IN THE HIGH COURT OF TANZANIA

AT SUMBAWANGA

MISC. CIVIL APPLICATION NO. 26 OF 2018

(Arising from Civil Appeal No. 3 of 2014 of the High Court of Tanzania at Sumbawanga, Original Civil Case No. 21 / 2000 of the District Court of Sumbawanga at Sumbawanga)

1st MORIS S/O MBILINYI
2nd HAIBE MOHAMED ABDALA } **.....APPLICANTS**

VERSUS

1st CRDB BANK LIMITED
2nd SALUM AMOUR (COURT BROKER)
3rd CONSTANTINO NZUMI } **.....RESPONDENTS**
4th MRS THERESIA NZUMI

RULING

23rd April – 19th May, 2020

MRANGO, J

The applicants herein have preferred this application under **section 5 (1) (c) of the Appellate Jurisdiction Act, Cap 141 RE 2002** seeking for this court to grant leave for the applicants to appeal to the Court of Appeal of Tanzania against the decision of this Court, (Mgetta, J) in DC. Civil Appeal No. 3 of 2014. The application is supported by an affidavit sworn by Mr. Ladislaus Rwekaza, learned advocate.

When the matter was called on for hearing before Hon. Mashauri, J, learned advocate for the 3rd and 4th respondents raised preliminary objection to the effect that firstly, the application is statutory time barred and secondly, the application is not tenable in law because the previous notice of appeal filed to the court of appeal was withdrawn. The preliminary objection was argued by way of written submission as prayed and agreed by the parties whereas the parties filed their respective submission as scheduled by this court. This court having considered the submission of both sides overruled the preliminary objection with an order for the matter be heard on merit.

On the day of hearing of this application on merit, Miss. Silvia Mwalwisi – learned advocate for the applicants informed this court that 3rd respondent has written a letter requesting Hon. Mashauri, J to disqualify himself from hearing this application where upon getting the said letter by 3rd respondent, Hon. Mashauri, J decided to disqualify himself from entertaining this matter and he returned the matter before Hon. Judge i/c for re-assignment. Hon. Judge i/c reassigned the matter to himself for the continuation of hearing and he set a date for hearing.

When the matter was called for hearing Ms. Silvia Mwalwisi – learned advocate for the applicants prayed for the matter to be argued by way of written submission whereas, Mr. Tumaini Msechu – learned advocate for the 1st and 2nd respondents and Mr. Mathias Budodi - learned advocate for 3rd and 4th respondents conceded to the prayer. This court set a schedule where the parties filed their respective submission.

Arguing in supporting of this application, learned advocate for the applicants submitted that this application is brought under **section 5 (1) (c) of the Appellate Jurisdiction Act, Cap 141 RE 2002** made by way of chamber summons supported by an affidavit of Ladislaus Rwekaza of which he prayed the same to be adopted by this court to form part of his submission.

He went on submitting that this application has originated from Civil Appeal No. 3 of 2014 High Court of Tanzania at Sumbawanga where the root of this application arose when the applicants on 8th day of February 2002 purchased the disputed property through an auction conducted by 2nd respondent on behalf of 1st respondent, whereby the 1st applicant purchased plot No. 120 Block KK HD with Tittle No. 3938 MBYLR to the

tune of Tsh. 3,100,000/= (Three Million and One hundred Thousands) while the 2nd respondent purchased plot No. 99 Block KK HD Tittle No. 3835 – MBYLR to the tune of Three Million and Three Hundred Thousands) both situated at Jangwani Area within Sumbawanga Municipality, thus innocent purchasers.

He further submitted that after the sale, the applicants together with 1st respondent successfully transferred the ownership from the previous owners who are the 3rd and 4th respondents herein. They argued that to their astonishment, sixteen years later, on September 2018, the applicants received a phone call from one person unknown to the applicants who introduced to them that he is an officer of the High Court of Tanzania at Sumbawanga who informed the applicants that there was an appeal which was Civil Appeal No. 3 of 2014 of the High Court of Tanzania at Sumbawanga and in the said appeal the applicants were alleged to be among of the litigants and henceforth they have lost the case, being so, they were ordered to return or handle back the title Deeds being plot No. 120 Block KK HD, with title No. 3938 MBYLR which is owned by the 1st applicant and plot No. 99 Block KK HD Title No. 3835 – MBYLR which is owned by the 2nd applicant.

