

IN THE HIGH COURT OF TANZANIA

(IN THE DISTRICT REGISTRY OF)

AT MWANZA

MISC. LAND APPLICATION NO. 64 OF 2021

(Arising from Land Appeal No.71 of 2014)

WILLIAM GETARI KEGEGE-----APPLICANT

VERSUS

EQUITY BANK-----1st RESPONDENT

ULTIMATE AUCTION MART-----2nd RESPONDENT

RULING

Last Order date: 08.10.2021

Ruling Date: 28.10.2021

M. MNYUKWA, J.

This application is brought under Section 47(2) of the Land Disputes Courts Act (Cap 216) R.E 2019. The applicant sought leave to appeal to the Court of Appeal against the decision of this Court delivered on 16/12/2015 before Makaramba, J. The applicant's Chamber Summons is supported by an affidavit sworn by William Getari Kegege. The application is opposed by the respondent who filed a Counter Affidavit sworn in by



Bahati Dollo, the Branch Manager of the first respondent, residing at Mwanza.

Briefly, it goes thus, in the District Land and Housing Tribunal for Mwanza at Mwanza, the applicant herein filed Land Application No 183 of 2014. The applicant lost the case and was ordered to pay the respondent Tsh 1. 273,000/=. Aggrieved by the said decision, he appealed to this Court through Land Appeal No 71 of 2014. The appeal failed in its entirety and was dismissed. Aggrieved by the decision of this Court, the applicant successfully applied to be supplied with certified copies of proceedings, judgment, and decree, an extension of time to file Notice of Appeal to the Court of Appeal, and an extension of time to file leave to appeal to the Court of Appeal.

On 25th June 2021, the applicant filed this application seeking leave to appeal to the Court of Appeal against the decision of this Court. According to paragraph 3 of the applicant's affidavit, he wishes to challenge the decision of this Court on the following points of law worth for consideration and determination by the Court of Appeal.

- (i) Whether it was proper for the first appellate court to dismiss the appeal in the absence of the proper trial tribunal's judgment and decree



- (ii) Whether it was correct in terms of the procedure for the first appellate court to determine the issue which was not framed and determined by trial tribunal
- (iii) Whether the first appellate judge was correct to dismiss the appeal while there was a tribal issue observed by the High Court Judge that there is conflict decision of the trial Tribunal.

When this application was fixed for hearing, the applicant appeared in person,unrepresented whereas the first respondent enjoyed the legal services of Mr. Sifael Muguri. By an order of the Court dated 8th October 2021, the application was disposed of by way of written submissions. Both sides filed their submissions hence this Ruling.

Submitting in support of the application, the learned counsel for the applicant averred that the points of law which the applicant wants the Court of Appeal to determine, are reflected in the third paragraph of his affidavit. He went on that, the applicant's mortgaged squatter dwelling house, worth Tsh 3,000,000/= sold for a small outstanding amount of Tsh 1, 273,000/= which the applicant would have settled by installments to settle in due course. He added that the first appellate court failed to take into consideration the fact that the applicant was a good customer of the first respondent who had paid a total of Tsh 4.327,000/= out of Tsh



5,000,000/= and left with Tsh 1,273,000/= which the applicant was continuing to pay by installments after they have settled out with the first respondent.

The applicant's counsel added that the first appellate Court sided with the reasoning of the trial Tribunal in his judgment that dealt with only one issue on the prayer by the applicant to continue paying the outstanding amount by installments. That the trial Tribunal had never determined the critical issue on whether the sale of the mortgaged dwelling house without court or tribunal order was unlawful. Instead, that issue was determined by the High Court which is unprocedural.

The counsel for the applicant claimed that the first appellate court was wrong to re-evaluate or re-considered the issue that was not framed and decided by the trial tribunal even though that issue was supposed to be framed and decided by the trial tribunal.

