence of any complaint from or by Commissioner for Lands who is the only party and privy to it.*
- f) *Whether it was proper for the High Court to uphold a sale of the suit property made by a party to the suit in deliberate violation of an injunctive order of the Court restraining such party to exercise any powers under the impugned mortgage.*
- g) *Whether the High Court was correct in impliedly holding that a Court Order prohibit or restraining the doing of a certain act ceases to have any force of law if and when a party required to comply with the Order violates that order in favour of a stranger to the proceedings under which the order was made.*

The respondents through the counter affidavits of SOUD AYOUB CHAMSHAMA the 1<sup>st</sup> respondent's Director and ELISA ABEL MSUYA, the 3<sup>rd</sup> respondent legal counsel strongly opposed the application.

On 8/5/2018 when the application was called for hearing, Mr. Denis Msafiri and Elis Msuya Learned Counsel appeared for the applicant and the 3<sup>rd</sup> respondent respectively. The court proceeded with the hearing in the absence of the 1<sup>st</sup> and 2<sup>nd</sup> respondents since they were absent with no notice.

In his brief submissions, Mr. Msafiri apart from pointing out the already stated grounds, he went further by arguing that, these are the serious issues of law which need the intervention of the Court of Appeal. He concluded by praying the application be granted as prayed in the chamber summons.

In reply, Mr. Msuya strongly objected the application since the stated grounds in paragraphs 4 (a)-(g) of the Affidavit do not constitute issues of law to warrant the grant of the sought leave. He further referred this court to the case of **RUTAGATINA C.L VERSUS THE ADVOCATES COMMITTEE AND CLAVERY MTINGO NGALAPA, CIVIL APPLICATION NO. 133 OF 2007 (CAT-DSM) (UNREPORTED)** which elaborated as to the legal principles to be considered by the court in determining the issue of leave to the apex court of this land.

Mr. Msuya submitted the application at hand is not automatic hence it can only be granted where the grounds raise a novel point of law or the grounds show a prima facie or arguable appeal as well as where the intended appeal has reasonable chances of success. All in all, the application can only be granted depending on the court's discretionary powers.

In attacking the first ground, Mr. Msuya argued Mr. Msafiri has failed to explain in detail as to why the applicability of the Land Act has vitiated the said decision. He went further and supported the view that the mortgage was null and void as correctly ruled out by the court. Basing on the foregoing reasons, he prayed the application be dismissed with costs.

Mr. Msafiri in his rejoinder insisted the raised grounds show there is an arguable appeal worth the attention of the Court of Appeal. He further maintained his earlier position as submitted in the submission in chief.

The issue here is whether the application has merits or otherwise.

From the outset I agree with Mr. Msuya that in such an application the court is vested with discretionary powers to allow or refuse the same. Further, I also agree with him that, the law is well settled that an application seeking for leave is not automatic. In other words, a party seeking the same must convince the court among other things that, there is a novel point of law which needs to be determined by the Court of Appeal. This position was amplified in **RUTAGATINA C. L's case** at page 6 the Court cited with approval the case of **BRITISH BROADCASTING CORPORATION VERSUS ERIC SIKUJUA NG'MARYO, CIVIL APPLICATION NO. 133 OF 2004 (UNREPORTED)** where it was stated, and I quote;

*"Needless to say, **leave to appeal is not an automatic. It is with the discretionary of the court to grant or refuse.** The discretion must, however be judiciously exercised on the materials before the court. **Leave to appeal will be granted where grounds of appeal raise of general importance or a novel point of law or where the grounds show a prima facie or arguable appeal.** (See Buckle Versus 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". [Emphasis is mine]*

Having in mind the above legal position and upon my objective consideration of the submissions from both camps, I find there is a point of law which need to be determined by the Court of Appeal. The reason being specifically as per paragraph 4 (b), (c), (d) and (e) of the corresponding affidavit. These not only show there are novel points of law to be determined by the superior court but also the same suggests there is an arguable appeal to be referred therein. It is thus a fit case which needs the intervention of the supreme court of this land.

From the foregoing reasons, I find the application has merits. Consequently, the application is hereby granted with no order for costs.

It is ordered accordingly.



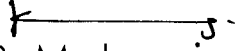
✠  
B. R. Mutungi

**JUDGE**

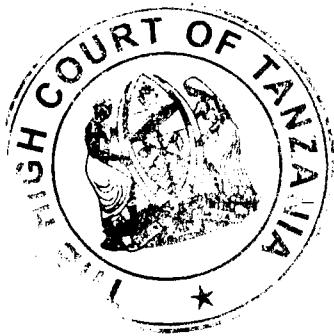
**22/06/2018**

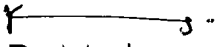
Read this day of 22<sup>nd</sup> June 2018 in the presence of the applicant and Regina Kiumba for the 3<sup>rd</sup> respondent.



  
B. R. Mutungi  
**JUDGE**  
**22/06/2018**

Right of appeal explained.



  
B. R. Mutungi  
**JUDGE**  
**22/06/2018**