He further said, after receiving the said information, the applicants decided to communicate/ share the said information to the 1st respondent who replied that there was an appeal which was filed by the 1st respondent's advocate and the applicants were among the litigants and in that appeal therefore it was dismissed with an order for the applicants to return the said disputed property. After that response, on September 2018, the applicants decided to peruse the said court file and found out that there was civil Appeal No. 3 of 2014 of which the applicants were joined as appellants without their knowledge and in that appeal the applicants never instructed the 1st respondent nor her advocate to file an appeal to represent them in that appeal.

He argued that it was from that situation, when the applicants started to seek their constitutional right by instituting an appeal to the Court of Appeal against the said Judgement in Civil Appeal No. 3 of 2014, simply they were not given the right to be heard in Civil Appeal No. 3 of 2014 and they did not instruct the advocate for the 1st respondent to appeal on their behalf, and to represent them and they were not informed the date for judgement.

He said due to that, they were also not informed with the date for judgement, the applicants found themselves late in instituting an appeal to Court of Appeal, hence the applicants made an application seeking extension of time to file notice of intention to appeal to Court of Appeal and leave to appeal to Court of Appeal on 15th day of November 2018 to the High Court of Tanzania at Sumbawanga via Misc. Civil Application No. 18/ 2018 whereby on 28th November 2018 the Court granted the said prayers hence this application.

He said applicant's affidavit has advanced the point of law that need to be taken into consideration by this court so as to be granted the application.

I. *That in the said Civil Appeal No. 3 of 2014, they were not afforded the right to be heard as a constitutional right nor did they instruct on Mr. Chambi to appeal to the High Court and there was no any proof advanced by Mr. Chambi to prove that he was instructed to by the applicants, furthermore no any summons that was served to the applicants to inform them about the existence of the said appeal.*

II. *That they were also not informed the date for judgement as required by the law, hence made them not to be aware of the said judgement, this is per* ***Order XX Rule 1 of the Civil Procedure Code, Cap 33 RE 2002.***

III. *That the decision in Civil Appeal No. 3 of 2014 did not consider the applicants as innocent purchasers and iossers that they have suffered in developing the said premises, since from the date when they purchased that is on 8th day of February 2002 until the date when judgement of Civil Appeal No. 3 of 2014 was entered that was on 16th November 2017 and the trial judge did not give reason for such decisions by ordering the applicants to return the said suit premises to 3rd and 4th respondents without any compensation, since the judgement only ordered the applicants to be returned the purchasing price only.*

He argued that in the circumstances above, it is clearly that there are disturbing features or prima facie grounds which need the interventions of the Court of Appeal of Tanzania to determine the following issues;

1. *Whether or not both the appellate court and trial court were proper for the applicants being innocent purchasers to be returned their purchasing price*

without considering the improvements made by the applicants in the said suit lands.

2. *Whether or not the High Court was proper to pronounce a judgement in absence of the applicants and without any notice or information on the date of judgement.*
3. *Whether the said appeal No. 3 of 2014 was a fair trial on part of the applicants.*

He further argued that since the orders given in Civil Appeal No. 3 of 2014 have negative impact to the applicants, as they are ordered to return the disputed premises without compensation taking into consideration that they are not only innocent purchasers but also they have renovated the buildings, changed titles and occupied the premises for more than sixteen years, henceforth the applicants have seen that the only remedy of challenging the same is to appeal to the Court of Appeal of Tanzania and that among of the procedures for appealing to the Court of Appeal is to obtain leave from this Honourable court, hence this application.

He prayed for this court to be guided by the case of **National Bank of Commerce versus Maisha Mussa Uledi (Life Business Center) Civil Appication No. 410/ 07 of 2019, CAT** at Mtwara unreported pg. 9 where the Court held that;

"In an application for leave to appeal, what is required of the court hearing such an application is to determine whether or not the decision sought to be appealed against raises legal points which are worth consideration by the Court of Appeal"

He is of the view that in the light of the afore said decision, it is the applicants contention that they have elaborated the legal points which need to be determined by the Court of Appeal of Tanzania and in that regard it is the applicants prayer that, for the interest of justice the prayers sought in the chamber summons be granted.

