

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

AT MWANZA

MISC. LAND APPLICATION NO. 186 OF 2019

(Arising from Land Appeal No. 85 of 2018 and originating from Land Case No. 33 of 2018)

JOYCE MBOYI SABINI APPLICANT

VERSUS

CRDB BANK PLC GEITA BRANCH 1ST RESPONDENT

HARVEST TANZANIA LTD 2ND RESPONDENT

BENEDICTOR JOHN (*As the Administrator*

of the Estate of the late Sylvester John) 3RD RESPONDENT

RULING

8th April, & 16th June, 2021

ISMAIL, J.

At the instance of the applicant, this Court is moved to grant leave that will enable the applicant to institute an appeal to the Court of Appeal of Tanzania. The impending appeal is against the decision of the Court (Hon.

Rumanyika, J.), delivered on 17th September, 2019. The judgement sought to be impugned was in respect of an appeal the decision of the District Land and Housing Tribunal (DLHT), that adjudged that the applicant was in default of a loan agreement entered with the 1st respondent. Having so held, the DLHT went ahead and ordered that the applicant's house, which was pledged as a collateral be sold. The house was sold at an auction which was conducted, by the 2nd respondent. The third respondent was the highest bidder to whom the said house was sold. The Court was convinced that the DLHT's decision was unblemished. Consequently, it dismissed the appeal, thereby triggering the action that the applicant intends to take.

The application is supported by an affidavit of Joyce Mboyi Sabini, the applicant herself, setting out grounds on which the application is based. The affidavit has raised what the applicant avers as series of disturbing features in the decision sought to be appealed against. These are framed as issues in paragraph 6 of the affidavit as follows:

- (i) *Whether an appeal can proceed while the third respondent had died and no administrator had been appointed to slot in for the deceased;*
- (ii) *Whether it was proper for the Court to uphold the DLHT's decision that dismissed the application on a preliminary objection which required evidence to prove it; and*

(iii) *Whether it was proper for the Court to limit the means of challenging mortgage issues/instruments.*

The application has encountered an opposition from the 1st respondent. Through a counter-affidavit sworn by Wenceslaus Mutabuzi Rwiza, its legal counsel, the contention is that the application has demonstrated no sufficient reason that may justify grant of leave by the Court. While the 3rd respondent was served and appeared in Court, and chose not to oppose the application, the 2nd respondent's whereabouts became a mystery, thereby compelling the Court to accede to the applicant's prayer for service of summons through substituted service by publication. Even then, the 2nd respondent was still unmoved. The Court ordered that hearing of the application proceeds *ex-parte*.

Hearing of the application, done by way of written submissions, pitted Mr. Emmanuel John, learned counsel for the applicant, against Mr. Tumaini Msechu, the 1st respondent's learned advocate.

Getting us under the way is Mr. John who began by reproducing an excerpt of the decision in ***British Broadcasting Corporation (BBC) v. Eric Sikujua Ng'maryo***, CAT-Civil Application No. 138 of 2004 (unreported), in which it was held that leave is grantable where the proposed appeal stands reasonable chances of success. With respect to the first issue,

the argument by the learned counsel is that where a party dies in the pendency of the proceedings, it is illegal to proceed with such proceedings without substituting the deceased's name with that of the administrator of his estate. Mr. John contended that this requirement was disregarded despite the fact that news of the demise was brought to the Court's attention. He found this to be irregular. To buttress his contention the Counsel cited the case of ***Seleman Ally Nyamalega v. Mwanza Engineering Works Ltd***, CAT-Civil Appeal No. 22 of 2014 (unreported).

Submitting on the second issue, the applicant's counsel contended that the question of whether sale of the property was preceded by a notice was discussed during the disposal of the preliminary objection. He took the view that this conduct was flawed since a preliminary objection is basically a point of law whose disposal would not require adduction of evidence.

With respect to the third issue, the contention by the learned counsel is that, notwithstanding several ways through which mortgage instruments can be challenged, in the instant matter the Court allegedly limited the challenging of the mortgage agreements. He held that such limitation was erroneous.

