

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(DAR ES SALAAM DISTRICT REGISTRY)**

**AT MOROGORO**

**MISC CIVIL APPLICATION NO. 550 OF 2019**

*(Application for Leave to Appeal to the Court of Appeal of Tanzania against the Judgment and Decree of the High Court of Tanzania in Civil Appeal No. 159 of 2019)*

**GODFREY PETER SALALA .....APPLICANT**

**VERSUS**

**NATIONAL MICROFINANCE BANK PLC..... RESPONDENT**

**R U L I N G**

**CHABA, J:**

The applicant, Godfrey Peter Salala filed the instant application seeking for leave to appeal to the Court of Appeal of Tanzania against the decision in Civil Appeal No. 159 of 2019 of the High Court of Tanzania, at Dar es Salaam (Hon. A.F. Ngwala, J., (As she then was)) delivered on the 27<sup>th</sup> day of September, 2019. This application has been preferred by way of a Chamber Summons made under section 5 (1) (a) of the Appellate Jurisdiction Act [Cap. 141 R.E. 2019] read together with Rule 45 (a) of The Court of Appeal Rules, G.N. No.344 of 2019. It is supported by an affidavit sworn by the applicant.

In his affidavit the applicant deponed that, when the said decision was delivered by the trial court, through the services of Mr. Halfani Moshi, learned advocate on 11/10/2019 he wrote a letter requesting the trial court to supply him with the certified copies of judgment, decree in appeal and trial court proceedings stemmed from Civil Appeal No. 159 of 2019 so that could commence effecting the appeal processes.

When the appeal was called on for hearing on 03/06/2021, Mr. Halfani Moshi, learned advocate entered appearance for the applicant, whereas Ms. Esther Shoo, learned advocate appeared for the respondent.

Mr. Halfani submitted that the instant application has been preferred under section 5 (1) (a) of the Appellate Jurisdiction Act [Cap.141 R.E. 2019] read together with Rule 45 (a) of the Court of Appeal Rules, G.N. No. 344 of 2019. Mr. Moshi prayed to adopt the applicant's affidavit and form part of his oral submission. He clarified that the basis of this application is due to the decision of this court while exercising its appellate jurisdiction varying over the same issue.

The background giving rise to this application may be stated as follows: The applicant (the plaintiff at trial) successfully filed a civil suit against the respondent (the defendant at trial) before the District Court of Morogoro, at Morogoro (the rial court) where he prayed for judgment and decree to the effect that he be paid by the respondent/defendant among other reliefs, the sum of Tanzanian shillings 33,100,000/= being money received without consideration. Indeed, it is a claim for refund of money that the applicant utilized in buying a house where the Court (Hon. Ngwala, J. (As she then

was)) ruled that since it was a land matter then the trial court had no jurisdiction to entertain the matter. He submitted that alike case was decided by Hon. Mugeta, J, in the case of **KCB Bank Tanzania Limited v. Ramadhani Myolela**, Civil Appeal No. 197 of 2018 (Unreported), where he ruled that a claim for recovery of purchased price does not amount to land dispute. Hence the learned advocate prayed to be availed with the leave so that the Court of Appeal of Tanzania can put a light as to whether a claim for recovery of a purchase price of land is a land matter or not. He cemented that for the applicant to procure a leave, there must be a legal issue that calls for attention of the Court of Appeal as stated in the case of **Jireys Nestory Mutalemwa v. Ngorongoro Conservation Area Authority**, Civil Application No. 154 of 2016 at page 10 (Unreported). He added that, they believe that in the circumstance there is a prima facie arguable appeal.

On the other hand, Ms. Esther Shoo, learned counsel for the respondent prayed to adopt her counter affidavit and form part of her oral submission. She went on submitting that, at the outset, the respondent is strongly opposing the application or applicant's prayers made via chambers summons supported by an affidavit sworn by the applicant. She underscored that the basis of the applicant prayer is that there are two contradicting decisions of the High Court of Tanzania. She invited this court to refer to the case of **James Funke Ngwagilo v. AG**, 2004, TLR where it was held that for the matters to be dealt with by the court, the same must be in pleadings. In another case of **Alex Dotto Massaba v. Attorney General And Three Others**, Miscellaneous Civil Cause No.309, page 10, it was held that affidavit is evidence. Looking at para 11 of the affidavit of the applicant it is stated

that there are two conflicting decisions of the High Court of Tanzania on one issue of the refund of the purchase price. Though did not state which decision among the two is in conflicts with the other decision, she highlighted that the same is not stated in the pleadings.

