

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF BUKOBA
AT BUKOBA

LAND CASE MISC APPLICATION NO.12 OF 2017

(Arising from Land Case Appeal No. 27 of 2015 of Bukoba High Court and Land Application No. 157 of 2011 of DLHT of Bukoba)

TWAHA MICHAEL GUJWILE-----APPLICANT

VERSUS

KAGERA FARMERS COOPERATIVE BANK LTD---RESPONDENT

RULING.

18/5/2020 & 29/5/2020

KAIRO, J.

Before me is an application for leave to appeal to the Court of Appeal against the decision delivered by Justice Bongole on 7/2/2017 in the High Court Land Case Appeal No. 27 of 2015. The application was brought under Section 5 (1) (c) of the Appellate Jurisdiction Act cap. 141 RE: 2002, Rule 45 (a) of the Tanzania Court of Appeal Rules 2009 and Section 47 (1) & (3) of Cap. 216 RE: 2002. The Applicant has further prayed for cost of this application be provided for. As usual, the application is supported by an

affidavit of the Applicant who is self-represented while the Respondent was represented by Advocate Frank Karoly from Kabunga & Associates together with Mr. Njoka, the learned State Attorney.

Briefly the genesis of this dispute is that the Respondent had sued the Applicant at the DLHT for the recovery of loan advanced to him in the form of an overdraft: Tshs. 20mln and Tshs. 10mln being term a loan. Both facilities were advanced in year 2008 October and was to be repaid within a year. That the said facilities were secured by the house with CT No. 15079 situate at Plot No. 313 Kyanyi Bukoba Municipality. However the Applicant didn't repay the loan which stood at Tshs. 27,357,134.40 by July when the dispute was taken to the Tribunal and thus the Respondent prayed for the repayment of the debt and related cost or an order for auctioning of the pledged security to recover the said loan and related costs. The DLHT decided in favor of the Respondent. The Appellant was aggrieved and decided to appeal to the High Court to impugn the said decision but failed, hence this application for leave so that he can appeal to the Court of Appeal.

The application was ordered to be disposed by written submission. The Applicant in his written submission has recapped what he has deposed in his affidavit as such I will collectively discuss them to avoid repetition. The Applicant submitted that he is applying for leave to appeal to the Court of Appeal as the intended appeal contains contentious legal points which need to be considered by the Court of Appeal.

In demonstrating them, the Applicant averred that the first appellate Judge erred in law to hold that he had never paid any amount of money towards the settlement of the loan of Tshs. 30mln and thus the Applicant was still indebted to the tune of Tshs. 31,500,000/= decided by the DLHT. He argued that the Respondent didn't prove the debt to the required standard of strict proof. He further clarifies that it was wrong for both the High Court and the Tribunal to shift the burden of the claimed debt of Tshs. 31,500,000/= to him adding that he had tendered copies of bank slips when filed WSD showing that he had already discharged the entire debt by depositing Tshs. 32,200,000/= into his loan account. He concluded that there is misappreciation of evidence on the part of the Tribunal and High Court which demands for the Court of Appeal's intervention so that the Court can make proper evaluation of evidence adduced citing the case of **Edwin Isidory Elias vrs Serikali ya Mapinduzi Zanzibar [2004]** TLR Pgs 297 and other authorities to support his contention.

The Applicant went on that the High Judge erred for failing to set aside and nullify the judgment and whole proceedings of the trial Tribunal which entertained and decided the Respondent's claim of Tshs. 27,357,134.40 and a prayer to exercise a power of sale of the purported mortgage without territorial nor pecuniary Jurisdiction to do so. He argued that Jurisdiction is a fundamental issue as it goes to the root of the authority of the court or tribunal and cited a plethora of authorities to that effect. He argued that the cause of action arose out of contract of loan which is commercial in nature

and the mortgaged property was just an ancillary to the subject matter which is centered on contract.

He went on to submit that there is variance between the decree and the Judgment thus incapable of being executed, as such the High Court was supposed to nullify the Tribunal's proceedings and the decision thereon.

The Applicant went on to submit on the points of the intended appeal arguing that the High Court had miss-interpreted the relevant provision with regards to mortgages. He clarified that the plot at issue was never legally mortgaged as security for the loan which is contrary to Section 113(4) of the Land (Amendment) Act, 2004 since it wasn't properly signed and executed by the concerned parties, nor registered.

He concluded that, there was no statutory mortgage entered between the parties in respect of Tshs. 30mln advanced to him in year 2008.

