

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
TABORA DISTRICT REGISTRY  
AT TABORA**

**MISC. CIVIL APPLICATION NO. 32 OF 2021**

*(Arising from Misc. Civil Application No. 29/2020, Misc. Civil Application No. 4/2018 & Civil Appeal No. 29/2017 in the High Court Tabora Original Civil Case No. 8/2017 District Court Kigoma )*

**NKANIYE NJOBE .....APPLICANT**

**VERSUS**

**AGNESS SINDALIVUZE.....RESPONDENT**

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**RULING**  
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*Date of Submissions: 3/08/2022 & 12/08/2022*  
*Date of Delivery: 30/08/2022*

**AMOUR S. KHAMIS, J:**

Nkaniye Njobe is aggrieved by Judgement and Decree of this Court in Dc. Civil Appeal No. 29 of 2017 dated 4<sup>th</sup> July 2013 and intends to challenge it in the Court of Appeal.

He filed the present application for leave to appeal to the Court of Appeal.

The application was made by way of Chamber Summons under Section 5(1) (c ) of the Appellate Jurisdiction Act, Cap 141, R.E 2019.

The Chamber Summons was supported by an affidavit sworn by Nkaniye Njobe, the applicant herein.

In the affidavit, Nkaniye Njobe averred that two grounds are worth consideration by the Court of Appeal, namely:

- i) *Whether it was right for the High Court to uphold decision of the District Court which the respondent admitted the claim against her.*
- ii) *Whether it was right for the District Court to dismiss the application and High Court upholding the decision while on records it shows there was a legal contract between the applicant and respondent.*

Agness Sindalivuze, the respondent herein, filed a counter affidavit challenging the application.

She deposed that the applicant's intended appeal does not constitute any tangible or genuine grounds warranting determination by the Court of Appeal.

She contended that since this Court found the applicant's application for execution before the District Court of Kigoma was nugatory, there was no decree to be executed.

Further, Agness Sindalivuze averred that the grounds of appeal advanced by the applicant are frivolous.

Hearing of this application was conducted with aid of virtual Court technology. Both parties were at the High Court premises in Kigoma and the presiding Judge was at the High Court building, Tabora.

Whereas Nkaniye Njobe appeared in person and fended for himself, Agness Sindalivuze was represented by Mr. Sadiki Alik, learned advocate of this Court.

Both applicant and Mr. Sadiki Alik, adopted contents of their affidavit and made spirited submissions in support of their respective cases.

On account of the chequered history of the case, I ordered parties to present copies of the various previous decisions relating to their dispute.

The order was duly complied with. The documents lodged at the High Court Kigoma were timely transmitted to this Court and will be referred to in visiting the dispute's history.

The issue is whether the application discloses sufficient grounds for extension of time.

In ***M/S ISABILA INDUSTRIES LTD V TANZANIA INVESTMENT BANK AND ANOTHER, CIVIL APPLICATION NO. 179 OF 2004*** (Unreported), the Court of Appeal addressed itself on the criteria for granting or withholding leave to appeal.

In the said case, the Court of Appeal referred to its earlier decision in ***WAMBELE MTUMWA CHAMTE V ASHA JUMA, CIVIL APPLICATION NO. 45 OF 1999***, thus:

*".....Unfortunately, it is not provided what factors are to be taken into account when considering whether or not to grant leave to appeal to this Court. However, it is obvious that leave will only be granted if the intended appeal has some merits whether factual or legal."*

In **GAUDENSIA MZUNGU V THE IDM MZUMBE, CIVIL APPLICATION NO. 94 OF 1999**, the Court of Appeal addressed a similar issue and held that:

*".....Again, leave is not granted because there is arguable appeal. There is always on arguable appeal. What is crucially important is whether there are prima facie, grounds meriting an appeal to this Court ....."*

In order to place the present case in the above stated legal perspective, it is necessary to recapitulate the relevant facts leading to this application.

