**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**
**MOSHI DISTRICT REGISTRY**
**AT MOSHI**
**MISC.CIVIL APPLICATION NO.41 OF 2021**

*(C/F Civil Appeal No.4 of 2021 of the High Court of Tanzania, Originally Civil Case No.17 of 2019 of the Resident Magistrate Court of Moshi at Moshi)*

**JUSTUS NTIBANDETSE..... APPLICANT**

**VERSUS**

**CRDB BANK PLC ..... RESPONDENT**

**RULING**

*6/4/2022 & 26/5/2022*

**SIMFUKWE, J.**

The applicant herein after being aggrieved by the decision of this court delivered on 25th day of August 2020 before Hon. Mkapa, J intends to appeal to the Court of Appeal of Tanzania against the said decision. As per the requirement of the law, the appellant is required to apply before the High Court for the certificate on the point of law. Thus, the applicant accordingly lodged the instant application.

The application has been filed under **section 5(1) (c) of the Appellate Jurisdiction Act (Cap 141 R.E 2019).** In this application, the applicant prayed for the following Orders:

1. *This Honourable Court be pleased to grant the applicant leave to appeal to the Court of Appeal of Tanzania against the judgment and decree of the High Court of Tanzania before*

*Hon S.B. Mkapa J in the High Court Moshi Registry Civil Appeal No.4 of 2021.*

2. *Costs to be in the course.*

The application was argued through written submissions since the parties were unrepresented.

In support of the application, the applicant who was assisted to draft the Submission by the learned advocate E. F. Mbise submitted to the effect that the law requires this court to go through the grounds of appeal as listed in the chamber summons and application to see whether the grounds of appeal are worth for the appeal. That, the same is done after the High Court to scrutinize the grounds of appeal in relation to the impugned judgment which is the judgment of Civil Appeal No. 4 of 2021.

The applicant referred to paragraph 7 of his affidavit where he listed the grounds of appeal that; -

1. *That, the Hon. High Court Judge failed to re-evaluate the evidence in relation to the grounds of appeal hence coming out with erroneous judgment.*
2. *That, the Hon. High Court Judge failed to analyze evidence by appellant vis a vis that of the Respondent as a result she came out with erroneous judgment.*
3. *That, the Hon. High Court Judge applied wrongly the principle of privity of contract in her judgment as a result came out with erroneous judgment.*

In his submission, the applicant relied upon the above grounds of appeal.

Submitting in respect of the first ground of appeal that this court failed re-evaluate the evidence; the applicant submitted to the effect that the grounds of appeal before this court against the decision of Resident Magistrate Court were that: -

1. *That, the trial magistrate erred in law and fact in holding that despite the agreement between the appellant (the applicant herein) and PASS (guarantor) in which PASS had already settled the debt, the respondent had to proceed with the loan recovery measures.*
2. *That the learned trial magistrate erred in law and fact in failing to comprehend the fact that the appellant was misdirected in the whole process that in case of any loss PASS would cover the loss.*
3. *That, the learned trial magistrate erred in law and fact in failing to consider the evidence adduced by the appellant regarding the reasons for non- repayment of the loan.*
4. *That, the trial magistrate erred in law and fact in concluding that there existed a contract of guarantee between PASS and respondent while it was a contract of indemnity.*

The applicant further quoted page 7 the first paragraph of the trial Court judgment in Civil Case No. 17 of 2019 which reads: -

> *"Sixth, it is even not disputed that the plaintiff never discharged his duty and the same had been discharged by his Guarantor".*

Also, the applicant referred to page 11, 2nd paragraph of the High Court judgment in Civil Appeal No. 4 of 2021 in which the Honourable Judge of this court said that:

> *"It is clear from a reading of the exhibits the fact that the agreement is silent on PASS being guarantor to the loan acquired by the appellant (applicant herein)."*

Construing the above quotation, the applicant stated that the learned judge tried to say that there is no document to prove the contract of guarantee between the applicant herein and his guarantor (PASS).

