

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

AT ARUSHA

MISC. CIVIL APPLICATION NO. 37 OF 2021

(Arising from the judgment and decree of the High Court of Tanzania (District Registry of Arusha) at Arusha by His Lordship Masara, J. delivered on the 30th April 2021 in Civil Appeal No. 09 of 2020)

CRDB BANK PLC.....APPLICANT

VERSUS

FANUEL ZAKAYO.....1ST RESPONDENT

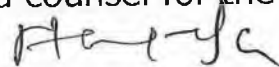
ANETH RAPHAEL.....2ND RESPONDENT

RULING

19.04.2022 & 28.04.2022

N.R. MWASEBA, J.

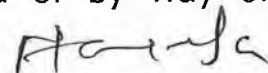
This application by the applicant, CRDB BANK PLC is made under Section 5(1)(c) of the Appellate Jurisdiction Act, Cap. 141 R.E 2019 and Section 95 of the Civil Procedure Code, Cap 33, R.E 2019. According to the chamber summons, the applicant is praying for leave to appeal to the Court of Appeal of Tanzania (CAT). The application is supported by an affidavit sworn by Mr John Mushi, learned counsel for the applicant. And



it was opposed by the 1st respondent's counter affidavit sworn by Mr. Lengai Nelson Merinyo, his learned counsel.

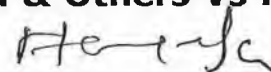
The affidavit supporting the application deponed that, on 3rd day of February 2020 the Resident Magistrate court of Arusha delivered its judgment in Civil Case No. 5 of 2018 against the 1st respondent herein. Aggrieved, the 1st respondent filed an appeal to this court challenging the said decision via Civil Appeal No. 09 of 2020. Upon the conclusion of the hearing of an appeal, this court on 30th day of April 2021 delivered its judgment and proceeded to quash the decision of the Resident Magistrate's Court of Arusha and awarded costs to the 1st respondent solely against the applicant (see Annexure CRDB -2 attached to their affidavit). Being aggrieved, the applicant is now seeking for leave to appeal to CAT against the impugned judgment.

The matter proceeded *ex parte* against the 2nd respondent who never entered appearance before this court. The efforts to serve her were made by a court process server, one Felisia Uroki T/A Nutmeg Auctioneers and Property Managers Co. Limited but was not fruitful. The affidavit of the said process server was filed before this court as a proof for the service. The application was disposed of by way of written submissions.



In his written submissions, the learned counsel for the applicant (Mr John Mushi) essentially reiterated the contents of the affidavit. He further contended that, the respondent did not counter paragraph 7 and 8 of his affidavit which respectively state the steps taken by the applicant after the delivery of the judgment by this court and that the intended appeal to the Court of Appeal has overwhelming chances of success. He invites this court to draw an inference that the said paragraphs are not disputed. He avers that his application is brought under **Section 5 (1) (c) of the Appellate Jurisdiction Act**, Cap 141 R.E 2019. However, the provision does not provide for the conditions to be considered in determining applications of this nature. So, it remains to be the discretion of the court.

He further explained that the court of appeal in a number of decisions has stated that leave to appeal will be granted where the ground(s) of appeal raises issues of general importance or a novel point of law or where the grounds show a prima facie or arguable appeal. He buttresses his point with the case of **British Broadcasting Corporation Vs Eric Sikujua Ng'maryo**, Civil Application No. 138 of 2004 (CAT-Unreported) and **Bulyanhulu Gold Mine Ltd & Others Vs Petrolube**

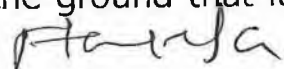


(T) Ltd & Another, Civil Application No. 364 of 2017 (CAT-Unreported).

It was his further submission that if the grounds in support of the application stated under paragraphs 6 (i), (ii), (iii), (iv) and (v) of the affidavit will not be considered it will set a bad precedent to the jurisprudence of this country.