Records show that Nkaniye Njobe sued Agness Sindalivuze in the District Court of Tabora for:

- "i) Payment of Tshs. 5,000,000/= which was the loaned amount to the defendant plus interest of Tshs. 500,000/= per month for the period of thirty two (32) months from 11 January 2000 to 1 August 2002.*
- i) Interest at Court rate over paragraph (i) above from date of payment in full*
- ii) Costs of the suit. "*

On 11 July 2003, the District Court of Kigoma (J.P. Ishengoma, DM) entered judgement and decree in favour of Nkaniye Njobe as prayed.

Further, the trial magistrate held that:

*"Hence the interest accruing from that loan up to this time which is a period of thirty two months times the interest of shs. 500,000/= per month adds up to 16,000,000/=*

*From that amount, I end up that the defendant to pay the plaintiff a total money indebted in one month failure to that the mortgaged house to be attached and sold for the payment of the plaintiff's money."*

Aggrieved, Agness Sindalivuze appealed to this Court vide DC, Civil Appeal No. 25 of 2009.

My brother, Haruna T. Songoro, J (as he then was) summarised the parties dispute in his judgment of 21 February 2011, thus:

*"What I gathered from the plaintiff's plaint filed on the 31<sup>st</sup> October, 2011 and trial Court proceedings is that on 12/4/1999 Agness Sindalivuze, appellant entered into agreement with Nkaniye Njobe, the respondent which was reduced in writing. According to the agreement the appellant received a sum of shs. 5,000,000/= as loan on the understanding that, in return, the appellant would repay the loan in full by 12/12/1999 and a sum of shs. 500,000/= as profit (faida) every month. The appellant also gave the respondent his house situated at plot No. 154MD, Mjimwema Kigoma,*

*Mjini as security (dhamana) and the titles of the house was handed over to the respondent.*

*The agreement was annexed by to the plaintiff's plaint as Annexure P1. It also bears a stamp duty and was signed by both the appellant and respondent and other six witnesses ..... but it appears from subsequent agreement understanding the appellant defaulted to repay the loan in full plus the interest which was payable every month.*

*Due to the appellant default in repaying the loan and interests, the appellant and respondent entered into two other agreements which were aimed at setting modalities of payment of outstanding loan and accrued interests.*

*The second agreement was entered on the 11/1/2000 and was titled "Hati ya Mkataba", while the third agreement titled". Mkataba wa Kulipa Deni la Tshs. 2, 144, 500" was entered on the 4/2/2002.*

*Together with what was agreed in the above mentioned 3 agreements and payments made by the appellant, the respondent maintained his claim and pressed for re - payment of loan and interests which was done. The respondent therefore on the 31/10/2000*

*instituted a suit at Kigoma District Court claiming that the appellant did not re – pay the loan in full and interests.*

By way of conclusion, the learned appellate Judge held that:

*“ After wiping out the above mentioned exhibits and annexure which were not admitted as exhibits and are not part of the suit record, it follows therefore that, trial court findings and the decision which was based on the crossed or cancelled evidence may not stand for obvious reason the substantive evidence have been removed from the record. In respect of the respondent request of conducting a review or revision on this matter at this instance because after removing the above cited documentary evidence from the suit record, I find that there is not substantive evidence on record which may support the proposed review/ revision process at this juncture.*

*For the reason explained above, I decide the trial court decision is not supported by presented evidence, also the manner of recording witnesses evidence was improper and further proceedings were improperly conducted. Therefore rule the 5<sup>th</sup> ground of appeal in favour of the appellant. With that decision, I find no*



*plausible reasons to proceed with determination of 2<sup>nd</sup> appellant's ground of appeal and other matters rose in this appeal.*

*I therefore allow the appellant's appeal, quash the trial court's decision, nullify proceedings and set aside all orders made thereunder. The respondent is at liberty to pursue his claims a fresh. Taking into account that it is the trial court proceedings and decision which were faulty it will be unfair to condemn the respondent to pay costs of the appeal. For that reason, I order that each party to bear his own costs. "*

Despite of the above decision, on 19<sup>th</sup> April 2017, Nkaniye Njobe filed an application for execution in the District Court of Kigoma.