It was Ms. Shoo's contention that the two decisions are not contradicting each other because the decision in Civil Appeal No. 159 of 2019 issued by Hon. Ngwala, J., (As she then was) did not held that refund of a purchase price is a land dispute. She stated that the trial magistrate failed to distinguish and analyses the cause of action because it was about refund of money and not validity of sale of a landed property which is unlike in the decision reached by Hon. Mugeta, J., in **Jireys Nestory Mutalemwa** (*supra*) which was clear that the plaintiff was claiming for a refund of purchase price of land which was not land dispute. Therefore, she contended that the issue raised is irrelevant as there is no contradiction at all.

Ms. Shoo accentuated that in granting the leave to appeal, the applicant must be able to show chances of success and prima facie grounds for appeal to be addressed before the Court of Appeal (T). To bolster her argument, she cited the cases of **British Broadcasting Corporation v. Sikujua Ng'maryo**, Civil Application No 138 of 2004 (Unreported) and **Gaudensia Mzungu v. The IDM Mzumbe**, Civil Application No 94 of 1999 (All unreported).

Referring to paragraph 8 of her Counter Affidavit, Ms. Shoo contended that the application was filed before the notice been filed in court which is contrary to rule 46 (1) of Court of Appeal Rules. She stressed that the order

under Rule 46 (1) of the Rules, demands first, the lodging of Notice of Appeal and then Application for Leave. To conclude, the learned advocate submitted that this application has no merit, henceforth incompetent.

To re-join, Mr. Halfani conceded the fact that there is a difference in dates. The Notice of Appeal was filed on 22/10/2019, whereas the application for leave and affidavit were filed on 11/10/2019. On the issue whether or not the affidavit does not show which cases contradict one another, the learned advocate underlined that the affidavit contains only facts of the cases, but does not affect the basis of the instant application. Regarding to the second issue that those two cases have no differences in decision, Mr. Halfani submitted that at page 2 of the typed judgment, Hon. Ngwala, J., (As she then was) spoke in respect of the ground of the suit at the trial court, whilst at pages 19-20 she said, the case involved land matters. He accentuated that Hon. Ngwala, J., held that the matter involved a claim of refund of purchase price.

At the close of oral submissions, the court noted that the counsel for the respondent raised a point of law in respect of Rule 46 (1) of the Court of Appeal Rules, 2009. The learned counsels were invited to address the court whether the application for leave was filed in-conformity with the abovementioned Rule. On 18<sup>th</sup> August, 2021 Mr. Halfani Moshi appeared for the applicant whereas, Mr. Jackson Liwewa entered appearance for the respondent. Arguing in support of the point of law raised by the respondent, Mr. Jackson Liwewa submitted that this application for leave to appeal to the Court of Appeal was filed on 11/10/219 while the Notice of Appeal was filed

eleven (11) days later on 22/10/2019 which is contrary to Rule 46 (1) of the Court of Appeal Rules [Cap. 141 R.E. 2019]. He submitted that the law states that:

*“Rule 46 (1) - Where an application for a certificate or for leave is necessary, it shall be made after the notice of appeal is lodged.”*

From the above, Mr. Liwewa had the view that the law requires that a Notice of Appeal shall be lodged first, followed by the respective application. In the instant application, the application was filed first, and the Notice of Appeal followed. In his view, that is inconformity with Rule 46 (1) of the Court of Appeal Rules was violated.

On his part, Mr. Halfani, learned advocate resisted the argument advanced by Mr. Liwewa by stating that there is no any legal challenge because the rule deals with the Orders issued by the Court. He referred this Court to the Rule 83 (2) of the Court of Appeal Rules which says:

*“Every notice shall, subject to the provisions of rules 91 and 93, be so lodged within thirty days of the date of the decision against which it is desired to appeal.”*

He accentuated that the judgment authored by Hon. Ngwala, J., was delivered on 27/09/2019 and the notice was filed on 22/10/2019 which is within thirty (30) days from the date of decision. This means that the application was filed within the prescribed time. He emphasized that from the contents of rule 83 (4) of the Rules, nowhere it indicates that it is

mandatory to lodge a notice before institution of an application for leave. The rule says:

*“When an appeal lies only with leave or on a certificate that a point of law is involved, it shall not be necessary to obtain the leave or the certificate before lodging the notice of appeal.”*

Mr. Liwewa articulated that Rules 83 (2) and (4) of the Court of Appeal Rules, 2009 are not couched in mandatory terms that before filing an application one must file a notice of appeal. He highlighted that even if the court may resort to Rule 46 (1), that is a procedural technicality which is remedied by section 3A (1) and (2) of the Appellate Jurisdiction Act [Cap. 141 R.E. 2019]. The applicant praying the court to grant application. As to the argument that this application is deficiency of legal requirements, Mr. concluded by stating such an argument has no leg to stand and it should be overruled.

