

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

AT MWANZA

MISC. LAND APPLICATION NO. 03 OF 2021

CASTOR MKUWA @ CASTOR S. MAZIKU APPLICANT

VERSUS

HEMED HAMAD 1ST RESPONDENT

JUMA ABDALLAH 2ND RESPONDENT

KIUMBE ABDALLAH AMRANI 3RD RESPONDENT

THE DIRECTOR, MWANZA CITY COUNCIL 4TH RESPONDENT

ILEMELA MUNICIPAL COUNCIL 5TH RESPONDENT

ASHA HEMED HAMAD 6TH RESPONDENT

RULING

13th July, & 27th August, 2021

ISMAIL, J.

In this application, the Court is called upon to grant leave that will enable the applicant to institute an appeal to the Court of Appeal of Tanzania, against the decision of the Court (Hon. Manyanda, J.), dated 14th December, 2020. The Judgment was in respect of Land Appeal No. 12 of 2017 which was dismissed with costs, thereby upholding the decision of the District Land



and Housing Tribunal that found in the respondents' favour. The impending appeal is intended to right the 'wrongs' allegedly committed by the Court.

Supporting the application is the affidavit deposed by the applicant himself, wherein grounds of the applicant's unhappiness with the impugned decision are contained. These grounds are contained in paragraph 19 of the affidavit.

The application has met an opposition, fielded by the 4th and 5th respondents, through their separate counter-affidavits in which allegations of irregularities, improprieties and illegalities are valiantly denied. The said respondents have taken the view that the decision of the Court is quite in order and free from any of the alleged impropriety. The respondents argue 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.

On the parties' concurrence, hearing of the matter was through written submissions the filing of which followed the schedule drawn by the Court.

Submitting for the applicant was Mr. Peter Paschal, a duly appointed attorney, whose submission was premised on what is stated in the supporting affidavit. The grounds which are considered to be worth of consideration by the Court of Appeal are as reproduced hereunder:

- (a) *The learned High Court Judge erred in law to consider only the submissions of the Respondents and completely ignore the appellant's submissions, an act which amounted to bias towards the Respondents.*
- (b) *The learned High Court Judge erred in law when he left undetermined Grounds Nos. 1 – 4 in the Memorandum of Appeal.*
- (c) *The learned High Court Judge erred in law when he held that the Appellant's suit/application in the District Tribunal was caught by the doctrine of res judicata.*

The applicant argued that grant of an application for leave to the Court of Appeal is dependent on the applicant's ability to demonstrate that there is a point worth of consideration by the Court of Appeal. Such point, he argued, must either be a pure legal point or a legal point mixed with facts. He supported this contention with the decisions in ***Nurbhai N. Rattansi v. Ministry of Water Construction Energy Land and Environment & Another*** [2005] TLR 220; ***Kumbwandumi Ndemfoo Ndossi v. Mtei Bus Service Limited***, CAT-Civil Application No. 27/02 of 2016; and ***British Broadcasting Corporation v. Erick Sikujua Ng'maryo***, CAT-Civil Application No. 138 of 2004 (both unreported). The applicant firmly contended that the grounds listed above exhibit a *prima facie* or arguable



appeal, and that the impending appeal stands reasonable chances of success.

The applicant further argued that the grounds raised in the application show apparent errors on the impugned decision, making the instant application meritorious. He took the view that the said grounds are arguable and they merit the attention of the Court of Appeal. He supported this contention by citing the decisions in ***Kalunga & Company Advocates v. NBC***, CAT-Civil Application No. 124 of 2005; ***Deusdedit Kisisiwe v. Protaz Bilauri***, CAT-Civil Application No. 49 of 2004 (both unreported); and ***Mpungu & Sons Transporters Limited v. Attorney General & Another*** [2006] 1 EA 212. He prayed that the application be granted.

The applicant's submission was rebutted by the 1st and 6th respondents whose submission was joint. Mr. Matata, learned counsel who drew the submission, began by stating that the applicant's submission contained irrelevant legal and factual accounts, while failing to include the impugned judgment which is the basis for the application under consideration.

With respect to the proposed grounds of appeal, the general contention by the respondents is that the same are lacking in weight. The contention by the respondents is that, in the absence of the impugned judgment, there is no material from which to discern the point of law or fact

that would enable the Court to exercise its discretion to grant or not to grant. Relying on the decision in ***BBC v. Eric Sikujua Ng'maryo*** (supra), the respondents termed the grounds as frivolous, vexatious or useless or hypothetical. The respondents urged the Court to refuse to grant leave because the grounds of the intended appeal do not raise any point of law or fact warranting the consideration by the Court of Appeal.

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

It is common knowledge 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 fact 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. These are, as is the established practice, gathered from the affidavit that supports the application. This means, therefore, that grant of leave to appeal is not automatic. Rather, it is discretionary and the Court can only exercise such discretion if the party has been able to present an arguable case. This position was accentuated in the case of ***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."*

See also: **British Broadcasting Corporation v. Eric Sikujua Ng'maryo** (supra); **National Bank of Commerce v. Maisha Musa Uledi (Life Business Centre)**, CAT-Civil Application No. 410/07 of 2019; **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 (all unreported).

The emphasis drawn in the foregoing decisions, is that leave to appeal to the Court of Appeal will only be granted if the application is based on solid grounds, premised on serious points of law or law and fact. The grounds of appeal must raise 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))

As stated earlier on, the applicant's argument is based on the grounds deponed in paragraph 19. These are the grounds that the applicant holds so dear, and argues that they are a 'sure' ticket to the Court of Appeal. The respondents are opposed to this contention, arguing that such grounds are not sound, pertinent and an aggregate of an arguable case. In the respondents' own words, these are frivolous, vexatious, useless or hypothetical. With respect, I hold a divergent view from what the respondents hold. I take the view that there are pertinent questions which constitute an arguable case, serious enough to engage the minds of the Justices of Appeal who will be sat to determine the appeal. Issues such as propriety or otherwise of the Court's failure to determine some of the grounds of appeal; and propriety or otherwise of invocation of the doctrine of *res-judicata*, are issues of general importance and they raise a *prima facie* case. These issues are neither frivolous, vexatious, useless nor are they hypothetical. In my considered view, this is a perfect fit in respect of which the guidance of the Court of Appeal is required.

In consequence, this application succeeds. The applicant is granted leave to appeal to the Court of Appeal. Costs to be in the cause.

It is so ordered.

DATED at **MWANZA** this 27th day of August, 2021.



A handwritten signature in blue ink, appearing to read "M.K. ISMAIL".

M.K. ISMAIL

JUDGE