The applicant further referred to article V of exhibit D5 which was admitted by the trial Court as evidence which reads: -

> *"This agreement shall be governed and construed in accordance with the laws of the United Republic of Tanzania."*

It was the applicant's argument that as per **section 78 of the Law of Contract Act, Cap 345** the contract of guarantee may be oral or written. Thus, the findings by the first appellate court that there was no contract of guarantee between the applicant herein and his guarantor (PASS) simply because there was no written agreement of the two parties is contrary to **section 78 of the Law of Contract Act** (supra) which recognizes both oral and written contract of guarantee. Also, he stated that the oral guarantee agreement is seen at page 18 and 21 of the trial court proceedings where PW3 and PW4 testified that the farmers including them and the applicant herein had a guarantor by the name of PASS.

Further to that, the applicant referred the court at page 3, 4th paragraph of the trial Court judgment which is to the effect that:

> *"Following such failure to repay the loan his guarantor who is PASS took over. The guarantor cleared the loan amount as it can be revealed through the bank statement which was admitted in court as exhibit P2. "*

Reference was also made at page 4, 2nd paragraph of trial Court judgment, which reads: -

> *"Concerning the agreement between plaintiff (applicant herein) the defendant (respondent herein) and PASS (The guarantor), it was PW3 and PW4's evidence that they also attended the meeting involving the trio, and that it was agreed that PASS will guarantee their loan upon climate change."*

Basing on the above arguments, it was the applicant's contention that the above evidence was not challenged anywhere in the trial court judgment or in the proceedings. In other words, the same were accepted by the respondent herein as can be seen at page 5 first paragraph of the trial court judgment where DW1 testified that: -

> *"They started by giving notice to the plaintiff and claimed for a guarantee from PASS. PASS paid the guarantee..."*

In that respect, the applicant was condemning the first appellate court for failure to consider exhibit P2 and the evidence by PW3 and PW4 which proves the contract of guarantee between the applicant herein and his guarantor PASS. The applicant thus questions whether it can be

said that the first appellate Court performed its work as required by the law? For him, the answer to this question is found in the judgment of the Court of Appeal in the case of **Paulina Samson Ndawavya Vs Theresia Thomasi Madaha, Civil Appeal No. 45 of 2017** (unreported) where at page 17 it was held that it is a duty of the trial court to evaluate evidence of each witness and make findings on the issues. The function of the first appellate court is to re-appraise (re-assess) the evidence on the record and draw its own inferences and findings having regard to the fact that the trial court had an advantage of watching and assessing the witnesses as they gave evidence.

Therefore, it was the applicant's comment that it cannot be said that the first appellate court re-evaluated evidence of each witness and made findings of the issues as demonstrated above. He opined that the remedy for this failure is to appeal to the Court of Appeal of Tanzania so that it can step in and make a proper re-evaluation of evidence.

The applicant also condemned the general findings of the first appellate court which decided to the effect that since PASS did not guarantee the applicant in his loan agreement with the Respondent herein the same disposes of the 2nd, 3rd and 4th grounds of appeal for lacking merit. It was the applicant's opinion that the first appellate Judge erred in making such a general statement because the applicant herein gave evidence to support the 2nd, 3rd and 4th grounds of the appeal to the High Court. He added that the Honourable Judge was supposed to go through the applicant's evidence in comparison with the evidence by the respondent and come out with her own findings as held in **Paulina Samson Ndawavya case** (supra).

