

**IN THE HIGH COURT OF TANZANIA
(IN THE DISTRICT REGISTRY)
AT MWANZA**

MISC. CIVIL APPLICATION NO.77 OF 2020

*(Arising from the Judgment of the High Court of Tanzania at Mwanza in
Land Appeal No. 93 of 2018 before Ndyakubora RM with Ext. Jurisdiction
delivered on 24th July, 2020)*

FINCA TANZANIA MICROFINANCE BANK LTD APPLICANT

VERSUS

1. SCOVIA ANDREA

2. NICODEMAS PETER MHINGA

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..... RESPONDENTS

RULING

Last order: 19.11.2020

Ruling date: 19.11.2020

A.Z.MGEYEKWA, J

This application is brought under section 47 (1) (c) of the Land Dispute Courts Act No. 02 of 2002. The applicant seeks to leave to appeal to the

Court of Appeal of Tanzania to impugn the decision of this Court in Land Appeal No. 93 of 2018 delivered on 24th July, 2020. The application is supported by an affidavit deposed by Francis Kazaura, the Principal Officer for the applicant. On the other hand, the respondent, Scovia Andrea, the respondent opposed the application.

When the matter came up for hearing on 19th November, 2020, the applicant enjoyed the legal service of Mr. Steven Kaswahili, learned counsel while the respondent enjoyed the legal service of Ms. Hidaya Haruna, learned counsel.

It was Mr. Steven who started to kick the ball rolling. He urged this court to adopt the applicant's affidavit and form part of his submission. The learned counsel for the appellant stated that the matter is related to mortgage whereas, the first respondent filed a suit in the capacity of a spouse of the second respondent. He added the first respondent claimed that she was not aware that the second respondent mortgaged the disputed house to the applicant.

Mr. Steven went on to state that during the trial the applicant tendered a spouse consent (Exh.D2), however, the endorsed signature was disputed but the trial tribunal holds that it is not in a position to determine the matter. He added that the Resident Magistrate Court with extended jurisdiction ordered the matter to be tried de novo. Mr. Steven faulted the decision of the Resident Magistrate Court with extended jurisdiction. He submitted that the matter was a criminal matter in nature whereas the tribunal has no jurisdiction to determine it since it had a duty to call a handwriting expert to prove the said signatures. He added that the respondent was required to prove her allegations under section 110 of the Law of Evidence Act, Cap.6 [R.E 2019].

In conclusion, Mr. Steven that the applicant has demonstrated sufficient proposed grounds for appeal which attracts the attention of the Court of the Appeal. He urged this court to grant the applicant's application to file leave to appeal before the Court of Appeal of Tanzania.

In her reply, Ms. Hidayya urged this court to find this court to adopt the counter affidavit and form part of his submission. She argued that the second respondent disputed the signature appearing in the spouse's consent. Ms.

Hidaya stated that it was correct for the Resident Magistrate Court with extended jurisdiction to order trial de novo because the trial tribunal decision had a lot of irregularities. She added that the trial tribunal ruled out that the court was not dealing with criminal matters and denied to determine the matter while it was contrary to section 73 of the Evidence Act, Cap. 16 [R.E 2019].

It was Ms. Hidaya's further submission that the first respondent was required to prove the disputed signature, to call the handwriting expert to state his opinion. To support her submission she cited the case of **Joseph Mapema v R** (1986) TLR 148 **Harban Haji v Omary Hillarly** (2001) TLR 409, it was held that leave is granted where there is a chance to succeed. And where there are disturbing features which draw the attention of the Court of Appeal of Tanzania.

In conclusion, Ms. Hidaya urged this court to find that the decision of the Resident Magistrate Court with extended jurisdiction was correct.

In his rejoinder, Mr. Steven reiterated his submission in chief and added that what has been stated by the learned counsel for the respondent

are disturbing features that need to be determined by the Court of Appeal of Tanzania.

In conclusion, the applicant urged this court to grant leave to appeal to the Court of Appeal of Tanzania.

Having heard the submissions of the learned counsel for the applicant and the respondent for and against the application, I will determine *whether the application is meritorious*. It is trite law that leave to appeal to the Court of Appeal is granted if prima facie grounds are meriting the attention of the Court of Appeal as it was held in the case of **Sango Bay v Dresdner Bank A.G** [1971] EA 17, it was held that:-

*"Leave to appeal will be granted where **prima facie** it appears that there are grounds which merit serious judicial attention and determination by a superior Court."*

Similarly, in the case of **Gaudensia Mzungu v IDM Mzumbe**, Civil Application No. 94 of 1994 (unreported), the Court of Appeal of Tanzania held that leave will be granted if, prima facie there are grounds meriting the attention and decision of the Court of Appeal. Accordingly, the case referred to me must be looked at its context rather than authority against the success

of the intended appeal. Howbeit, my reading of the decision reveals that Resident Magistrate Court with extended jurisdiction ordered a retrial after noting that the dispute in regard to the signature of the second respondent was not resolved. In the case of **Grupp vs. Jangwani Sea Breeze Lodge Ltd**, Commercial case No.93 of 2002 (unreported) my brother Massati, J (as he then was) expressed the matter this way:-

"... I have no jurisdiction to go into merits or deficiencies of the judgment or orders of my sister judge in this application. All that I am required to determine is whether there are arguable issues fit for the consideration of the Court of Appeal..."

Reading the above authority, I have noted that on paragraphs 6,7, 8, 9 and 10 of the applicant's affidavit, the applicant's Advocate has raised arguable issues that Resident Magistrate Court with extended jurisdiction erred to order the matter to be tried afresh. With a direction to take new evidence of an expert while the applicant is the one who is required to prove her signature. In my view, once an appeal is eventually lodged, the Court of Appeal of Tanzania will determine issues such as whether the order of the Resident Magistrate Court with extended jurisdiction was proper. I do not think this and other grounds raised in the applicant's affidavit are not serious

enough to be determined by the Court of Appeal. I will, in the circumstances, exercise my discretion under section 47 (1) (c) of the Land Dispute Courts Act No. 02 of 2002 and grant leave to appeal to the Court of Appeal of Tanzania.

Order accordingly.

DATED at Mwanza this 19th November, 2020.




A.Z. MGEYEKWA

JUDGE

19.11.2020

Ruling delivered on the 19th November, 2020 in the presence of Mr. Steven Kaswahili, learned counsel for the applicant, and Ms. Hodaya, learned counsel for the respondent.


A.Z. MGEYEKWA

JUDGE

19.11.2020