To rejoin, Mr. Liwewa contended that the provisions of any statute cannot be read in isolation. It must be read in conjunctions with the other provisions of the law to get the real meaning. Whereas, Rule 45 (a) of the Court of Appeal Rules, 2009 requires an application for leave to be filed within thirty (30) days, Rule 83 (2) says the Notice shall be filed within thirty (30) days. He said, the two Rules does not indicate which one should start first. In his view, Rule 46 (1) is an appropriate provision of the law as the same clearly states that Notice of Appeal shall be first lodged followed by the application for leave. He ended by stating that as this Rule is couched in mandatory terms, the crux of the matter at hand starts here. He prayed this

application be dismissed as the same has been brought before this court without adherence to the legal requirements.

Before dealing with the substance of this application in light with the applicant's affidavit, counter affidavit and rival submissions from both sides, I find apposite to refer to the guiding principle of law relied on by the applicant to move this court. As alluded to above, the application has been preferred by way of a chamber summons made under section 5 (1) (a) of the Appellate Jurisdiction Act [Cap. 141 R.E. 2019] (the AJA) read together with Rule 45 (a) of The Court of Appeal Rules, G.N. No.344 of 2019 (the Rules). It read:

**“Section 5 (1) of AJA** - *In civil proceedings, except where any other written law for the time being in force provides otherwise, an appeal shall lie to the Court of Appeal-*

*(a) against every decree, including an ex-parte or preliminary decree made by the High Court in a suit under the Civil Procedure Code, in the exercise of its original jurisdiction.”*

**“Rule 45 of the Rules** - *In civil matters:*

*(a) notwithstanding the provisions of rule 46 (1), where an appeal lies with the leave of the High Court, application for leave may be made informally, when the decision against which it is desired to appeal is given, or by chamber summons according to the practice of the High Court, within thirty days of the decision; Without wasting time, I am convinced to enlighten the following two*



*observations which will assist me to easily determine the raised issue.”*

Basing on the realm of the above provisions of the law and submissions from both sides, I have examined the court record and the rival submissions by the parties, the central issue of determination is whether this application is meritorious or otherwise.

**One**, it should be firstly noted that, an application for leave to appeal to the Court of Appeal is usually granted if there is good reason, normally on a point of law or on a point of public importance, that calls for the Court’s intervention. Principally, the underlying principle on aspect of leave to appeal to the Court of Appeal was well articulated by the Court of Appeal in **Harban Haji Mosi and Another v. Omar Hilal Seif and Another**, Civil Reference No. 19 of 1997 (Unreported) where it was held that:

*“Leave is grantable where the proposed appeal stands reasonable chances of success or where, but not necessarily, the proceedings as a whole reveal 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.”*

The same principle was re-stated and in lucidity expounded by the Court of Appeal of Tanzania in **British Broadcasting Corporation v. Eric Sikujua Ng’maryo** (supra). In this case, as it was cited in the case of **Rutagatina C. L. v. The Advocates Committee and Another**, Civil

Application No. 98 of 2010 (Unreported), the Supreme Court of the Land had this to say:

*“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 the 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 case or arguable appeal. (See: **Buckle vs. 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.”*

From the forgoing authorities, it is undisputed fact that for the applicant to succeed in the instant application, his affidavit in support of his application must demonstrate that the ground of the intended appeal raises arguable issue in the appeal. In other words, the raised ground of appeal or a point of law must suggest commendable appeal before the Court of Appeal of Tanzania.

**Two;** I have keenly taken time to read the contents of paragraph 11 (a) and (b) of the affidavit in support of an application for leave to appeal to the court of appeal which raises a point of law as to conflicting decisions by the High Court of Tanzania as to whether the trial court would have determined the dispute pertaining to recovery of purchase price of land or not. Simply to say as submitted by Mr. Halfani, whether the claim of purchase price amounts to a land dispute. The fact that the specific decisions were

not stated, however the Court would have taken a judicial notice on existence of the same since affidavit is evidence.

