

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

MISCELLANEOUS LAND APPLICATION No.62 OF 2019

(Arising from Land Appeal No. 46 of 2018, original Land Application No. 161 of 2011 of the District Land and Housing Tribunal for Mwanza)

SOSPETER HEZRON BUHUBA &

ANOTHER.....APPLICANTS

VERSUS

VICTORIA SAVINGS AND CREDIT &

ANOTHER.....RESPONDENT

RULING

19th March, & 7th May, 2020.

TIGANGA, J.

The applicant herein, having been aggrieved by the decision of this court in Land Appeal No. 46 of 2018 before Hon. Matupa J, filed an application for leave of this court to appeal to the Court of Appeal of Tanzania. The applicant's chamber summons has been taken out under section 5(1) (c) of the Appellate Jurisdiction Act, Cap 141 R.E.2002, Rule 45 of the Court of Appeal Rules and section 47(1) of Land Disputes Courts Act No.2 of 2002. The chamber summons has been supported by a joint

affidavit duly sworn by the applicants which sets out the grounds and reasons for the application. In the affidavit the applicants pointed out one main ground for which they want to move the court of appeal which is "whether a purchaser is protected from illegal auction of mortgaged property".

The order sought in the chamber summons are that the court be pleased to grant leave to the applicant to appeal against the decision of this court in Land Appeal No.46 of 2018 delivered on 15/4/2019 by Hon. **S.B.M.G Matupa, J**, costs of the Application be in the course and any other relief as the honourable court may deem fit and just to grant.

When this application was placed before me for hearing, the applicants were represented by the learned counsel Mr. Hezron whereas the respondents enjoyed the services of the learned counsel Mr. Tuguta who was for the 1st and 2nd respondents and Misalaba for the 3rd respondent.

Submitting in support of the application, the learned counsel for the applicants started by adopting the contents of the joint affidavit sworn and filed by the applicants to form part of his submission. He further invited this court to screen and find whether there are disturbing features worthy to be determined by the Court of Appeal of Tanzania. He cited the case of **Rutagatina C.L vs The Advocates Committee and Another**, Civil Application No.98 of 2010 to that effect.

He claimed that the point of law which the applicants want the Court of Appeal to deal with is reflected in the fourth paragraph of the affidavit. He submitted that, in mortgage cases the house of the mortgagor should not be sold without the mortgagor being notified of the default and the

amount defaulted. He referred this court to section 126(d) of the Land Act which was reflected in the judgment against which an appeal is intended.

Counsel cited the case of **Adam Rugemalira versus CRDB Ltd**, Land Appeal No.72 of 2009 in which the court nullified the public auction which was conducted without notifying the mortgagor. In the circumstances he prayed that they be allowed to go to the Court of Appeal so that the said court can give directives. He then prayed that the application be allowed with costs.

In reply to the submission by counsel for the applicants, counsel for the 1st and 2nd respondents, Mr. Tuguta submitted first by praying to adopt the counter affidavit of his clients. He thereafter informed this court that the grant of leave to appeal is not an automatic right of the applicant, but it is in the discretion of the court to grant or refuse. So what the court needs, is to exercise that power judiciously based on what is fair depending on the circumstances of each case. He also referred to the case of **Rutagatina C.L** (supra), stating that in exercising such powers the court must satisfy itself that there are contentious points of law worthy of consideration by the Court of Appeal or that there should be an issue of public importance needing intervention of the Court of Appeal.

He further claimed that the affidavit of the applicants must have shown that the intended appeal has reasonable chances of success and if the said factors were not averred then the application is bound to fail because it becomes hard for this court to know whether or not there is a point of law or of public importance to be decided by the Court of Appeal.

Regarding the notice of default, the counsel stated that, the applicants knew of it and still did not pay, he submitted that the same was reflected in the appeal judgment.