The applicant supported his argument by citing the case of **Kukal Properties Development Ltd vs Maloo & others** (1994-1994) E.A 281 and the case of **Joseph Ndyamukama (Administrator of the estate of the late Gration Mdyamukama vs N.I.C Bank Tanzania Ltd & 2 Others**, Civil Appeal No 239 of 2017. CAT at Mwanza. He further claimed that the parties were not afforded an opportunity to address the framed



issue. He bolsters his argument by referring to the case of **Omary Farouck Karamaldin vs Justinan R. Kahwa** (1998) T.L.R 100.

In reply to the submission, the counsel for the respondent adopted the counter affidavit filed in this Court on 15th October 2021. He submitted that the applicant's affidavit does not indicate points of law worth be determined by the Court of Appeal. He went on that if the applicant admits the claims as it is in the present case, the Court usually dismiss the case. He cited the case of **Joshwa Wilson @ Obondo vs Okech Odiyo**, Civil Appeal No 37 of 2020 (2021) TZHC 3590 (07 June 2021).

He added that, in respect of the point of law stated in paragraph 3(ii) of the application, since the applicant admitted the claims, it was right for the Court to dismiss that ground of appeal. He cited the case of **Director Tajack Insurance vs Ally Salim & 3 others**, Misc. Civil Application No 182 of 2004. TZCA 64; (17th November 2005). He concluded that the dismissal of the applicant's appeal by this Court was proper.

I have considered the parties' submissions for and against the application. The main issue for determination is whether there are sufficient grounds to grant leave for the applicant to appeal to the Court of Appeal.



In the determination of this application, the Court is mandated to see if the intended appeal is arguable or not. This court lacks jurisdiction to go into merit or deficient of the judgment. In the case of **Jireyes Nestory Mutalemwa vs Ngorongoro Conservation Area Authority**, Application No 154 of 2016, the Court of Appeal observed that;

"The duty of the Court at this stage is to confine itself to the determination of whether the proposed grounds raise an arguable issue(s) before the Court in the event leave is granted. It is, for this reason, the Court brushed away the requirement to show that the appeal stands better chances of success as a factor to be considered for grant of leave to appeal. It is logical that holding so at this stage amounts to prejudging the merits of the appeal."

Furthermore, in the case of **British Broadcasting Cooperation vs Erick Sikujua Ng'maryo**, Civil Application No 138 of 2004 CAT at Dar es Salaam it was pointed out 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,"



Guided by the above decisions, it is upon this Court to scrutinize the points of law advanced by the applicant and exercise judiciously the discretion to grant or refuse to grant leave to appeal to the Court of Appeal.

After going through the judgment intended to be challenged, the pleadings and the submissions by the parties, I find that there are two points of law worth to be determined by the Court of Appeal as demonstrated by the applicant in his affidavit and submissions. I am not certifying the third point of law raised by the applicant. The third point raised by the applicant in his own verbatim reads as hereunder;

iii. Whether the first Appellate court Judge to dismiss the appellant Appeal is proper while there is a tribal issue which observed by the High Court Judge that there is conflict decision at the trial Tribunal.

With due respect to the learned counsel of the applicant, after going through the said Judgement I did not see any **tribal issue** that has been observed by the Judge when determining the appeal. It is to this end that I don't find that provision of para 3(iii) of the applicant affidavit is related to this application for it to be certified as a point of law.

In my opinion, I am satisfied that the affidavit demonstrates two points of law that calls for the attention of the Court of Appeal to wit;



- (i) Whether it was proper for the first appellate court to dismiss the appeal in the absence of the proper trial tribunal's judgment and decree
- (ii) Whether it was correct in terms of the procedure for the first appellate court to determine the issue which was not framed and determined by the trial tribunal.

From the foregoing reasons and to the extent as stated above, an application for leave to appeal to the Court of Appeal against the decision of this Court in Land Appeal No 71 of 2014 is hereby granted. Costs shall follow the cause.

It is so ordered.



A handwritten signature in blue ink, appearing to be "M. Mnyukwa".

M. MNYUKWA

JUDGE

28/10/2021

Ruling delivered on 28th day of October, 2021 via audio teleconference whereby all parties were remotely present.

A handwritten signature in blue ink, appearing to be "M. Mnyukwa".

M. MNYUKWA

JUDGE

28/10/2021