

**IN THE HIGH COURT OF TANZANIA**

**IN THE DISTRICT REGISTRY**

**AT MWANZA**

**MISC. LAND APPLICATION No. 33 OF 2021**

*(Arising from Misc. Land Application No. 84 of 2020 of the High Court of Tanzania  
dated 16/03/2021 Originating from Misc. Land Appeal no. 31/2018 of the High Court  
of Tanzania at Mwanza)*

**MAGDALENA WEREMA CHACHA .....APPELLANT**

**VERSUS**

**CHRISTINA LUCAS MARANYA .....RESPONDENT**

**RULING**

29<sup>th</sup> July & 13<sup>th</sup> August, 2021.

**TIGANGA, J.**

In this application, the applicant Magdalena Werema Chacha, moved this court through the service of Ms. Nyamnyaga Magoti under section 5(1)(c) of the Appellate Jurisdiction Act [Cap 141 RE 2002] and Rule 45(a) of the Court of Appeal Rules, 2009 GN. No. 368 of 2009 as amended by GN. No. 362 of 2017 and GN No. 344 of 2019, together with any other provision of the law, to grant the following orders namely;

1. That this court be pleased to grant leave to the applicant to appeal to the Court of Appeal of Tanzania,

2. Cost of this application be provided for,
3. Any other relief as this Honourable Court may deem fit to grant.

The application was preferred by chamber summons and it was supported by the affidavit sworn by Evangel Onyango Otieno, an Advocate of the High Court who was representing the Appellant in Misc. Land Appeal No. 31 of 2018 which was dismissed for non appearance on 11<sup>th</sup> September 2018 for want of prosecution. That was before the applicant had filed Misc. Land Application No. 84 of 2020 to set aside the order which dismissed the Land Appeal No. 31 of 2018 which was also dismissed.

Being aggrieved by the said ruling the applicant filed a Notice of appeal intending to lodge an appeal before the Court of Appeal to challenge the same on the ground that his non appearance leading to the dismissal of Misc. Land Appeal No. 31 of 2018 was not intentional but was apparently due to sickness of her child and could not be pre determined by her and no fault on her side which resulted into that dismissal.

To prove that she was not negligent, on the date when the said appeal was dismissed, she called her Advocate Boniphace Sariro who was at the court premises to seek assistance by holding brief on the matter.

that given the reasons for her non appearance which she adduced she expected the matter would be restored.

Lastly she submitted that the matter is a fit case for this court to grant leave to appeal to the Court of Appeal of Tanzania to consider the following issues.

- i. Whether the Court was proper to dismiss the application without considering the reasons which were beyond reach for the applicant.
- ii. Whether the court was proper to dismiss the application regardless the sufficient reasons laid down in the application by the applicant's Advocate.

After physical service of the process was impossible, it was ordered by the court that service be effected by substituted service by way of publication which was served through Mwananchi News paper, issue No. 08567573 No. 7612 dated 10/06/2021 yet still the respondent did not appear and defend the application, consequently the application was argued ex parte.

The submission made by Mr. Nyamnyaga Magoti during hearing of the application was just a replica of the content of the affidavit filed in support of application for that reasons, I will, for purposes of brevity not reiterate what has already been summarised.

From what has been submitted by the applicant through his counsel I find it important to point out the stand of the law in as far as application for leave to appeal to the Court of Appeal is concerned. The law upon which this application has been brought that is section 5 (1) (c) of the Appellate Jurisdiction Act [Cap 141 RE 2002] requires that the appeal shall lie in civil proceedings from the High Court to the Court of Appeal with the leave of the High Court or of the Court of Appeal, against every other decree, order, judgment, decision or finding of the High Court, except where any other written law for the time being in force provides otherwise.

The issue remains what are the requirements which the applicant must fulfil in order to be entitled to the grant of leave to appeal to the Court of Appeal in civil proceedings? In other words, what the court before which an application asking for leave has been filed should consider in granting the leave?

As the provision of section 5(1)(c) of the Appellate Jurisdiction Act, cited above does not provide for the criteria to be considered in granting leave to appeal, a plethora of case laws have extensively discussed and provided for general principles and 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 unmeriting matters and to enable it to give adequate attention to cases of true public importance"*

In the authority of **British Broadcasting Cooperation vs Erick Sikujua Ng'maryo**, Civil Application No.138 of 2004 (CAT) - Dar Es Salaam (Unreported) (which was cited and relied on in the decision of **Swiss Port Tanzania Ltd Vs Michael Lugaiya** (supra)) 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 raise 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.”*

Those issues with such disturbing features proving that there would be the arguable appeal must be shown by the applicant both in his affidavit and the submissions.

Now the issue is whether the applicant in this application has managed show through the issues raised the arguable points or disturbing feature or any novel point of law worthy to be attended by the Court of Appeal?

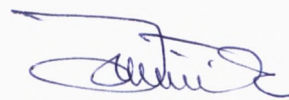
I have carefully considered the application, the supporting affidavit together with the submissions by the counsel in support of the application in line with the guiding principle as enunciated in the case authorities cited above.

As rightly deposed in the affidavit filed in support of the application and the submission filed in support of the application, what I am required to do, is to look from the material before me to ascertain whether there are points shown to entitle the grant of leave to appeal. Applying the principle in the above relied on authorities; I find all two points raised in the affidavit for the applicant to have disturbing features worthy for consideration by the Court of Appeal.

That said, I hereby allow the application in terms of prayer 1 in the chamber summons by granting leave to the applicant to appeal to the Court of Appeal of Tanzania on the two grounds indicated herein above.

The costs of this application shall abide to the appeal before the Court of Appeal of Tanzania.

**DATED at MWANZA** this 13<sup>th</sup> day of August, 2021



J. C. Tiganga

**Judge**

**13/08/2021**

Ruling delivered in open chambers in the presence of Ms. Nyamnyaga Magoti, Advocate in the absence of the respondent against whom the application was heard exparte, through audio tele - conference.



**J. C. Tiganga**

**Judge**

**13/08/2021**

ORIGINAL