Further, I had an opportunity to read the two judgments which the applicant contends to portray conflicting decisions to warrant leave of this court, which is the decision of the High Court (Ngwala, J.) in Civil Appeal No. 179 of 2019 envisioned to be appealed and the one authored by my learned brother Hon. Mugeta, J., in **Jireys Nestory Mutalemwa** (supra). Upon considered these two judgments, I am inclined to subscribe fully to the contention made by the learned counsel for the applicant that the two cases have all the qualities of being termed as conflicting decisions. This is simply because in both decisions the Judges while exercising appellate jurisdictions have held in respect of the competency of the trial court to determine the matter pertaining to recovery of purchase price on a matter related to land matters. Despite the indifference of the factual version of the two cases, but the central points which the applicant seeks for audience of the Court of Appeal is, on my opinion, clear that each Judge had his or her own observation as to whether an action or suit to recover a purchase price of land had to be necessarily filed in the tribunals or courts exclusively vested with the powers to determine land matters or it is just a normal civil suit.

In the decision reached by Hon. Mugeta J., just like the one handled by Hon. Ngwala, J. in Civil Appeal No. 159 of 2017, shows that in the original suit, the plaintiff claimed for recovery of a purchase price, and Hon. Mugeta J., while exercising appellate jurisdiction stressed on the proposition that for the matter to be considered as the land dispute there are two indicators that

may be viewed, that there is either ownership of land or right to possession which includes occupation by tenancy. Thus, the recovery of purchase price does not amount to a land dispute.

In similar terms, but with a contradicting finding the later decision in Civil Appeal No. 159 of 2017, Hon. Ngwala, J., (as she then was) while the plaintiff was claiming for a refund of purchase price of land before the trial court, in her deliberation while exercising appellate jurisdiction, the Court had the following to say at page 19:

*“...In this case it seems the trial magistrate, decided to take the risk of assuming jurisdiction despite being alerted at the earliest stage that the court had no jurisdiction. What is clear, from the proceedings is that the trial magistrate, did not follow the provisions of section 4, 33 (1) and 37 (1) of the Land Disputes Courts Act [CAP. 216 R.E. 2002] now (Revised Edition 2019) which vests exclusive jurisdiction on landed matters in the District Land and Housing Tribunal and the High Court, as the Courts which shall have and exercise original jurisdiction on land matters.”*

From the above observation by the appellate Court, I do not tend to divulge to the issue so raised, but rather to ascertain if at all the instant application is commendable for suggested appeal. Considering the nature of it being a point of law, I believe that only through interpretation by the Court of Appeal the rights of the parties will be dispensed with. As regards to the point of law raised by the counsel for the respondent, I do not wish to be detained by it here since the instant application was filed timely though it preceded the notice of appeal contrary to rule 46 (1) of the Rules. Both the

notice of appeal and the application for leave were filed timely as required by the provisions of Rules 45 (a) and 83 (2) of the Rules. Henceforth, in the circumstance of this case it is prudent to, and I hereby do the invocation of the overriding objective principle enshrined under section 3 A (1) and (2) of the Appellate Jurisdiction Act [Cap. 141 R.E. 2019], which intends to facilitate the just, expeditious, proportionate and affordable resolution in as far as this application is concerned.

From the foregoing observations, to the extent of my findings I am satisfied that the applicant has demonstrated sufficient reason to warrant this Court exercise its discretionary powers to grant the prayer sought by the applicant in line with the the conditions envisaged under section 5 (1) (a) of the Appellate Jurisdiction Act [Cap. 141 R.E. 2019] read together with Rule 45 (a) of The Court of Appeal Rules, G.N. No.344 of 2019.

Accordingly, I allow the application and hereby grant leave to the applicant to appeal to the Court of Appeal of Tanzania against the judgment and decree of the High Court of Tanzania in Civil Appeal No. 159/2017. The appeal shall be lodged within sixty (60) days of delivery of this ruling. Costs shall abide by the outcome of the intended appeal.

**I so order.**

**DATED at MOROGORO this 06<sup>th</sup> day of December, 2021.**



**M. J. CHABA**

**JUDGE**

**06/12/2021**

Ruling delivered at my hand and the Seal of this Court in Chambers today on the 6<sup>th</sup> December, 2021 in the presence of Mr. Halfani Moshi, leaned advocate for the appellant and Prof. Binamungu, learned advocate for the respondent.



**M. J. CHABA**

**JUDGE**

**06/12/2021**

Rights of the parties fully explained.



**M. J. CHABA**

**JUDGE**

**06/12/2021**