As for the first and second grounds he submitted that, the Hon. Judge was of the view that the 2nd respondent could not have signed the spousal consent while at the same time she is a borrower. However, the law is clear that a mortgagor is a person who places a property as a security for the loan and the spousal consent is to show willingness of the other spouse before the matrimonial property is charged. In their case the property was registered under the name of the 1st respondent who is also a mortgagor thus he could not sign spouse consent since it would defeat its meaning. Thus, even the cited provision by the Hon. Judge did neither support his contention nor support the borrower's need to sign spouse's consent. Even the cited case of **NBC vs Nurbano Abdallah Mulla** is distinguishable to their case.

As for the 3rd ground, Mr Mushi submitted that the appellate Judge question the validity of the spouse consent on the ground that it was a



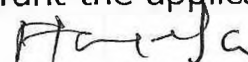
forgery one while the 1st respondent did not produce any proof regarding the said forgery or that they had reported at the police.

Coming to the fourth ground, it was alleged that the appellate Judge nullified the loan agreement entered between the applicant and the 2nd respondent without giving reasons as required by the law while the evidence and the testimonies of the witnesses prove that the 2nd respondent did take the loan from the applicant and defaulted to pay.

As for the last ground, Mr Mushi argued that the appellate court condemned the applicant to pay costs both at the lower court and the appellate court exempting the 2nd respondent from bearing the same while at the lower court the 1st respondent sued both the applicant and the second respondent the act which they believe was wrong.

He went further submitting that all the intended grounds bear chances of success and prayed for the application for leave to be granted as prayed.

Responding to the submission made by the applicant's counsel that paragraphs 7 and 8 are not disputed, Mr Merinyo learned counsel says it is a wrong and misleading submission. He says filling a notice of appeal is not a reason to let the court grant or not grant the application of this nature.



He submitted further that, the respondent's counter affidavit particularly paragraphs 4, 5 and 6 show that there are no sufficient grounds advanced by the applicant to grant the application. He says there must be sufficient reasons to let the court grant leave to the applicant who intends to appeal. It is upon the discretion of the court to grant or refuse application and it should be exercised judiciously (See the case of **Elibariki Jacob Vs Babu Libilibi & Another**, Misc. land Application No. 88 of 2020 (Unreported)).

As for the question whether the facts stated in paragraph 6 (i), (ii), (iii), (iv) and (v) of the affidavit make issues of general importance or novel point of law or prima facie arguable appeal, the answer is no. This is due to the fact that the judgment intended to be appealed for has no discrepancy or mischief that will require the attention of the Court of Appeal.

He added that, the second respondent cannot be a mortgagor at the same time a spouse to issue consent while the title deed by which the loan was secured bears the name of the 1st respondent and he has never created a third-party mortgage. As it was well elaborated by the Appellate Court judge at page 9 paragraph 3 of his judgment that:

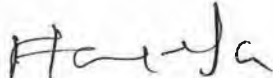
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"With due respect, the learned advocate is misguided.

*One cannot be the borrower and at the same time sign
the spouse consent"*

As for the 2nd ground he responded that, an issue as to whether the court was justifiable to rule that the spouse consent should have been executed by the first respondent, who was also a mortgagor, and not the second respondent was attended in detail at the trial as well as at the first appeal level. Therefore, it is not a point of general importance arguable at the court of appeal.

On the 3rd ground of the intended appeal, Mr Merinyo submitted that the Hon. Judge did give reasons as to why he nullified the agreement entered between the applicant and the 2nd respondent, and the same is reflected at page 17 and 18 of the appellate court's judgment. So there is no need to waste the ample time of the court of appeal which is required to deal with issues of general importance.

As for the fourth ground, the issue of costs is discretionary. There is no need for the court of appeal to review the discretion that was already exercised judiciously. Further to that, the next step now is the work of the taxing master to assess the awarded costs. 

The respondent's counsel was of the view that the intended grounds of appeal as submitted by the counsel for the applicant, are such that the court needs to see whether issues raised in the application are embraced with requisite conditions directed by the law regarding the application of this nature as it was done in the case of **Mwita Chacha Gasaya vs Abdalah rashid Mtumbo**, Misc. Land Application No. 4 of 2019 (Unreported). In the end, he prayed for the application to be dismissed with costs for lack of merit.

