

**IN THE HIGH COURT OF TANZANIA  
(DAR ES SALAAM DISTRICT REGISTRY)  
AT DAR ES SALAAM**

**MISC. CIVIL APPLICATION NO. 19 OF 2022**

(Originating from the Ruling of the High Court in Misc. Civil Application No.372 of 2021,  
Dr. E.I. Laltaika, J. dated 13<sup>th</sup> December 2021)

**THE REGISTERED TRUSTEES OF SHADHULIY LIYASHURTIY..... APPLICANT**

**VERSUS**

**MAHAFUDH SALIM OMARY BIN ZAGAR**

**(Administrator of the estate of the late Salim Omary).....RESPONDENT**

**RULING**

Date of last Order: 19/05/2022.

Date of Ruling: 17/06/2022.

**E.E. KAKOLAKI, J**

The Applicant herein preferred this Application under sections 5(1)(c) of the Appellate Jurisdiction Act, [Cap. 141 R.E 2019] (the AJA) and any other enabling provision of the law for grant of leave to appeal to the Court of Appeal of Tanzania against the Ruling and Drawn Order of this court, Dr. E.I. Laltaika, J, in Misc. Civil Application No. 372 of 2021, handed down on 13/12/2021. The Application is supported by the affidavit of applicant's advocate, one Edward Peter Chuwa and the same is strongly resisted by the respondent who affirm and filed his counter affidavit to that effect.

The background story in which this application originates as gathered from the applicant's affidavit can be briefly stated as hereunder. The Applicant filed an application for objection proceedings seeking among others an order of this Court to suspend execution proceedings in respect of Civil Case No. 35 of 1982, preferred by the Respondent/deed holder against the judgment debtor (The Registered Trustees of Shadhily) which was pending before the Deputy Registrar in this Court. It transpired that prior to filing that application, the applicant allegedly was served with the summons to appear before the Deputy Registrar and defend the application in which she is not party to as her name is The Registered Trustees of Shadhily Liyashurtiy a body dully incorporated under the Trustees Incorporation Act, [Cap 318 R.E 2002] and not The Registered Trustees of Shadhily whom the Eviction Order was issued against by this Court in Civil Case No. 35 of 1982, who does not exist. Before the Application could be heard, the Respondent raised the preliminary Objection on points of law on the grounds that; **One**, the Application is instituted beyond time limit prescribed in Part III, paragraph 6 of the Law of Limitation Act, [Cap 89 R.E 2019]. **Second** that, the Application is unnecessarily delayed and contravenes the provisions of Order XXIX Rule 57(1) & (2) of the Civil Procedure Code, [Cap 33 R.E 2019]. It was the finding

of this court in its ruling that, the application was preferred out of time and in contravention of the Law of Limitation Act, [Cap. 89 R.E 2019], hence proceed to dismiss the application with costs. Disgruntled, the applicant filed a Notice of appeal to the Court of Appeal against the said Ruling before he preferred the present application for leave so as to be allowed to file his appeal to the Court of Appeal.

With leave of the court hearing proceeded by way of written submissions as both parties were represented by learned advocates. The applicant enjoyed the service of Mr. Edward Chuwa, learned advocate whilst the respondent fended by Capt. Ibrahim Mbiu Bendera, learned advocate.

In this ruling I am not intending to reproduce the submissions by the two legal minds but rather I will summarize them in the course. In his submission while adopting the supporting affidavit Mr. Edward Chuwa for the Applicant argued that, the impugned decision was arrived erroneously as the Court wrongly reckoned the time from 1/09/2016 when the Eviction Order in respect of Civil Case No. 35 of 1982 as the Eviction Order subject of the impugned Ruling was issued by Hon. J.E. Fovo, Deputy Registrar on 22/10/2021. It is his further argument that, time could not run against the applicant from 01/09/2016 for being stranger to the objection proceedings

as summons of the judgment debtor The Registered Trustees of Shadhily was wrongly addressed and served to the applicant intending to evict her from her property situated at Plot No.19 Block No. M, Twiga Street, Kariakoo Area, Dar es salaam. Citing to the Court the case **Buckle Vs. Holmes**, 1926 All ER 90, where it was held that, the decision whether to grant leave or not is in the discretion of the Court which has to be exercised judiciously, he urged the court to find merit in this application. To back up his prayer on the argument that there is arguable issues to the intended appeal, he cited the case of **Harban Haji Mosi and another Vs. Omar Hilal Seif and another**, Civil Reference No.19 of 1997 which cited with **Approval British Broadcasting Corporation Vs. Eric Sikujua Ng'amaryo**, Civil Application No.138 of 2004 (all CAT decisions unreported).

In his reply submission Capt. Bendera while adopting the counter affidavit attacked the applicant's submission terming it to be misconceived, wanting and based on untenable adverse legal interpretation of precedents from our courts for going against the test for granting leave as provided under section 5(1)(c ) of AJA, thus this application should be dismissed with costs. He argued the purpose of leave stage before appealing is to prevent baseless, unwanted and un-worth appeals to reach the Court of Appeal. Citing to the

Court the cases of **Simon Kabaka Daniel Vs. Mwita Marwa Nyang'anyi & 11 others** [1989] TLR 64, **Said Ramadhani Mnyanga Vs. Abdallah Saleh** [1996] T.L.R 74, providing for the conditions for grant of application for leave, he contended there is no point of law or contentious matter raised by the applicant in the present matter deserving attention of the Court of Appeal.