He further contended that the High Court Judge also misconstrued the provision of Section 48(1) (e) of the CPC Cap. 33 RE: 2002 by holding that the same doesn't preclude the attachment and sale of the Applicant's suit property.

On his another ground for his appeal to the Court of Appeal the Applicant argued that the High Court Judge proceeded with the appeal and decided in favor of the Respondent without allowing the Applicant's request to produce documentary evidence to support his claim to the effect that he had already settled the debt with the Respondent's.

In his 8th ground of the intended Appeal, the Applicant argued that the learned Judge of the first Appellate Court applied wrong approach as he failed to make specific findings on each and every issue/ground of appeal raised at the High Court.

He thus prayed this court to allow his application for leave with cost.

First of all I wish to state from the onset that this is an application for leave to appeal to the Court of Appeal and not an appeal. The Applicant has labored so much to argue before this court the grounds of the intended appeal to the Court of Appeal but this court with due respect is not a proper forum, as such the arguments are premature. His arguments were to be reserved for the Court of Appeal in the circumstances leave is granted. It is with this in mind that I resolved not to be worthy to go analyzing the said grounds in detail as above replicated together with the reply thereto.

I am aware that the Applicant need to show the good reason on point of law or of fact that calls for the Court of Appeal's intervention in a move to convince the High Court grant the leave sought, but with due respect, what has been demonstrated by the Applicant is the arguments for the intended appeal itself, when one looks at the way detailed the points were argued with a lot of authorities. I am thus skeptical to go into analyzing the arguments the points/grounds raised and reply thereto lest that this court usurp the mandate of the Court of Appeal which it doesn't have. I reproduced the said arguments above so as to appreciate the court's skepticism in this application.

The underlying principle in the grant of leave was well underscored in the case of **Herban Haji Mosi and Another vrs Omari Hilal Seif and Another**; [2001] TLR 409. Wherein the court observed as follows:-

*“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 acquire the guidance of the Court of appeal. The purpose of the provision is therefore to spare the court the spectra of un-meriting matters and to enable it to give adequate attention to cases of **true public importance**.*

It goes therefore that the criteria is either:-

- (1) There is any disturbing feature to necessitate the guidance of the Court of Appeal and therefore there is a chance of success by the Applicant.
- (2) There is a point of public importance.

It is also imperative to understand that, the points/grounds that are to be taken to the Court of Appeal for its consideration must originate from the Judgment upon which the appeal is preferred, and in the matter at hand therefore is the Judgment of Hon. Bongole, J. It should be noted further that the grounds of appeal which were dealt with at the High Court are similar with the ones listed in the intended appeal to the Court of Appeal save for the 4th ground at the High Court which was on assessors.

In his rejoinder, the Applicant attacked the Respondent's reply to the written submission arguing that it was a futile endeavor and the court shouldn't consider it as the respondent's counter affidavit filed beyond 7 days with no court leave quoting JALA Section 2(1) (3) and R.7 (1)(b) of GN 174 to support his argument. Suffice to state that the cited provisions were misconceived as do not deal with time limitation to file counter affidavits. But also a counter affidavit's filing is not automatic legally but is filed with the leave of the court. But even if that would have been the case, this court as earlier pointed out will not go analyzing the grounds raised and reply into detail for the reason above stated since doing so amounts to analyzing the appeal which is not within the mandate of this court at this juncture. I will thus briefly react to the points/ grounds of an intended appeal vis a vis what has been decided by the High court.

Starting with his argument in 4th and 1st para of his affidavit that the High Court erred for finding that he has never paid any amount towards liquidating the loan of 30mln he obtained. Going through the attached judgment I observed the Applicant had tendered no document at the trial court to verify his assertion that he had paid the debt, as such the said findings was correct. It is the stance of law that he who alleges must prove (Section 110 of the Law of Evidence Cap. 6 RE: 2002). But further the proceeding of the DLHT suggests that he conceded to the debt and promised to repay within a year. (Pg 32) Though in his contentions he averred that the High Court refused to admit this documents to show his

repayment, but with due respect, the said documents were to be tendered during trial at the DLHT and not at the High Court which is an appellate court. I thus found the findings of the High Court on those aspects to be correct and there is nothing to be intervened by the Court of Appeal.

On the question of Jurisdiction of the DLHT, whereby the Applicant is of the view, that, the nature of the dispute was contractual/commercial as such the DLHT had no Jurisdiction to deal with it. In my view, the matter was well articulated by the High Court when discussing the issue.

It is the stance of law that a loan dispute which was secured by a mortgage can properly be entertained at the Tribunal provided the Jurisdictions in terms of pecuniary and territorial is within the DLHT concerned.

