

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

**AT MWANZA**

**MISC. CIVIL APPLICATION NO. 128 OF 2020**

**NATIONAL MICROFINANCE BANK PLC ..... 1<sup>ST</sup> APPLICANT**

**YONO AUCTION AND CO. LTD ..... 2<sup>ND</sup> APPLICANT**

**VERSUS**

**STEPHEN NKAINA MARWA ..... RESPONDENT**

**RULING**

*4<sup>th</sup> April, & 30<sup>th</sup> June, 2021*

**ISMAIL, J.**

This is a ruling on an application for leave to appeal to the Court of Appeal, against the Court's decision in Land Appeal No. 9 of 2020, in which the applicants' appeal was struck out. The striking out of the appeal came as a result of the Court's satisfaction that the appeal was not tenable, in view of the fact that the right course of action would be to institute an application for setting aside the impugned *ex-parte* decree.


The applicants feel hard done by the decision, hence their quest for 'better' justice through the impending appeal. To get there, there is one

hurdle to surmount. This is leave of the Court, craved through the instant application. The application is supported by an affidavit sworn by Gwakisa Gervas, the applicants' duly instructed counsel, in which grounds for the prayers sought are laid out. The applicants' main grounds of contention are averred in paragraphs 5 and 6 of the said affidavit.

The application has been fervently opposed by the respondent. Through a counter-affidavit affirmed by Kassim S. Gilla, the respondent's counsel, contentions by the applicants have been discounted. The deponent contended that the appeal was struck out after the applicants had been afforded an opportunity to be heard on preliminary objections raised against the appeal. The respondent maintained that the impending appeal has not raised any novel or serious point of law that can move the Court of Appeal and make a finding thereon.

Disposal of the application was done by way of written submissions. Credit to the counsel, these submissions were preferred ahead of the scheduled time.

The applicants' submission began by laying the background to the matter and what bred the present application. Moving on to the substance of the application, Ms. Gervas submitted that grant of leave to appeal to the



Court of Appeal is premised on the applicant's ability to demonstrate that there are points of law or facts which have been decided by the High Court but need to be revisited by the Court of Appeal before rights of the contending parties are conclusively determined. The counsel referred me to the decision of the Court in ***Swissport Tanzania Limited & Another v. Michael Lugaiya***, HC-Civil Appeal No. 119 of 2010 (unreported).

The learned counsel further submitted that two grounds are intended to be taken to the Court of Appeal. The first queries the regularity of the Court's decision to strike out the appeal while the judgment from which the appeal arose was not an *ex-parte* decision. The second intends to question jurisdiction of the District Land and Housing Tribunal to hear and determine a land application which was founded and based on fraud and breach of contract.

On the weight of the application, the applicants' counsel submitted that grounds on which the application is based are deponed in paragraphs 5 and 6 of the supporting affidavit. He argued that the said depositions are in all fours with the Court of Appeal's decision in ***Bulyanhulu Gold Mine Ltd v. Petrolube (T) Ltd & Another***, CAT-Civil Application No. 364/16 of 2017 (unreported), wherein it was held:

*"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 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 raise issues of general importance or a novel point of law or where the grounds show prima facie or arguable appeal (see: **Buckle v Holmes** (1926) All E.R. 90 at page 91). However, where the grounds of appeal are frivolous, vexatious or useless or hypothetical, no leave will be granted."*

It was the counsel's view that the grounds of the intended appeal raise novel points of law, and a prima facie or arguable case, to be determined by the Court of Appeal.

The respondent's rebuttal submission was persistent in its opposition. Mr. Gilla, learned counsel whose services were enlisted by the respondent, began by restating what is otherwise a known position. This is to the effect that leave to appeal to the Court of Appeal is grantable upon disclosure or revelation of a disturbing feature or a novel point of law that warrants the upper Bench's guidance. He submitted that this was held in a number of decisions, including the **British Broadcasting Corporation v. Eric Sikujua Ng'maryo**, CAT-Civil Application No. 138 of 2004; and **National**

***Bank of Commerce v. Maisha Musa Uledi (Life Business Centre),***

CAT-Civil Application No. 410/07 of 2019 (both unreported).

Commenting on the Court's decision, Mr. Gilla argued that the decision to strike out the appeal in Land Appeal No. 9 of 2020 was justified as the appeal was preferred prematurely and against an *ex-parte* judgment that ought to have been set aside by the court which passed it. Filing of Misc. Application No. 104B of 2019 has been cited as a testimony to that fact.

Submitting on the second issue, the respondent's counsel took the view that the point of jurisdiction is not novel as to require guidance of the Court of Appeal of Tanzania. He argued that the established position is that the remedy that is available once the an *ex-parte* order is made is to have it set aside. He argued that, in this case, the applicants chose to appeal against the decision, meaning that they chose to confine themselves to the merits of the suit. This, Mr. Gilla contended, was an irregular path that justified the Court's decision to strike out the appeal, and it cannot be said that such decision contained disturbing features or a novel point of law for which leave is grantable. The respondent fortified his position by referring the Court to the decisions of the Court of Appeal of Tanzania in ***Regional Manager TANROADS Lindi v. DB Shapriya Company Ltd***, CAT-Civil Appeal No.