With regard to the contention by Mr. Chuwa that the sought to be stayed eviction order was the one resulted from the decision before Hon.Fovo (DR) he said that it was not a matter which was raised or even mentioned before Hon. Laltaika, J, for consideration before he arrived to the decision he reached to. He insisted the decision by Justice Laltika, J in which the leave is sought by the Applicant against was not concerned with the orders issued by Hon.Fovo on 22<sup>nd</sup> October 2021, but it was an application to suspend execution proceedings under eviction orders issued by P.R. Kahyoza on 31<sup>st</sup> August,2016. Thus it was correct for the court to rely on the date of the said eviction order to adjudge that the applicant has spent more than five (5) years hence out of time. In his rejoinder submission Mr. Chuwa almost reiterated his earlier submission in chief and added that, the referred eviction order of 31<sup>st</sup> August 2016 by Capt. Bendera was not subject of execution

proceedings which were prompted by the summons dated 03<sup>rd</sup> November 2020. Hence insisted that, this application has merit as there are intricate points of law to be addressed by the court of Appeal.

I have dispassionately taken into consideration the fighting submissions by both parties as well as thoroughly perused the affidavit and counter affidavit in support and against this application. It is trite law that the discretion whether to grant leave or not lies solely on the shoulders of this Court and the same must be exercised judiciously. The position is so as leave is not automatically granted as the applicant is duty bound to establish to the Court that, the grounds of appeal raise issues of general importance or a novel point of law or where the grounds have a prima facie of arguable appeal. See the cases of **Buckle Vs. Holmes**, (supra), **Wambele Mtimwa Shamte Vs. Asha Juma**, Civil Application No. 45 of 1999, **British Broadcasting Corporation Vs. Eric Sikujua Ng'imaryo**, Civil Application No. 133 of 2004 and **National Bank of Commerce Vs. Maisha Musa Uledi (Life Business Centre)**, Civil Application No. 410/07 of 2019 (all CAT-unreported) to mention few. In **Buckle Vs. Holmes**, (supra), it was stated that:

*"Leave to appeal is not automatic. It is discretion upon the court on whether to grant leave or not. The discretion however, has to be exercised judiciously. An application for leave to appeal can be granted where the grounds of appeal are likely to raise issues of general importance or a novel point of law or where the grounds show a prima facie or arguable appeal."*

On factors to be considered before the grant of leave the Court of Appeal in the case of **British Broadcasting Corporation** (supra) held thus:

*"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 have a prima facie of arguable appeal.** However, where the grounds of appeal are frivolous. Vexatious or useless or hypothetical, no leave will be granted."* (Emphasis supplied)

I am also alive to the settled law that, in determining whether to grant leave or not this court is not enjoined to determine the merit of the ground sought to be argued, but rather to establish whether out of it there is arguable appeal and the grounds raised are not vexatious, useless or hypothetical.

See the cases of **Bulyankulu Gold Mine Limited and 2 Others Vs. Petrolube** (T) Limited, Civil Application No. 364/16 of 2017 (CAT-unreported) and **Jireys Nestory Mutalemwa Vs. Ngorongoro Conservation Area Authority**, Civil Application No. 154 of 2016 [2021] TZCA 9.

Now back to the matter at hand the issue is whether the applicant established the grounds warranting this court to exercise its discretion in granting or not the prayers sought in the chamber summons. Gathered from the applicant's affidavit and submissions in support of this application, I failed to come across any specific ground raised by the applicant intended to be addressed by the higher court, in her attempt to convince this court that one exist, apart from general arguments that it exists. However, in paragraph 7 of her affidavit she averred that and I quote:

*"7. That it was manifestly wrong on the part of the honourable judge to hold that the application was time barred as the applicant was an objector to the execution and a different person from the judgment debtor and thus time could not run against her."*

I have had time to peruse the ruling by this court in Misc. Civil Application No.372 of 2021, intended to be appealed against handed down on 13<sup>th</sup>



December, 2021. What is deciphered therefrom is the uncontroverted fact that, the court relied on the eviction order dated 01/09/2016 to reckon the time limitation against applicant herein to file the said application in which she contends was not a party to, as the judgment debtor therein is The Registered Trustees of Shadhuly, who does not exist. It is further undisputed fact that, the said Registered Trustees of Shadhuly is a different legal person to The Registered Trustees of Shadhuly Liyashurtiy, who was the objector in the said objection proceedings in Misc. Civil Application No. 372 of 2021, and stranger to the proceedings. Now, whether time could be reckoned against the appellant who is stranger to the proceedings (objector) from 01/09/2016 for an order which she was not a party to, I find is an arguable issue worth determination by the Court of Appeal. I therefore disagree with Capt. Bendera that this application is misconceived, wanting and untenable and hold to the contrary that the applicant has raised good ground warranting this court grant her leave. Hence the above raised issue is answered in affirmative.

That said and done, I find this application to be meritorious. Leave to appeal to the Court of Appeal is therefore granted with no order as to costs.

DATED at Dar es salaam this 17<sup>th</sup> day of June 2022.

E. E. KAKOLAKI

**JUDGE**

17/06/2022.

The Ruling has been delivered at Dar es Salaam today on 17<sup>th</sup> day of June, 2022 in the presence of Mr. Mahfudhu Mbagwa, advocate holding brief for Ms. Anna Lugendo advocate for the Applicant and Capt. Ibrahim Bendera advocate for the Respondent and in the presence of Ms. Asha Livanga, Court clerk.

Right of Appeal explained.

E. E. KAKOLAKI

**JUDGE**

17/06/2022