The 1st and 2nd respondents jointly replied to submission by the applicants by saying that they have had more than sufficient time to read and reflect on the submissions in chief by the counsel for the applicants regarding the present application which has been argued in a reshuffling manner. Having understood its nature and content they are of the strong view that the same is misconceived and out of context. Not only that the applicants' submissions have been coached on unfounded arguments, it has also based on hopeless reasoning. For the purposes of convenience they prayed that the affidavit of Tumaini Andrew Dunduri Msechu being

the advocate for the 1st and 2nd respondents to be adopted by this Honourable to form part of their submission.

Learned advocate, Tumaini Msechu argued that since the applications of this nature are determined basing on the advanced points of law for determination by the Court of Appeal, they reply on the so called points of law for consideration by the Court of Appeal as hereunder;

> *1.1 That in the said Civil Appeal No. 3 of 2014, they were not afforded the right to be heard as a constitutional right nor did they instruct on Mr. Chambi to appeal to the High Court and there was no any proof advanced by Mr. Chambi to prove that he was instructed to by the applicants, furthermore no any summons that was served to the applicants to inform them about the existence of the said appeal.*

He said, the applicants are trying to mislead them and the court that they were not given the right to be heard in the said Civil Appeal No. 3 of 2014. He submitted to the contrary that argument is vague and misconceived because it is on record that all the applicants were represented by Mr. Chambi from the trial court in Civil Case No. 21 / 2000. He said it is a well standing practice that an appeal should call for a

separate instruction, thus Mr. Chambi could not have acted without the applicants instruction. If at all they did not have given that instruction to Mr. Chambi, the same could have instituted a separate appeal since they had notice the impugned judgement in Civil Case No. 21/ 2000.

So he submitted to the contrary that the foregoing argument is a shear lie and does not form a concrete point of law worth determination by the Court of Appeal.

> *1.2 That they were also not informed the date for judgement as required by the law, hence made them not to be aware of the said judgement, this is per* ***Order XX Rule 1 of the Civil Procedure Code, Cap 33 RE 2002.***

He argued that the applicants counsel has tried to mislead them and the court that the applicants were ought to have given the notice of judgement in Civil Appeal No. 3 / 2014, however, he submitted to the contrary that, since it is on record that the same were duly represented by Mr. Chambi who was present when the judgement was delivered, the court

was not supposed to notify them separately. The same should have been notified if the appeal was heard ex parte against them.

He said from the foregoing observation he submitted that that also does not form a concrete point of law worth determination by the Court of Appeal, so the application should not be allowed.

> *1.3 That the decision in Civil Appeal No. 3 of 2014 did not consider the applicants as innocent purchasers and losses that they have suffered in developing the said premises, since from the date when they purchased that is on 8th day of February 2002 until the date when judgement of Civil Appeal No. 3 of 2014 was entered that was on 16th November 2017 and the trial judge did not give reason for such decisions by ordering the applicants to return the said suit premises to 3rd and 4th respondents without any compensation, since the judgement only ordered the applicants to be returned the purchasing price only.*

He argued that the applicant's counsel has tried to mislead them and the court that the trial judge should have ordered a special compensation to the applicants in civil appeal No. 3 / 2014. He submitted to the contrary that legally compensation is given in civil suit when proved that one has

suffered to a certain magnitude. It is on record that trial court had ordered refund of their purchase price from the 1st respondent which is very fair compensation considering the nature of this case.

Mr. Msechu submitted that, if at all the applicants have special claims against the respondents they should file a separate suit so that the said claims could be specifically proved and awarded and not to file an appeal to the court of appeal.

He finally submitted that with the above submissions it is clear that the applicants have not demonstrated any point of law worth consideration by the Court of Appeal. He humbly submitted that the application is destitute devoid of any merit and the same should be dismissed with costs.