Submitting in respect of the 2nd ground of appeal on failure to analyse appellant's evidence vis a vis that of respondent; it was the applicant's contention that it is trite law that for fair hearing there must be a comparison between the evidence given by the plaintiff (applicant herein and defendant (respondent herein). That, the 1stappellate court had a duty of re- assessing the evidence on record of both sides of the case and come out with its own decision. The applicant was of the view that, the first appeal is a form of re-hearing of evidence for the second time. To substantiate his argument, the applicant referred to the judgment of the Court of Appeal in the case of **Kaimu Said vs The Republic, Criminal Appeal No. 391 of 2019** at Page 12 2nd paragraph which held that: -

> *"...The High Court, as the first appellate Court was bound to analyze the evidence for both sides with the view to satisfy itself that the finding of the trial court was justified on the evidence."*

On that basis, the applicant condemned the first appellate court for failure to comply with the above position of the law. That, nowhere the court made any comparison of the evidence from the two sides of the suit. Basing on that reason, it was the applicant's prayer that this court should grant leave to appeal to the Court of Appeal of Tanzania in order to rectify this anomaly.

Regarding the 3rd ground of appeal, the applicant condemned the Hon. Judge for wrongly applying the principle of privity of contract which resulted to erroneous judgment. He stated to the effect that, only a person who is a party to the contract can derive benefits from it but a

stranger cannot. That, the contract cannot impose obligations to the stranger. Therefore, the admitted contract (D5) was between the Respondent herein and PASS (the guarantor of the applicant herein) and thus the same cannot impose any obligation to the applicant since he was not a party to that contract and he never signed it.

It was further argued that the Honourable Judge had a different legal position saying that exhibit D5 which is a contract between PASS and the Respondent herein which can impose obligation binding the applicant herein and the applicant herein cannot challenge that because by doing so he will be interfering the contract between the Respondent herein and PASS while he is not a party to that contract. It is these two opposing sides on the point of law which the applicant intends to be resolved by the Court of Appeal of Tanzania. Thus, he prayed for leave to appeal to the Court of Appeal to resolve the matter.

In the end, the applicant implored this court to grant this application for leave with costs so that he can appeal to the Court of Appeal of Tanzania.

In reply, the respondent's advocate Mr. Rwiza submitted that the applicant's submission is misconceived and out of context and that its argument has been coached on unfounded arguments. That, the same is based on hopeless reasoning.

He argued that in granting leave to appeal, the court must satisfy itself that the appeal stands reasonable chances of success in order to spare the Court of Appeal from unmeriting matters and to enable it to give adequate attention to cases with true public importance. To support his submission, the learned advocate referred to the decision of the Court of Appeal in the case of **Rutagina C.L Vs. Advocates Committee &**

**Another, Civil; Application No. 98 of 2010** and the case of **National Bank of Commerce Vs. Maisha Mussa Uledi (Life Business Centre) Civil Application No. 410/07 of 2019.** In the case of National Bank of Commerce, it was observed that:

> *"In an application for leave to appeal, what is required of the court hearing such an application is to determine whether or not the decision sought to be appealed against raises legal points which are worthy consideration by the Court of Appeal."*

Basing on the above authority, it was Mr. Rwiza's submission that the instant application is devoid of merits, since the raised points are not worth to be considered by the Court of Appeal. He stated further that this application is just a shear move by the Applicant to delay the Respondent from taking recovery measures including sale of the mortgaged property, which is in dispute for purpose of recovering its money.

The learned advocate replied in respect of the expected 1st ground of appeal on re-evaluation of the evidence. He submitted to the effect that the evidence adduced by the Applicant in the lower court was referring to the repayment of the loan. That, it is undisputed that the Applicant breached the terms of the loan agreement and he did not raise any contractual dispute on the loan Agreement, and thus, the court found no prima facie cause of action from the pleadings. Mr. Rwiza stated further that the issue of guarantee by the Private Agricultural Sector Support Trust (PASS) was an office arrangement between PASS and the Respondent under which PASS was to provide credit guarantee for

customers who had no sufficient security to cover the Loans. That, even the knowledge as to the meaning of PASS, guarantee was given to all customers intended to benefit from that arrangement.