In the case of **Michael Mwaikupili vrs CRDB Bank Ltd and Others; Land Case No. 7 of 2003 (unreported)** the court in a similar circumstances held as follows:-

*“In general, mortgage of land is commercial matter but a mortgage of land is also **a land matter**---“.*

The above holding means, a party can institute the same either at the commercial court or land courts. Besides, the land at issue in this matter is within Bukoba Municipality and the debt was within the pecuniary jurisdiction of the Tribunal. Thus the institution of the claim at the DLHT was proper with much respect.

Again I didn't find anything disturbing to necessitate the Court of Appeal's intervention with regards to attachment of the security mortgaged against the loan whereby the applicant argues that the mortgaged house being a residential one was not liable to attachment as per Section 48 (1) (e) of the CPC (supra). However his argument is a misinterpretation of the said provision. The correct interpretation was given in the case of **Idda Mwakalindile vrs NBC Holding Corporation and Son Saijen Mwakalindile; Civil appeal No. 59 of 2000 CAT** Mby Registry (unreported) wherein the court held as follows:-

*"Section 48 of the CPC does not apply for **sale enforcing mortgage** but execution of court decree"* (emphasis mine)

In the same veins the house at issue, being a mortgage is not covered under the cited Section 48 of CPC (supra). The reason is not farfetched. A mortgage being among the types of land disposition is done freely and consciously by the mortgagor assenting to the disposal of the land concerned in case of default. Thus doesn't fall under the ambit of Sec 48 of the CPC as the Applicant argues.

The Applicant has also stated that there were variance between the Judgment and the decree of the DLHT arguing that the same cannot be executed as a result. Going through the mentioned document I discovered no distinction as stated. In the Judgment the award was to dispose the mortgaged property to recover the debt which was properly and correctly extracted in the decree. Thus the variance doesn't exist with due respect.

With regards to improper execution procedure of the mortgage, I should confess that looking at the documents tendered at the trial (Exhibit 1A), both parties signed the documents, and registered the mortgage in particular with the Registrar of Titles, which means the Applicant transferred his rights over the property, in case of default. Further scrutiny at the documents revealed that there was a deed of variation following the Applicant's request for an additional loan, the fact which the Applicant didn't dispute. I thus failed to understand/appreciate which procedures weren't followed.

The Applicant has also argued that the High Court failed to form specific finding on each ground of appeal. It should be understood that it is not a legal requirement that a Judge should form an issue for each ground of appeal. This is because several grounds may boil down or converge to some few grounds or even one ground upon which the court would form an issue and determine it, thereby determining all of the issues raised.

Coming to the matter at hand, I didn't find any ground which wasn't addressed to in the Judgment of the High Court Judges. I thus failed to comprehend the basis of his contention.

Having analyzed all the points he listed by the Applicant upon which he is seeking leave to go to the Court of Appeal so that the same can be addressed therein, I found that there is none which requires the attention of the Court of Appeal. Thus his argument that he stands a greater chance to succeed is with due respect not true. It is trite law that leave to appeal is not

automatic, rather the Applicant must show that the intended grounds of appeal are prima facie arguable.

In the case of **British Broadcasting Corporation vrs Erick Sikujua Ng'maryo; Civil Application No. 133 of 2004** (unreported) had this to say when discussed the criterion to grant leave-

"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 the materials before the court. As a matter of general principle, leave to appeal will be granted where the grounds, of appeal raised 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 or useless or hypothetical, no leave will be granted."

Basing on the above discussion, it is the finding of this court that there is no point/ ground among the listed which need the attention of the Court of Appeal as all were correctly dealt with at the High Court, hence nothing novel.

The application is therefore without merit, I proceed to dismiss it with cost.

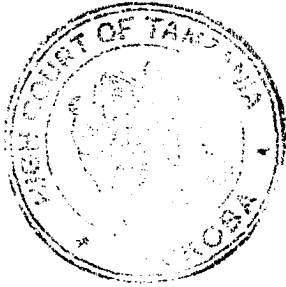
It is so ordered.




L.G. Kairo
Judge

29/5/2020

R/A Explained.




L.G. Kairo
Judge

29/5/2020

Date: 29/5/2020

Applicant: Present in person

Respondent: Mr Gerald Njoka; State attorney

C/C Lilian Paul

Court: The matter is for ruling, the same is ready and is read over before the Applicant who is present in person and Mr Gerald Njoka the learned State attorney for the Respondent in open Court today 29/05/2020.




L.G. Kairo
Judge

29/5/2020