86 of 2020; and ***Integrated Property Investment (T) Limited and 2 Others v. The Company for Habitat and Housing in Africa***, CAT-Civil Appeal No. 107 of 2015 (both unreported). The respondent's counsel wound up his submission by urging the Court to see that the points raised are not meritorious enough to constitute the basis for granting leave to appeal to the Court of Appeal. He prayed that the application be submitted with costs.

From the parties rival contentions the germane question is whether the application has raised sufficient grounds or a disturbing feature capable of engaging the Court of Appeal in the intended appeal.

While I attach an invaluable weight and value to the counsel's splendid submissions, I am mindful of the trite position that, it is the parties' averments through their sworn depositions which constitute an evidence that hold a bigger and decisive sway than submissions made by the parties, orally or in writing. The latter are an elaboration of evidence that is already tendered through affidavits (See ***The Registered Trustees of Archdiocese of Dar es Salaam v. Chairman Bunju Village Government and Others***, Civil Application No. 147 of 2006 (unreported)).

The counsel are in unison on the settled fact that an application for leave to appeal to the Court of Appeal requires demonstration, with material sufficiency, that the intended appeal carries an arguable case which merits the attention of the Court of Appeal. It follows that, grant of leave must be based on solid grounds, premised on serious points of law or law and fact. Thus, an application for leave is said to be meritorious if it is able to show that the intended appeal raises issues of general importance or a novel point of law, or where there is a prima facie or arguable appeal (See ***Harban Haji Mosi (2) Shauri Haji Mosi v. (1) Omar Hilal Seif (2) Seif Omar***, CAT-Civil Reference No. 19 of 1999 (unreported))

The position in the cited decision was underscored in ***Nurbhai N. Raittansi v. Ministry of Water Construction Energy and Environment & Another*** [2005] TLR 220, wherein it was held:

*"In determining an application for leave to appeal to the Court of Appeal, the Court must ascertain if there is a legal point worth of being considered by the Court of Appeal."*

The reasoning in the just cited decision augmented the upper Bench's own decision ***British Broadcasting Corporation v. Eric Sikujua Ng'maryo***, (supra), cited by the respondent's counsel.



Whilst the applicants are adamant that the affidavit has demonstrated reasons that are sound and pertinent, and are in the mould of an arguable case, the respondent holds an opposite view. He is of the position that the said application contains nothing that suggests that conditions for the grant of leave have been met. The argument is that these points were canvassed in previous decisions and are no longer novel. He concluded that this is not a fit case for resolution by the Court of Appeal.

Leafing through the affidavit and the support submissions, two issues are distilled. These issues are distilled from the paragraphs 5 and 6 of the supporting affidavit. These are:

- 1. Whether a decision that arises from proceedings in which the defendant filed a written statement of defence and took part in the proceedings, including examining the witnesses qualifies as an ex-parte decision.*
- 2. Whether the applicants were denied the right to be heard by virtue of the fact that Land Appeal No. 9 of 2020 was struck out.*

The question that arises is: are these issues serious points of law and fact to be considered by the Court of Appeal. While these points are, as Mr. Gilla argued, not novel since they have been considered in previous



decisions, I am not convinced that they are not weighty enough to constitute an arguable case to be brought to the attention of the Court of Appeal. They are a contention that is sound, pertinent, and are not frivolous, vexatious, useless or hypothetical. In my considered view, this is a perfect fit in respect of which the guidance of the Court of Appeal.

As I wind down, I feel obliged to drop a few lines on the applicant's contention with regards to the District Land and Housing Tribunal's decision to hear and determine an application that was founded and based on fraud and breach of contract. Pertinent as it may, this ground has not been factored in the supporting affidavit. In view thereof, the same cannot be considered as one of the issues that can be taken on appeal.

In the upshot, it is my conviction 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 30<sup>th</sup> day of June, 2021.



  
**M.K. ISMAIL**  
**JUDGE**

**Date:** 30/06/2021

**Coram:** Hon. M. K. Ismail, J

**Applicant:** Mr. Gwakisa Gervas, Advocate

**Respondent:** Mr. Kassim Gilla, Advocate

**B/C:** J. Mhina

**Court:**

Ruling delivered in chamber, in the presence of Mr. Gwakisa Gervas, learned Counsel for the applicants, and Mr. Kassim Gilla, learned advocate for the respondent, this 30<sup>th</sup> day of June, 2021.



**M. K. Ismail**

**JUDGE**

**At Mwanza**

**30<sup>th</sup> June, 2021**