In his rejoinder, the counsel for the applicant reiterated what he submitted in chief.

Taking into consideration the affidavit, the counter affidavit, the submissions by the parties, the record of this application and the law, the main issue to be determined here is whether or not this application for leave to appeal to the CAT is meritorious. Before I attack this issue, I find it proper to outline, as I will do herein below, some relevant principles related to the law on leave to appeal to the CAT.

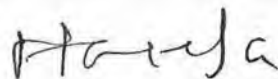
Our written law does not provide for the conditions for granting an application for leave to appeal to the CAT. However, case law does so. The conditions were summarised by this court (Massati, J. as he then was) in the case of **Citibank Tanzania Limited v. Tanzania**

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Telecommunications Company Ltd and 5 others, Misc. Commercial Cause No. 6 of 2003 (unreported). In that precedent this court remarked thus, and I will quote:

"I think it is now settled that, for an application for leave to appeal to succeed, the applicant must demonstrate that the proposed appeal raises contentious issues worth taking to the Court of Appeal or are of such public importance, or contain serious issues of misdirection or non direction likely to result in a failure of justice and worth consideration by the Court of Appeal....In an application of this nature, all that the Court needs to be addressed on, is whether or not the issues raised are contentious....the Court cannot look at nor decide either way on the merits or otherwise of the proposed grounds of appeal."

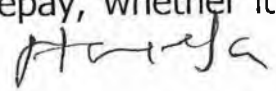
In arriving at the decision in the **Citibank's case** (supra), the learned Judge did consider various precedents including **Gaudencia Mzungu v. IDM Mzumbe**, Civil Application No. 94 of 1999 (CAT-unreported), which held that:



"...leave is not granted because there is an arguable appeal. There are always arguable appeals. What is important is whether there are prima facie grounds meriting an appeal to this Court. The echo stands as guidance for the High Court and Court of Appeal."

Having gone through submissions of the parties herein and the above case laws, I am of the considered opinion that, in this application there are arguable grounds for determination of the Court of Appeal. As per the circumstances of this application, such grounds are:

- i. Whether it was proper and justifiable for this court to declare that the 2nd respondent herein could not sign the spousal consent while at the same time she is the borrower;
- ii. Whether this court was justifiable to rule that the spouse consent should have been executed by the 1st respondent, who was also a mortgagor and not the 2nd respondent;
- iii. Whether it was proper and justifiable for this court to rely on a mere allegation of forgery from the 1st respondent without any sufficient proof to demonstrate that his signature was forged;
- iv. After having declared that the 2nd respondent admitted to have taken the loan from the applicant and failed to repay, whether it



was correct for the judge to nullify the loan agreement entered between the applicant and the 2nd respondent without giving out any reason; and

- v. Whether it was justifiable for this court to solely condemn the Applicant to pay costs to the 1st respondent both at this court and lower court and at the same time exempting the 2nd respondent.

On my part, I do not have jurisdiction to go into merits of the intended appeal. As it was expressed in the case of **Grupp vs Jangwani See Breez**, Commercial Case No. 93 of 2002 [unreported] Hon. Massati, J. [as he then was] as follows:

"I have no jurisdiction to go into the merits or deficiencies or the judgment or orders of my learned judge in this application. All that I am required to determine is whether there are arguable issues fit for the consideration of the Court of Appeal..."

Therefore, it is clear that, this court has no mandate to consider the prospects of success in an intended appeal which is in the domain of the court of appeal.

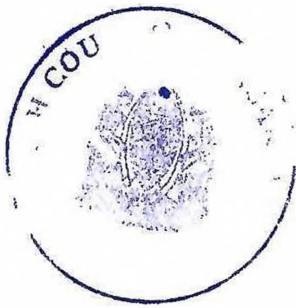
On the basis of the foregone reasons, this application succeeds. The applicant is hereby granted leave to appeal to the Court of Appeal as

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prayed in the Chamber Summons and in the submission in support thereof.

It is so ordered.

DATED at **ARUSHA** this 28th day of April 2022.



N.R. Mwaseba
N.R. MWASEBA

JUDGE

28.04.2022