The learned advocate commented that the recovery process for unpaid loans from defaulters like the applicant is always first directed to the borrower to enforce him to repay the same by following all recovery procedures. That, PASS guarantee comes in to remedy the situation for the unsettled; however, such arrangement would not exonerate the respondent from taking recovery measures against benefiting borrowers like the applicant.

Also, the learned advocate stated that the issue of bank statement which was referred by the applicant to substantiate that the loan was fully settled was misconceived because that is a Personal Account and not Loan Account of which as for now it is still indebted and which require the Applicant to repay it.

Basing on such observations, it was Mr. Rwiza's considered view that such point is devoid of merits and is not worth consideration by the Court of Appeal.

On the issue of failure to analyze evidence by the appellant vis a vis that of the Respondent as raised by the applicant in his 2nd intended ground of appeal, Mr. Rwiza was of different opinion; that the same was properly analysed which enabled the Judge to come up with the right judgment. It is also the strong belief of Mr. Rwiza that the analysis was made by the Hon. Judge before arriving at that decision. Thus, the allegation that the honourable Judge failed to make re-assessment of the parties' evidence has no merit at all for consideration. Mr. Rwiza insisted that the

arguments by the applicant are hopeless and baseless. He wondered the measurement used by the Applicant to make a conclusion that the judgment was erroneously reached after failing to make analysis between the parties' evidence. The respondent's advocate was of the view that in the eyes of law this is a point of fact and not point of law. Thus, the same cannot be entertained by the Court of Appeal of Tanzania (CAT).

Submitting in respect of the 3rd intended ground of appeal, that the appellate court wrongly applied the principle of privity of contract hence reached to erroneous judgment; it was Mr. Rwiza's debate that it is the matter of principle that the Privity of Contract imposes the contractual rights and duties to the parties of a contract. That, the immediate parties to the contract are the ones bound by the terms of the contract. Thus, it is obvious that the applicant admitted that he was not a party to the Agreement between the Respondent and PASS and therefore the issue of Privity of Contract does not apply here since he was not a party to the contract.

It was further contended that the Hon. Judge was quite right to come with the decision in considering also the Concept of Privity of Contract, whereby she held that the Applicant was a stranger in the Guarantee Agreement between the respondent and PASS. It was Mr. Rwiza's argument that the intended point is devoid of merits which does not need consideration by the Court of Appeal.

Lastly, it was submitted by the respondent's advocate that the Applicant has not demonstrated any point of law worth consideration by the Court

of Appeal. That, the Application is devoid of any merit and the same should be dismissed with costs.

In rejoinder, the applicant quoted the following paragraph of the respondent's submission that:

*"The recovery process for unpaid loans from defaulters like the applicant is always first directed to borrower to enforce him to repay the same by following all recovery procedures. PASS guarantee comes in to remedy the situation for the unsettled: however, that arrangement would not exonerate the Respondent from taking recovery measures against benefiting borrowers like the applicant."*

The learned counsel for the applicant argued that from the above quotation Exhibit D5 was admitted by the trial court. Therefore, the issue for determination by the Court of Appeal in the ground of re-evaluating the evidence is whether exhibit D5 has any legal significance in the eyes of the law as far as this case in concerned.

It was the applicant's view that in the eyes of the law the said exhibit D5 which has been relied strongly by the respondent has no any legal significance because of the following reasons; ***first,*** such exhibit D5 contravenes the principle of privity of contract between the Respondent herein and the PASS (guarantor). That, the applicant was not a party to that contract and therefore the said exhibit D5 cannot put any obligation to the third party (the applicant). ***Second,*** the said exhibit D5, breaches **section 97 of the Law of Contract Act** (supra) which is similar to section 97 which is to the effect that the creditor (Respondent) cannot sue the principal debtor nor claim any monies from him after the guarantor (PASS) had settled the loan. He was of the view that such

section is to be read together with **section 92** of the same Act. That, after the guarantor had settled the loan the respondent (BANK) had nothing to claim from the applicant herein as their money is already paid back by the guarantor (PASS).