The 3rd and 4th respondents herein after having gone through the applicant's submission found it baseless, unreasonable, and fictitious and without any colour of merit wishes to make a brief reply as hereunder.

Learned advocate, Mr. Mathias Budodi said according to the applicant's submission, the applicants have raised three issues which they intend to be determined by the Court of Appeal in the event this application for leave is granted. These issues are firstly, that the applicants were condemned

unheard in Civil Appeal No. 3 of 2014 on reason that they did not instruct Mr. Chambi to represent them in the said appeal. Secondly, they were not informed the date for judgement, lastly, while ordering the applicants to surrender the suit premises to 3rd and 4th respondents, this court did not consider the so called compensation to the applicants for development of the suit premises.

Mr. Budodi argued that it is a firm principle that in granting leave to the court must satisfy itself the appeal stands reasonable chances of success in order to spare the Court of Appeal the sectre of unmeriting matters and to enable it to give adequate attention to cases of true public importance (reference is made to the case of **Rutagina C.L v. Advocates Committee & Another, Civil Application No. 98 of 2010** CAT Dsm unreported at pg. 6.

He said in their submission, he therefore endeavored to substantiate that in all points raised none of them raises legal point worth for consideration by the Court of Appeal rather the application aims to delay and deny the 3rd and 4th respondents from enjoying the fruits of their judgement since the whole plots have numerous frames for renting hence

the applicants wrongly and illegally continue to benefit from any kind of delay.

With regard the first legal point, he submitted that the same is an afterthought and lies under oath, he submitted that the applicants were dully present and represented by their advocate Mr. Chambi throughout the proceedings as it clearly appears at pages 8, 10, 15, 17, 18 and 23 of the proceedings of DC. Civil Appeal No. 3 of 2014. Mr. Chambi was introducing himself as the counsel for the applicants in front of the applicants before the court. The applicants never objected representation of Mr. Chambi throughout the proceedings. In other occasions the applicants does not question or fault the said proceedings. Even unreasonable person can ask that if the applicants never filed an appeal what they were going for to prosecute in court as appears to the proceedings.

In other dimensions, Mr. Budodi said if their lies on oath would have been mistakenly believed that they did not instruct Mr. Chambi to appeal, it would presupposes that they never challenged the decision of the trial court which also nullified the public auction and ordered the applicants to

surrender the suit premises to the 3rd and 4th respondents. The same was the position of this Court in Appeal, by necessary implication applicants agreed with the orders which were ordered, why then do they use the umbrella of the court to continue benefiting from the suit premises. It suffices to say that granting this application of this ground which is unworthy for determination shall only amount to abuse of court process.

With regard the second ground, the applicants contend that they were not informed on the date of judgement. First of all, he said this point was not stated in the affidavit hence cannot be argued in the submission. According to the principle set by this court in the case of **Vidayarth v. Ranraicha, [1957] EA 542**, the arguments must be confined to the pleadings filed in court. He therefore prayed the same be rejected. Had it been pleaded still the same does not hold water since the judgement was delivered in the presence of their advocate thus, in law they deemed informed by their representative, if the applicants so wished also to be present in person it was their duty to know the date and attend hence they have no one to share the blame.

With regard the third ground, Mr. Budodi argued that the applicants try to blame this court for deciding the appeal subject to this application without ordering the applicants to be compensated for the so called development over the suit premises. Though the applicants are trying to conceal some crucial facts and they are prepared to reveal the facts. In the trial court it is the applicants, 1st and 2nd respondents who sued the 3rd and 4th respondents. And it was immediately after the auction of the suit premises, thus the applicants if at all they made any developments it was while the case is pending and at their own peril, that is why in the trial court the issue of compensation was never pleaded hence no evidence was led to that effect consequently no finding on the issue of compensation would have arrived in the circumstances.