He moved the trial court to execute its decree in Civil Case No. 21 of 2001. The amount sought to be recovered was Tshs. 88,100,000/= comprising of Tshs. 21,000,000/= principal sum Tshs. 78,000,000/= interest from 11/8/2003 to 11/3/2017 times 154 months for Tshs. 500,000/=

The sought mode of execution was attachment of the house on Plot No. 154 MD situated at Mjimwema area, Kigoma.

In Dc. Civil Appeal No. 29 of 2017, my brother Rumanyika, J (as he then was) presided over an appeal arising from (Misc) Civil Case No. 8 of 2017 of the District Court of Kigoma which related to execution between the same parties.



In page 1 of the typed judgment, the learned Judge introduced what was before him, thus:

*"The appeal is against the 26/10/2017 order dismissing application of execution for a Primary Court decree allegedly of 28/8/2003."*

In page 2 of the typed judgment, Rumanyika, J (as he then was) shade light on the dispute, thus:

*"Mr. E. Mkwe very briefly in reply submitted that there was nothing to fault, the learned Resident Magistrate. Much as no decree was ever attached to the application really. That Mwita, J's was not a decree but a mere drawn order. Having struck out the respondent's incompetent application for extension of time within which to appeal. Then came back and succeeded and lodged appeal. But this Court (Songoro, J) nullified proceedings on 21/2/2012 and ordered a retrial. That from there, wasn't any decree executable by either party. The appeal be dismissed with costs, stressed Mr. E. Mkwe learned counsel.*

*The issue is whether the appeal is tenable in law. The answer is quite in the negative. According to records, this Court (Mwita, J) may have, as did, struck out on 21/4/2006 the respondents application for extension of time to lodge appeal. Therefore the judgement and decree remained intact yes! But then, the fact remained that the respondent came back to*

*Court, and this time around he had Dc. Civil Appeal No. 25 of 2009 been finally determined on 21/02/2021 by Senior brother Songoro, J who in effect decreed proceedings (in) the lower court a nullify and subsequently ordered trial denovo. It follows therefore, like Mr. E. Mkwé, precisely in my view argued, now that by order of this Court the lower court's proceedings and orders were nullified. There was with effect from 21/02/2012, no decree orders to execute."*

On the above reasons, Rumanyika, J (as he then was) dismissed Nkaniye Njobe's appeal with costs.

Nkaniye Njobe was resentful of this decision of 4 July 2013 and is geared to seek intervention of the Court of Appeal.

In the submissions made in this application, Nkaniye Njobe contended that an allegation that Songoro, J (as he then was) quashed the judgement proceedings and orders of the trial court were not true.

Mr. Sadiki Alik, learned advocate for the respondent, urged this Court to disregard the application and find that Rumanyika, J (as he then was) was right to dismiss the appeal because his decision originated from the Judgement of Songoro, J (as he then was).

Having heard parties and examining the available records, I gleaned that the parties herein, apart from the series of proceedings earlier on stated, were involved in multiple other proceedings.

Records show that in Misc. Civil Application No. 9 of 2004, Agness Sindalivuze moved this Court for enlargement of time within which to appeal against judgement of the District Court of Kigoma in Civil Case No. 21 of 2001.

In a ruling delivered on 5 July 2006, Mwita J (as he then was) upheld a preliminary objection raised by Nkaniye Njobe and struck out the application for incompetency.

Subsequent to that ruling, Agness Sindalivuze successfully appealed to this Court Vide Dc. Civil Appeal No. 25 of 2009 whose judgement was quoted in extenso as per Songoro, J (dated 21/2/2011).

Records further show that subsequent to nullifications of the trial court's proceedings, judgement and decree, Nkaniye Njobe instituted a suit at the District Land and Housing Tribunal for Kigoma against Agness Sindalivuze.

In the said suit, Nkaniye Njobe prayed for an eviction order from the disputed house on Plot No. 154 MD, Mjimwema area, Kigoma Ujiji Municipality against some three (3) tenants; Athuman Juma Kinendi, Nelson Mwamwaja Ali and Simu Athuman Yusuf Lao.

He also prayed for declaration that he was the legal owner of the disputed house and a refund of rent collected by Agness Sindalivuze for the period from 12/12/1999.

The District Land and Housing Tribunal decided in favour of Nkaniye Njobe.