Mr. Misalaba for the third respondent submitted in opposition of the application, by first adopting the counter affidavit of his client to form part of his submissions. He went on submitting that there was no illegal sale or auction and that can be seen in the impugned judgment. He further submitted that, the only way to interfere with the sale is where there has been fraud, misrepresentation, or dishonesty. In this case according to him, the applicants never pleaded any of that.

Regarding notice of default, the counsel claimed that, it was there but was rejected in the District Land and Housing Tribunal under regulation 10(2) of the regulations of the tribunals. He claimed further that the *bonafide* purchaser is protected. He cited the case of **Peter Adam Mbeweto vs Abdullah Kulala & Another** (1981) TLR 335. He then prayed for the application to be dismissed with costs.

In his rejoinder, counsel for the applicants reiterated his earlier contention that there was no notice given to the applicants and invited this court to look at the records and satisfy itself. He submitted further that he would want the Court of Appeal to look into the matter and decide whether sale without notice is legal. He concluded by stating that the submission by the respondents be rejected and the leave sought be granted.

Now having summarised at length the contents of the affidavit and counter affidavit as well as the submissions and the arguments of the counsel for the parties, I am entirely in agreement on the principle of what

constitutes the grounds for granting leave to appeal to the Court of Appeal. However, it is important to note that the provisions upon which the application has been preferred do not provide for the criteria to be considered in granting of the leave to appeal. However a plethora of case laws have extensively discussed and provided for the principles and general guidance.

In **Harban Haji Mosi and Another Vrs Omar Hilal Seif and Another**, Civil Reference No. 19 of 1997 CAT, the following principles were laid down;

"Leave is grantable where the proposed appeal stands reasonable chances of success or where, but not necessarily the proceedings as a whole reveals such disturbing feature as to require the guidance of the Court of Appeal. The purpose of the provision is therefore to spare the court the spectre of un-meriting matters and to enable it to give adequate attention to cases of true public importance"

In the authority of **British Broadcasting Cooperation Vrs Erick Sikujua Ng'maryo**, Civil Application No.138 of 2004 (CAT) - Dar Es Salaam (Unreported) it was held *inter alia* 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 should however be judiciously exercised and on the materials before the court. As a matter of general principle, leave to appeal will be granted where the grounds of Appeal raises issues of general importance or a novel point of law or where the grounds show a prima facie or arguable

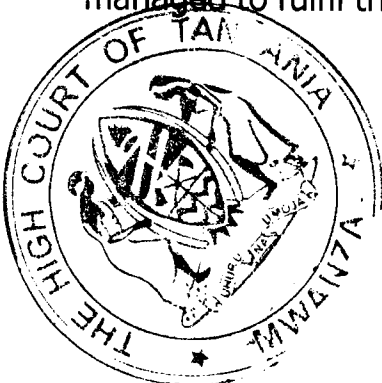
Appeal....However, where the grounds of Appeal are frivolous, vexatious, useless or hypothetical, no leave will be granted."

From the authorities above, it is the law that the court before which an application for leave to appeal has been filed has the discretion to grant that leave or refuse it. However, that discretion must be judiciously exercised and the court in so doing must act on the materials before it. Gathering from the above position, the applicant must prove to the court the following facts for him to be entitled for leave of the High Court to appeal to the Court of Appeal;

- i) That the intended appeal raises issues of general importance or a novel point of law or
- ii) That the grounds show a prima facie or arguable Appeal or
- iii) That the grounds are not frivolous, vexatious, useless or hypothetical
- iv) That the appeal stands a reasonable chance of success
- v) That the proceedings reveal the disturbing features which require the guidance of the Court of Appeal.

Those facts must be shown by the applicant both in his affidavit and the submissions in support of the application, and the deficiencies so moving him to appeal must be clearly seen in the proceedings and decision sought to be impugned.

Now the issue is whether the applicant in this application has managed to fulfil the conditions elaborated in the above cited authorities?



[Signature]