From the foregoing, he argued that the issue of compensation was never raised both in the trial court and in the appeal before this court hence it cannot be raised in the second appeal to the superior court. The logic behind is simple that no one can fault a magistrate or a judge on the issue which he/ she did not determine. Reference is made to the Court of Appeal decision in the case of **Hotel traverntine & Others v. NBC LTD, [2006] TLR 133.** This court when confronted with similar circumstance

declined to grant leave and dismissed the application having realized that the ground for leave or intended appeal was not raised in the trial court hence cannot have a place in the Court of Appeal, this was the case of **Alfred Nyaoza v. Salvatory Mwanambula, Misc. Application No. 3 of 2012** HC at Sumbawanga unreported at the last page of paragraph 10 to 11. Thus he prayed for the court to hold that this point as well is not worthy for determination.

Considering his well substantiated submission herein and since it is clear that there is no legal points which worthy consideration by the Court of Appeal raised in the decision sought to be appealed as required in law and the same substantiated in the case cited by the counsel for the applicant in his submission to wit: the case of **National Bank of Commerce v. Maisha Musa Uledi (Life Business center)** supra. He humbly invited this honourable court to dismiss this entire application for want of merit with costs.

In rejoinder, jointly the applicant's through their advocate submitted that the point as raised by the applicants that they were not afforded right to be heard as submitted in their submission in chief, the 1st and 2nd

respondents have replied that, as they quoted that; the applicants are trying to mislead this court and that appeal is a well standing practice that appeal is a separate instruction and the applicants authorized one Mr. Chambi to appeal on their behalf, and if there was no such instructions then the applicants could institute separate appeal against the judgement of civil case No. 21 / 2000.

It is their contention that the advocate for the 1st and 2nd respondents has failed to provide any authority to this court as regard to his view that appeal is a separate instruction, and to show to this court at what point of time the applicants instructed one Mr. Chambi to appeal on their behalf, they thus pray that this contention raised by the 1st and 2nd respondent to be disregarded for lacking merit, further they rejoin that the applicants rights were discussed and touched in civil appeal No. 3 of 2014, without them being notified of the said appeal, and its judgement, which had its origin from civil case No. 21/ 2000 and to challenge the said appeal to the Court of Appeal, hence this application is proper before this court.

The 1st and 2nd respondents has also replied that in civil appeal No. 3 of 2014, what was ordered as regard to compensation was fair and right to

the applicants that they should only be refunded their purchasing price. As he has submitted in his submission in chief that the issue of the applicants to be refunded the purchasing price without taking into consideration the developments that they have made in the suit premise, was not proper as ordered in civil appeal No. 3 of 2015, since the appellate Court failed to provide reasons for the same hence it is a point of law which need to be discussed by the Court of Appeal, hence the submission made by the 1st and 2nd respondents still lacks merit since they have failed to submit on how this argument is not a point of law to the extent submitted in their submission in chief.

Coming to the submission submitted by the 3rd and 4th respondents, in replying to their submission in chief the 3rd and 4th respondents have started by submitting that, it is the principle of law that in granting leave what is required is whether the appeal has chances of success. He contended that this opinion raised by the advocate for the 3rd and 4th respondents since the current position is whether the intended appeal raise a pure point of law as he has submitted in his submission in chief and this position is from the current decision of the Court of Appeal which he has cited in his submission in chief which is the case of **National Bank of**

Commerce vs. Maisha Uledi (Life Business Centre) Civil Application No. 410/ 07 of 2019, Court of Appeal of Tanzania at Mtwara, unreported and thus the case of **Rutagatina, C.L vs. Advocates Committee and Another** is not applicable at the present case and the same is distinguishable.

Now resorting to what has been submitted by the 3rd and 4th respondents, as regard to the 1st legal point, the 3rd and 4th respondents have argued the proceeding of the appellate Court, one Mr. Chambi was introducing that he was the counsel for the applicants herein and that if the applicants did not instruct Mr. Chambi then the applicants did not challenge the appeal.

Mr. Rwekaza said as they have rejoined above to the 1st and 2nd respondents, he still maintained that the applicants did not instruct Mr. Chambi to represent them in the said appeal and since it was an appeal anyone could have putdown the names of the applicants and act as their representative and the applicants intend to appeal to the Court of Appeal of Tanzania because their rights were discussed and touched in the civil appeal No. 3 of 2014 of the High Court of Tanzania at Sumbawanga

without their will, since they were not given right to be heard and the said judgement infringed the applicant's rights, hence this application is proper before this honourable court since the application is based on a pure points of law as to whether or not the appellate court was proper to order the applicants being innocent purchasers to be refunded their purchasing price without considering the development effected by the applicants in the suit premise.