He insisted that **section 97** was not complied with by the trial court nor by the first appellate court. Thus, once the contract contravenes the provision of the law like it is for exhibit D5 the same becomes illegal and therefore it cannot be enforced by law.

Basing on the cited laws, the applicant prayed the court to grant leave to go to the Court of Appeal of Tanzania so that the matter could be considered intensively.

On the allegation that the respondent did not know which measurement was used by the applicant to make a conclusion that the Hon. Judge reached to the erroneous conclusion and that it was supposed to be a point of fact and not a point of law; the applicant referred to the case of **Kaimu Said Vs Republic, Criminal Appeal No 391 of 2019** (unreported) in which the Court of Appeal at page 7 stated that: -

> *" We understand that it is settled law that a first appeal is in the form of a re-hearing as such the first appeal court has a duty to re-evaluate the entire evidence in an objective manner and arrive at its own finding of fact, if necessary."*

Basing on the above quotation, the applicant reiterated that it is the duty of first appellate court to re-hear and re-evaluate the evidence. He insisted and reiterated that the first appellate court did not perform this duty. Thus, leave is required so that he can go to the Court of Appeal for

the same to perform a duty which was required to be performed by the High Court or otherwise order the case be remitted back to the High court before another judge for re-hearing. The applicant was of the view that this is a point of law and not a point of fact as alleged by respondent.

The applicant also reiterated his submission in respect of the principle of privity of contract.

In conclusion, he prayed to be granted leave with costs to appeal to the Court of Appeal of Tanzania.

Before scrutinizing the application, I wish to start with the obvious. Leave is usually granted if there is good reason, normally on a point of law or on point of public importance as it was held in **BRITISH BROADCASTING CORPORATION V ERIC SIKUJUA NG'MARYO, Civil Application No. 133 of 2004 (Unreported)** 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 must, however be judiciously exercised 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 or useless or hypothetical, no leave will be granted."*

Also, in **Sango Bay Estates Ltd & Others V Dresdner Bank** [1971] EA 17 (2) the East African Court of Appeal held that:

*"Leave to appeal from an order in civil proceedings will normally be granted where prima facie, it appears that there are grounds of appeal which merit serious judicial consideration."*

Having established as such, I now come to the merit or otherwise of this application. I wish to state that the parties submitted as if they were arguing the grounds of appeal. It is like they placed this court to step into the shoes of the Court of Appeal; while this court was only dealing with an application for leave to appeal. In the application of this nature, the parties ought to state why leave should or should not be granted. The Court of Appeal when faced the same situation where the parties argued in support of appeal instead of leave, in the case of **Jireys Nestory Mutalemwa vs Ngorongoro Conservation Area Authority, Civil Application No. 154 of 2016** at page 6 it held that:

*"...Similarly, in applications of this nature, it is a well-established principle of law that the Court is not expected to determine the merits or otherwise of the substantive issues before the appeal itself is heard..."*

At page 10 of the case of **Jireys Nestory Mutalemwa** (supra) as far as the factors of granting leave are concerned, the Court of Appeal had this to say: -

*"...much as the grant of leave is discretionary, yet it is not automatic. The court adjudicating on such application is not left free to do so. It can grant leave to appeal* ***only where the grounds of the intended appeal raise arguable issues for the attention of the Court.*** [Emphasis added]

I subscribe fully to the above authorities. In the instant application, I am of considered opinion that the grounds of appeal raised are arguable and warrants judicial consideration. The intended grounds of appeal as raised at paragraph 7 of the Applicant's affidavit raised issues of importance to be considered and adjudicated by the Court of Appeal.

I thus grant leave to the applicant to appeal to the Court of Appeal as prayed. Considering the circumstances of the case, no order as to costs.

It is so ordered.

Dated and delivered at Moshi this 26th day of May, 2022.


**S. H. SIMFUKWE**

**JUDGE**

**26/5/2022**