Disgruntled with the judgement and decree of the District Land and Housing Tribunal for Kigoma, Agness Sindalivuze appealed to this Court Vide Land Case Appeal No. 12 of 2016.

In the said appeal, Utamwa, J allowed the appeal and quashed the proceedings and judgement of the tribunal on grounds of incompetency.

Utamwa, J's judgement in Land Case Appeal No. 12 of 2016 was delivered on 27 February 2017.

Apart from those civil proceedings, parties were involved in Criminal Proceedings.

In Criminal Case No. 33 of 2012 of the District Court of Kigoma, Nkaniye Njobe was charged for the offence of brawling contrary to Section 89 (1) (b) of the Penal Code, Cap 16, R.E 2002.

The prosecution alleged that on 12<sup>th</sup> day of January 2012 at about 1500 hours at Mjimwema street within the Municipal, District and Region of Kigoma, he did brawl by attaching a notice of selling a house on Plot No. 154 MD, Lubengera area, the property of Agness D/O Sindalivuze, and created a disturbance to the owner which is likely to cause a breach of peace.

Upon trial, the District Court of Kigoma was satisfied that the prosecution case was proved beyond reasonable doubts and thus convicted Nkaniye Njobe for the offence of criminal trespass under Section 299 of the Penal Code, Cap 16, R.E 2002.

He was acquitted for the offence of brawl contrary to Section 89 (1) (b) of the Penal Code, Cap 16, R.E 2002.

The trial magistrate sentenced him to two (2) years imprisonment.

Indignant of the conviction and sentence, Nkaniye Njobe appealed to this Court through Criminal Appeal No. 3 of 2013.

On appeal, Mruma, J, held that Nkaniye Njobe was treated unjustly in every sphere of the case.

Consequently, the learned Judge allowed the appeal, quashed the conviction and set aside the sentence meted against Nkaniye Njobe.

This background sufficiently summarise the parties history of litigation which spread in a span of about eleven (11) years.

Having digested the facts extractable from the available records, I am now required to tackle the application for leave to appeal to the Court of Appeal.

On the available records and as per parties rival assertions, the question is whether the Judgement of Rumanyika, J in Dc. Civil Appeal No. 29 of 2017 disclose fertile grounds to be challenged in the Court of Appeal.

Having read the impugned Judgment together with the Judgment of Songoro, J in Dc. Civil Appeal No. 25 of 2009, I see no justifiable grounds for faulting the learned Judge.

There is no doubt that the applicant, Nkaniye Njobe was the decree holder in Civil Case No. 21 of 2001 of the District Court of Kigoma.

However, the proceedings, Judgement and decree of the District Court of Kigoma in Civil Case No. 21 of 2001 were nullified quashed and set aside by this Court (Songoro, J) on 21 February 2012.

It follows therefore that the applicant improperly moved the District Court of Kigoma to execute a decree in Civil Case No. 21 of 2001 which did not exist after being nullified by the High Court.

Presiding over an appeal that determined the trial court's decision to dismiss the unfounded application for execution, Rumanyika, J (as he then was) was right to find that the appeal was misplaced.

In the circumstances, the intended grounds of appeal highlighted in the applicant's affidavit in support of the application are factually and legally misplaced.

There is nothing legally unique as to warrant intervention of the highest Court of the Land in view of the background that I have just stated.

In my view, since decisions of the District Court of Kigoma and of the District Land and Housing Tribunal for Kigoma involving parties herein were quashed and nullified, the remedy available for the the applicant is to institute a fresh suit in a competent forum and not to appeal against the decision of this Court that point blankly made him aware that he had no decree to execute against the respondent.

For the reasons stated above, the application is hereby dismissed.

Being aware of the parties painful background as shown herein before, I make no order for costs.

It is so ordered.

  
**AMOUR S. KHAMIS**

**JUDGE**

**30/08/2022**

**ORDER**

Ruling delivered by way of video conference in presence of the applicant in person and absence of the respondent who was represented by her daughter, Ms. Martha Yohana Libume.

Right of Appeal is Explained.



  
**AMOUR S. KHAMIS**

**JUDGE**

**30/08/2022**