Coming to the 2nd ground, the 3rd and 4th respondents through their advocate have submitted that, the point that the applicants were not notified on the date for judgement was not stated in the affidavit, hence it should not be acted upon. He said in this point he rejoined that, Chamber Summons and affidavit are not pleadings, pleading is defined under **Order VI Rule 1 of the Civil Procedure Code, Cap 33 RE 2002** and affidavit is not included, henceforth the case of **Vidayarth vs. Ranraicha**, is distinguishable from this case at hand. However the cited case being the decision of this court, it is a trite law that this court is not bound by its previous decision.

Moreover, he said it is the applicants contention that this point of non-notification on the date for judgement to the applicants, in civil appeal No. 3 of 2014 is not a new fact, since in the applicants chamber summons, page 2 it was stated clearly that other grounds and reasons will be adduced during the hearing of this application and they are now on the said hearing of the application.

Also the 3rd and 4th respondents have contended that the point of compensation was not raised in the appellate court, that is in the civil appeal No. 3 of 2014, hence cannot be raised at this juncture and that the applicants if they made any development was done on their own peril since there was a pending matter.

It is his contention that before the judgement of Civil Appeal No. 3 of 2014 there was no any order to restrain the applicants from developing the suit premises, hence they were legal owners of the suit premises, they ought to do what they wish and further the applicants were not informed on the presence of Civil Appeal No. 3 of 2014 of the High Court of Tanzania at Sumbawanga as they were joined without their will, hence it was proper for them to develop the suit premises, being innocent purchasers and the

said Civil Appeal No. 3 of 2014 was filed for the interest of the 1st respondent after being ordered by the trial court to compensate the 3rd and 4th respondents the amount of one hundred Million Tanzanian Shillings.

As regard to the issue of compensation, he said in the judgement of Civil Appeal No. 3 of 2014 of the High Court of Tanzania at Sumbawanga, the appellate Court ordered the applicants to vacate from the suit premises and to be returned their purchasing price only, hence it is not a new fact since it is the order of the judgement entered in the appellate court and to help this Honourable court in the judgement of Civil case No. 21 of 2000 of the District Court of Sumbawanga, the trial court did not order the applicants to vacate from the suit premises and to be paid back their purchasing price only, hence at this stage is the only stage which orders of Civil Appeal No. 3 of 2014 of the High Court of Tanzania are sought to be challenged if this application will be granted and in other words the 3rd and 4th respondents have failed to reply to this point of law.

Finally, Mr. Rwekaza said in the light of the above submission, it is the applicants prayer that, the submission made by the respondents be disregarded to the extent submitted herein, and the applicants submission

be considered as they have elaborated the legal points which needs intervention by the Court of Appeal of Tanzania and in that regard it is the applicants prayer that for the interest of justice the prayers sought in the chamber summons be granted.

Having gone through submission of both parties, the question to determine is whether the applicants have advanced materials points of law sufficient to move this court to grant the leave sought.

It is now the discretion of the court to grant or refuse leave. This court under **section 5 (1) (C) of the Appellate Jurisdiction Act, Cap 141 RE 2002** has power to grant leave against every decree, order, judgement, decision of finding of the High Court. The High Court may grant the said leave where it is satisfied that the grounds are justifiable to lodge an appeal.

Also, the discretion of the court pointed above, has been lucidly elaborated in a number of cases. In the case of **Tanzacoal East Africa vs. The Minister for Energy & Minerals, Misc. Commercial Application No. 331 of 2015** (Arising from Commercial Appeal No. 1 of 2014 at pg. 3, Hon. Mansoor, J had this to say;

"There is no scope for granting leave unless two conditions are satisfied: (i) the case should involve a substantial question of law worth the consideration of the Court of Appeal; and (ii) that the grounds raised must be of issues of general importance or novel point of law or prima facie case necessitating the intervention of the Court of Appeal. ***Buckay vs. Holmes (1926) All ER*** *No. 90 at Pg. 91"*

