

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

**MUSOMA SUB REGISTRY**

**AT MUSOMA**

**MISC. CIVIL APPLICATION NO 89 OF 2021**

(Arising from land Appeal No 37 of 2021 in the High Court of Tanzania at Musoma and originating from Land Application No 80 of 2020 in the District Land and Housing Tribunal)

**HUSNA JOSEPH BUYAGA ..... APPLICANT**

***VERSUS***

**CHARLES MATOKE MAHINDI ..... RESPONDENT**

**RULING**

24<sup>th</sup> August & 31<sup>st</sup> August, 2022

**F. H. MAHIMBALI, J.**

This court (Kahyoza, J) in Land Appeal no 37 of 2021, dismissed the appellant's appeal as lawful owner of the suit house. The dismissal order aggrieved the appellant, thus dully lodged her notice of appeal to the CAT.

Since the appellant intends to appeal to the Court of Appeal, it is the legal requirement pursuant to section 47 (2) of the LDCA that she first seeks and obtains leave of this court. This is now the said

application preferred under section 47 (2) of the LDCA Cap, 216 R. E. 2019.

As to what grounds of appeal are advanced for this court's leave to the CAT, the applicant in her third paragraph of the sworn affidavit in support of the application deposed:

- i) Whether the consent of the spouse in mortgaging the matrimonial house to the financial institutions might legalize the husband to enter into another sale agreement with the third party for the purpose of paying the debts of the financial institution without further consent from the spouse.*
- ii) Whether the procedure to execute the mortgage which is matrimonial home by financial institution where the Husband defaulted to pay debt might be done without further notice to spouse who consented on mortgage.*
- iii) Whether the principle to join the third necessary party who sold the land in dispute have limitation to the administration of estate of deceased person.*
- iv) Whether the mortgage can be financial institution broker to execute the mortgage by selling to the third party the matrimonial home and pay debt contrary to the mortgage law and consent from spouse's deed terms.*
- v) That, the 1<sup>st</sup> and 2<sup>nd</sup> Appeal Courts erred in law for failure to consider the evidence of the applicant.*

During the hearing of the application, Mr. Gervas learned advocated represented the applicant whereas Mr. John Manyama

learned advocate who resisted the application represented the respondent.

In arguing the first ground in support of the application as to why Mr. Gervas submitted that the one who had mandate to sell that property was FINCA and not the applicant's husband. He faulted the manner the respondent acquired this property as it is contrary to the law and that the applicant had not consented to that disposition as done.

On the second ground she faulted the manner FINCA executed the mortgaged property following the default payment by the applicant's deceased husband. That if the deceased husband defaulted repayment of the borrowed money, as consenting spouse ought to have been dully informed as per law.

On the third ground of leave to appeal, she raised a concern that failure by the respondent to join the administrator in claiming of his right vitiated the justice of the case. He argued that the applicant's husband who borrowed the FINCA's money if he failed to repay the loan, upon his demise, the administrator/executor of the deceased's estate ought to have been joined as necessary party instead of the applicant herself.

In the fourth ground of the application, the counsel argued, whether it was proper for the mortgagor to execute the mortgaged facility as per law. He considered the mortgagor acting as broker to the respondent in the sale instead of being executor of the mortgaged deed.

On the fifth ground he faulted that there was an error in considering the evidence in record in reaching the proper finding of the court.

In resisting the application, Mr. John Manyama countered the submission and its affidavit on the following submissions.

First, there was no proof of service of the Notice of Appeal pursuant to rule 84 (1) of the CAT's rules. The applicant was charged to serve them with the Notice of Appeal in 14 days' time.

On the merit of the application, he submitted so long as the issue of spouse's consent was well dealt by the trial tribunal and the first appellate court, the applicant ought to have clearly stated how the High Court erred in determining the issue of consent for this court to grant the applicant's leave for CAT's determination. As there is no fault of the High Court's judgement pointed out, he wondered how leave could be granted in the circumstances of this case. With ground number three, he

challenged the application as raising new issue which was not determined by the High Court.

Responding to ground number four, he submitted that the mortgaged property was not sold by FINCA but the applicant's husband after having obtained the mortgagor's leave. In his considered view, all grounds raised by the applicant have been sufficiently responded by the High Court.

Having heard the submissions by the parties, it is important to note that at this stage this Court is enjoined to respond whether there are arguable grounds for CAT's consideration. The duty of this court in applications of this nature is not to determine the merits or demerits of the grounds of appeal raised when seeking leave to appeal. Instead, a court has only to consider whether the proposed issues are embraced in conditions set in the case of **British Broadcasting Corporation vs Eric Sikujua Ng'maryo** Civil Application No. 138 of 2004 (both unreported).

For clarity, I wish to state what the Court of Appeal considered in the case of **Bulyanhulu Gold Mine Ltd and 2 Others Vs. Petrolube**

**(T) Limited and Another**, Civil Application No. 364/16 of 2017, CAT at Dsm (Unreported) at page 14, where it was stated:

*"Another principle which I think is worth consideration is that at this stage the court is not supposed to look at nor make a finding on the merits or demerits of the intended appeal. It is not the duty of this court to examine the details of the proposed issues."*

The foregoing Court's expression accords with the well-established principle of law that in applications of this nature courts should avoid making decisions on the substantive issues before the appeal itself is heard. That stance was pronounced by the Court in the case of **The Regional Manager-TAN ROADS Lindi vs DB Shapriya and Company Ltd**, Civil Application No. 29 of 2012 CA (unreported) in which it stated that:-

*"It is now settled that a Court hearing an application should restrain from considering substantive issues that are to be dealt with by the appellate Court. This is so in order to avoid making decisions on substantive issues before the appeal itself is heard..."*

Certainly, deciding at the stage of applying for leave whether the grounds raised have merits or not is to travel beyond the mandate of the court faced with such an application. This court should confine itself to the determination whether the proposed grounds raise an arguable issue(s) before the Court and leave it for the Court, in the event leave is granted, to determine the merits or otherwise of such proposed issues.

This accounts for the reason why the Court of Appeal did away with the requirement to consider whether "the appeal stands chances of success on appeal as a ground for granting leave to appeal or extension of time to appeal.[See **Murtaza Mohamed Raza Virani vs Mehboob Hassanali Versi**, Civil application No. 168 of 2014 and **Victoria Real Estate Development Limited vs Tanzania Investment Bank and Three Others**, Civil Application No. 225 of 2014 (both unreported)].


In consideration of the above stand, coming back at this application for consideration, I am of the view that whether these grounds for leave to appeal to Court of Appeal have merits or not is the domain of the Court of Appeal itself. It is not the duty or responsibility of this Court. However, at this stage I am satisfied that the grounds put by the applicant and argued by her learned counsel, have pointed out

arguable points for the Court of Appeal's determination. Whether they stand chances for appeal's success is not the duty of this Court now.

I accordingly allow the application under section 47 (2) of the LCDCA and hereby grant leave to the applicants to appeal to the Court against the decision of the High Court of Tanzania (Musoma – Sub Registry) in Land Appeal No. 37 of 2021 which is dated 22<sup>nd</sup> September, 2021. The appeal shall be lodged within sixty (60) days of the delivery of this ruling.


DATED at MUSOMA this 31<sup>st</sup> day of August, 2022.



  
F.H. Mahimbali  
Judge

**Court:** Ruling delivered this 31<sup>st</sup> day of August, 2022 in the presence of the respondent and Mr. Gidion Mugo. Appellant being absent.

Right of appeal is explained.

  
F.H. Mahimbali  
Judge