

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

AT MWANZA

MISC. CIVIL APPLICATION NO. 167 OF 2020

WITNESS A. MOLLELAPPLICANT

VERSUS

ISMAIL Y. ALLY1ST RESPONDENT

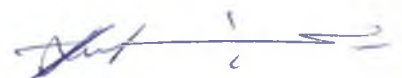
JAPHES GERASE2ND RESPONDENT

RULING

2nd September, & 2nd November, 2021

ISMAIL, J.

Leave of the Court is sought, to allow the applicant institute an appeal to the Court of Appeal of Tanzania. The impending appeal is against the decision of the Court (Hon. Tiganga, J) that dismissed an appeal which was preferred by the applicant. The Court's decision concurred with the decision of the trial court which, while condemning the 1st respondent for breach of agreement, ordered him to make good the sum of TZS. 14,500,000/- which constituted the contractual sum of the sale of a motor vehicle, it also awarded interest on the principal sum. In addition, the applicant was awarded a sum of TZS. 5,000,000/-, being general damages. The decision of the trial court was not to the applicant's liking, hence her decision to



challenge it by way of an appeal which fell through, when the Court upheld the trial court's decision. The applicant's quest at both stages of the proceedings was that the respondents should surrender the motor vehicle or payment of the contract sum.

The applicant is aggrieved yet again, and he has taken steps in respect thereof. This application is the second step towards realization of her quest. The application is supported by an affidavit sworn by the applicant herself, and it contains grounds on which the application is sought. Two issues have been drawn as proposed grounds of the impending appeal. These are quoted in verbatim as follows:

- 1. That having concluded that the Appellant was still the lawful owner of the motor vehicle in issue following a breach of the sale agreement between him (sic) and the 1st respondent at the trial, whether the appellate court was right in confirming the lower court's decision which was against the law; and*

- 2. Whether the first appellate court was right in concluding that the Appellant had no cause of action against the 2nd respondent who was in possession of the motor vehicle the subject of this case of this case without regard that he was sued as a necessary party without whom rights of parties in this case could not be properly determined.*



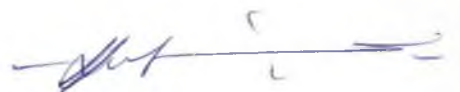
When the matter was called for orders, Mr. Njelwa prayed to proceed *ex-parte* against the 1st respondent who, on service by publication, had chose to enter a disappearance. This prayer was granted and the matter was ordered to proceed *ex-parte* against the 1st respondent. Ms. Tunu Msangi, learned counsel who represented the 2nd respondent did not contest the application. She was amenable to the grant of leave to the applicant, if the application has what it takes to have the said leave granted.

The applicant's support submission was made in writing, and Mr. Njelwa underlined three issues that the applicant intends to carry with him to the Court of Appeal of Tanzania. These arise from the contentions stated in paragraph 6 of the supporting affidavit. The first issue is predicated on section 23 of the Sale of Good Act, Cap. 214 R.E. 2019 which is to the effect that, where goods are sold but without any authority or consent of the owner then the buyer of the said goods acquires no title to the goods, unless the owner's conduct precludes him from denying the seller's authority to sell. He took the view that, since sale of the vehicle fell through, ownership thereof remained with the applicant and the courts ought to have ordered return of the vehicle to the applicant. From this contention, Mr. Njelwa's view is that the issue to be resolved on appeal is whether the appellate court was right in confirming the lower court's decision which ordered that the motor vehicle

in issue remains with the 2nd respondent, whose title was no better than that of the applicant.

The second issue is intended to question propriety of the Court to hold that the applicant had no cause of action against the 2nd respondent. In Mr. Njelwa's view, the applicant had a cause of action against the 2nd respondent, and this is demonstrated by the 2nd respondent's act of filing a written statement of defence to the applicant's plaint in which retention of the vehicle, albeit for different reasons, was acknowledged. The learned counsel held the view that the Court of Appeal should be invited to resolve an issue on whether the first appellate court was right in concluding that the applicant had no cause of action against the 2nd respondent who was in possession of the Motor Vehicle without regard that he was sued as a necessary party without whom rights of the parties could not be properly determined.

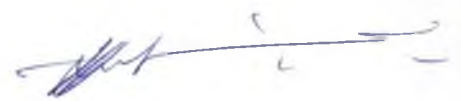
With respect to the last point, the contention by Mr. Njelwa is that, having held that the plaint did not disclose any cause of action against the 2nd respondent, the next consequential action was to reject the plaint, consistent with the provisions of Order VII Rule 11 (a) of the Civil procedure Code, Cap. 33 R.E. 2019. It followed that the decision by the trial court to maintain the anomalous plaint was, in the counsel's view, erroneous, and that issue that should be resolved in the impending appeal is whether, upon



concluding that the plaint disclosed no cause of action against the 2nd respondent, it was right to proceed with determination of the suit instead of rejecting it.

From the applicant's unassailed submission, the singular issue for resolution is whether the application is meritorious.

The law with respect to grant of leave to appeal is settled in this country. It is simply that such grant is a matter of discretion, enjoyed by the Court upon demonstration that the intended appeal to the Court of Appeal carries any points of law, fact or law and fact, weighty enough to engross the Court of Appeal. This implies that, leave is not granted as of right or a mere walkover that can be easily surmounted. Ascertainment of whether the appeal carries any novel, significant point or arguable case requires glancing through the contents of the supporting affidavit. This position has been stated in numerous court decisions. They include: ***British Broadcasting Corporation v. Eric Sikujua Ng'maryo*** CAT-Civil Application No. 138 of 2004; ***Harban Haji Mosi (2) Shauri Haji Mosi v. (1) Omar Hilal Seif (2) Seif Omar***, CAT-Civil Reference No. 19 of 1999; ***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).

Accentuating this position was the Court of Appeal, 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:

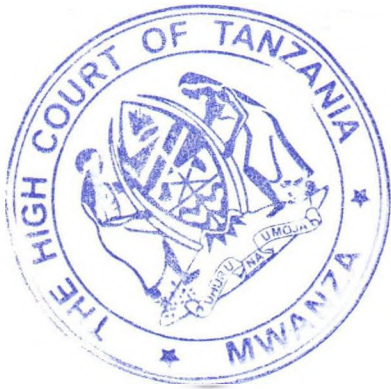
*"Needless to say, leave to appeal is not automatic. It is within the discretion of the court to grant or refuse leave. The discretion must, however judiciously exercised and on the materials before the court. As a matter of general principle, leave to appeal will be granted where the grounds of appeal 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."*


Going through the applicant's averments as deposed in paragraph 6, there can be no doubt that issues raised constitute an arguable case which should be considered by the Court of Appeal of Tanzania. These issues will form solid grounds of appeal which are neither frivolous or vexatious, nor are they useless or hypothetical. They are of general importance and qualify as the basis for which leave may be granted.

In view of the foregoing, it is my considered view that the application has met the threshold set out by the cited decisions and it succeeds. Accordingly, the same is hereby granted. Costs to be in the cause.

Order accordingly.

DATED at **MWANZA** this 2nd day of November, 2021.




M.K. ISMAIL
JUDGE