Again, in the case of **British Broadcasting Corporation versus Eric Ng'maryo, Civil Application No. 133 of 2004**, unreported, CAT at D.s.m, the court held that;

"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 material before the court. As a matter of general importance or a novel point of law or where the grounds show a prima facie of arguable appeal. However, where the grounds of appeal are frivolous, vexatious or useless or hypothetical, no leave will be granted"

Coming to the application at hand, it is evident on the record that applicants initially were jointly plaintiffs in a Civil Case No. 21 of 2000 along with 1st and 2nd respondents herein who sued both 3rd and 4th respondents herein at the District Court of Sumbawanga to secure the judgement and

decree in their favour; that is to be declared owners of the two houses located on plot No. 120 Block KK HD with Title No. 3938 – MBYLR and Plot No. 99 Block HD with Title No. 3835 – MBYLR respectively both located at Sumbawanga Municipality (then the suit premises) after the 3rd respondent herein failed to service the loan advanced by the 1st respondent herein. The 1st respondent through court broker (2nd respondent) conducted public auction in favour of the purchasers (the applicants herein).

However, in an endeavor to be declared owners of the suit premises applicants along with 1st and 2nd respondents through the legal service of Mr. Chambi – learned advocate, they filed a summary suit, Civil Case No. 21 of 2000 at the trial court as pointed above, the trial court having heard testimonies of both sides entered judgement and decree in favour of the 3rd and 4th respondents herein with an order as to costs on the grounds that, one, there was no spousal consent in respect of the suit premises mortgaged, two the sale was done before expiration of thirty days without the consent of the judgement debtor, and without purchase certificate being granted to the purchasers, three, the auction was conducted by an unauthorized court broker and lastly the suit premises were sold in throw away prices.

Aggrieved by the trial court's decision, the applicants along with the 1st and 2nd respondents appealed to this court in a DC. Appeal No. 3 of 2014 comprised of five grounds of appeal challenging the decision. Those grounds are, that the trial court erred to hear the case in which the parties were not at issue, that the trial court erred to act on a counterclaim poorly drawn and without prayers, that the trial court erred to find the auction void for want of spousal consent, that the trial court erred to find the auction void for being conducted by an unauthorized court broker (2nd respondent herein) and lastly, that the trial court erred to decide the matter basing on the law enacted in 2004. This court having heard both sides dismissed the appeal on 16. 11. 2017 after found it to have no merit, and upheld the trial court decision with regard to the sale of the suit premises and it accordingly ordered for the applicants herein to be refunded of their purchase prices.

Now addressing the points of law as raised by the applicants herein, with regard the first point of law that they were not afforded the right to be heard in Civil Case No. 3 of 2014. This court is of the view that the applicants were dully present and as well represented by the Mr. Chambi – learned advocate in a Civil Case No. 3 of 2014. The reasons for this stance

are several. On my keenly perusal of the this court proceedings in respect of the Dc. Civil Case No. 3 of 2014 particularly at pg. 8, 10, 15, 17 and 18 of the typed proceedings it transpires to this court that the applicants were present and represented by Mr. Chambi learned advocate. For instance at pg. 8 the Coram appears as follows;

Date – 28. 04. 2015

Coram – Hon. K.M. Nyangarika, J

For Applicants

1st Applicant
2nd Applicant
3rd Applicant
4th Applicant

} Present and represented by Advocate Chambi

For Respondent

1st Respondent
2nd Respondent

} both are present in person

B/C – Mr. N.C. Malela

The above quoted Coram and others pages as cited to me by the advocate for the 3rd and 4th respondents in his submission show that the applicants on several occasions appeared in court, thus made this court to have a strong belief that the applicants were aware of the appeal before this court as they were present in persons and being represented by the learned advocate Mr. Chambi. The applicants in their submission in chief or in rejoinder did not object to the said proceedings which indicate their presence in the hearing of the appeal, thus it can be said they have conceded to the fact.