In his rebuttal submission, Mr. Msechu argued that leave appeal must only be granted when the Court is satisfied that the impending appeal stands

reasonable chances of success, and raises legal points which are worth of consideration by the Court of Appeal. He underscored this contention by citing the cases of ***Rutagatina C.L. v. Advocates Committee & Another***, CAT-Civil Application No. 98 of 2010; and ***National Bank of Commerce v. Maisha Mussa Uledi (Life Business Centre)***, CAT-Civil Application No. 410/07 of 2019 (both unreported). The counsel took the view that the instant application is devoid of any merit. With respect to the first issue, the counsel argued that the contention was merely an afterthought. Mr. Msechu argued that on the 3rd respondent's demise, the Court granted an adjournment that would allow for an appointment of an administrator of the estate. He argued that this is not a responsibility that is bestowed on the Court. It was the counsel's argument that the Court would not wait indefinitely, and it was quite in order that the Court decided to proceed with the next step of the proceedings.

With regards to the second issue, the counsel's contention is that the Court was right in its decision to dismiss the matter for lack of a cause of action. He considered it as baseless point that is not worth the consideration by the Court of Appeal. On the third issue, the 1st respondent's argument is that the only issue which was at stake in the appeal was whether the 1st respondent was justified to attach and sell the mortgaged. The learned

counsel submitted that the applicant admitted that she had been in default of the loan agreement. He took the view that this issue is underwhelming and devoid of any merit. He urged the Court to dismiss the application with costs.

From these submissions the only issue for settlement is whether the application is meritorious. It is a trite position that grant of leave to appeal to the Court of Appeal must be preceded by demonstration, by the applicant thereof, that the intended appeal contains an arguable case, sufficient enough to merit the attention of the Court of Appeal. This means that no leave to appeal will be granted unless there are solid and weighty grounds, enough to engage the minds of the Court of Appeal. These points must be serious points of law, or law and fact. This position has been underscored in many a decision, including the ***Rutagatina C.L.*** case (supra), cited by the applicant's counsel. Others include, ***Abubakari Ally Himid v. Edward Nyalusye***, CAT-Civil Application No. 51 of 2007; and ***Junaco (T) Ltd and Justin Lambert v. Harel Mallac Tanzania Limited***, CAT-Civil Application No. 473/16 of 2016 (all unreported); and ***British Broadcasting Corporation (BBC) v. Eric Sikujua Ng'maryo*** (supra)

The cited decisions lay an emphasis that an appeal for which leave is sought must embody issues of general importance; a novel point of law or,

if the appeal is arguable or prima facie. The disturbing features, as the applicant's counsel put it, should be in the mould of serious points of law which warrant the attention of the Court of Appeal. This position is consistent with the reasoning of the upper Bench in ***(i) Harban Haji Mosi (ii) Shauri Haji Mosi v. (i) Omar Hilal Seif (ii) Seif Omar***, CAT-Civil Reference No. 19 of 1999 (unreported), wherein it was held:

"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 require the guidance of the Court of Appeal. The purpose of the provision is therefore to spare the Court the specter of unmeriting matters and to enable it to give adequate attention to cases of true public importance."


Thus, where an application demonstrates none of the stated requirements, it means that the same has fallen short of requisite threshold, and the Court is justified to refuse to grant leave. (See: ***Saidi Ramadwani Mnyanga v. Abdallah Salehe*** [1996] TLR 74); and ***Nurbhain Rattansi v. Ministry of Water Construction Energy Land and Environment and Another*** [2005] TLR 220.

The question to be resolved is: has the instant application met the requisite threshold for its grant? My scrupulous review of the averments in paragraph 6 of the affidavit and the applicant's submission point to a conclusion that the intended appeal carries with it, an arguable case that bears sufficient importance. It justifies the attention of the Court of Appeal through the impending appeal whose grounds will, most likely, be distilled from the issues paraphrased above.

Consequently, I hold the view that the application has met the legal threshold for grant of leave. Accordingly, the same is granted as prayed. Costs to be in the cause.

It is so ordered.

DATED at **MWANZA** this 16th day of June, 2021.


M.K. ISMAIL
JUDGE

Date: 16/06/2021

Coram: Hon. M. K. Ismail, J

Applicant: }

Respondents: } Absent

B/C: P. Alphonse

Court:

ruing delivered in chamber, in the absence of the parties, this 16th
day of June, 2021.



M. K. Ismail

JUDGE

At Mwanza

16th June, 2021