If that had not been a point before this court, the fact that the 1st and 2nd applicants were plaintiffs as PW2 and PW3 respectively in their effort to secure judgement and decree in their favour in Civil Case No. 21 of 2000 at the trial court with regard to the public auction of the suit premises and thereafter the trial court determined the suit in their disfavour by nullifying the public auction with regard to the suit premises, implies that the suit premises acquired the status quo which was before such sale was conducted, that is the ownership reverted back to the 3rd and 4th respondents in legal meaning. The applicants had knowledge of such impugned decision of the trial court which culminated into the Dc. Appeal

No. 3 of 2014 which thereafter upheld the decision of the trial court. This court find that a prudent person cannot develop the suit premises which the court has already nullified its sale by public auction. And the fact that the applicants had been affected by the decision of the trial court a reasonable person would expect that the applicants would file an appeal along with the 1st and 2nd respondents and that was done. They were informed of the Dc. Appeal No. 3 of the 2014 of which advocate Mr. Chambi represented them all. The argument that they made improvement on the suit premises for sixteen years without being informed of the appeal is afterthought. And if the applicants had not filed a separate appeal against the decision of the trial court which is a reality to this court, it means that they made improvement on the suit premises at their own peril as rightly argued by the advocate for the 3rd and 4th respondents in his submission.

It is obvious, I would like to agree with Mr. Budodi that the issue of compensation as raised by the applicants herein is a new issue which was neither raised by the trial court nor on appeal by this court, therefore, the issue can be said to be of no worth to be considered and determined by the Court of Appeal. There is a chain of authorities which have taken that

stance, which is, matters not considered by the lower courts cannot be raised in the Higher Court. See **cases of George Mwanyingili vs. Republic, Criminal Appeal No. 335 of 2016, unreported, Juma Manjano vs. Republic, Crimninal Appeal No. 211 of 2009, unreported, Sadick Marwa Kisase vs. Republic, Criminal Appeal NO. 83 of 2012, unreported,** also the case of **Alfred Nyaoza vs. Salvatory Mwanabula, Misc. Application No. 3 of HC** at Sumbawanga cited to me by the learned advocate. In **Juma Manjano** (supra) the Court held that;

> *"As a second appellate court, we cannot adjudicate on a matter which was not raised as a ground of appeal in the first appellate court. The record of appeal at page 21 to 23 shows that this ground of appeal by the appellant was not among the appellant's ten grounds of appeal which he filed in the High Court. In the case of* ***Abdul Athuman vs. R. [2004] TLR 151*** *the issue on whether the Court of Appeal may decide on a matter not raised in and decided by the High Court on the first appeal was raised. The Court held that the Court of Appeal has no such jurisdiction. This ground of appeal therefore struck out."*

"The Court has repeatedly held that matters not raised at the first appellate court cannot be raised in a second appellate court."

This court is of the firm view that the applicants herein were part of the appeal in a Dc. Appeal No. 3 of 2014 by being represented by the Mr. Chambi – learned advocate along with 1st and 2nd respondents herein as argued by both learned advocate for the 1st and 2nd respondents and as well the learned advocate for the 3rd and 4th respondents.

In the light of the foregoing discussion, it is my considered view that there is no grounds whatsoever has been established by the applicants so as to move this court to grant leave to appeal to the Court of Appeal of Tanzania as the purported points of law advanced so far to this court appear to be vexatious, frivolous, useless and hypothetical.

This application is therefore devoid of merit, the same is warranting the dismissal order with costs as I hereby do.

Order Accordingly.

D.E MRANGO

JUDGE

19. 05. 2020.

Date	-	19.05.2020
Coram	-	Hon. D.E. Mrango- J.
1st Applicant 2nd Applicant	}	Mr. Peter Kamyalile – Adv. for Mr. Ladislaus Rwekaza – Adv.
1st Respondent 2nd Respondent 3rd Respondent 4th Respondent	}	Present & represented by Mr. Mussa Lwila – Adv.
B/C	-	Mr. A.K. Sichilima – SRMA

COURT: Ruling delivered today the 19th day of May, 2020 in presence of Mr. Peter Kamyalile – Learned Advocate for the Applicants and in presence of the Respondents and Mr. Mussa Lwila – Learned Advocate for the Respondents.

Right of appeal explained.

D.E. MRANGO

JUDGE

19.05.2020