

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

MISC. LAND APPLICATION NO 26 OF 2022

(Arising from Civil Revision No 01 of 2021 and originating from RMA Civil Case No 07 of 2019 the Magistrate's Court of Musoma at Musoma)

MONICA MABULA 1ST APPLICANT

GHATI PIUS 2ND APPLICANT

MTOLELA PIUS 3RD APPLICANT

NYAMITI PIUS 4TH APPLICANT

VERSUS

MWASI AMONI WARIOBA 1ST RESPONDENT

SHUKRAN PIUS MWEMBE 2ND RESPONDENT

LEOKADIA SHIGURU SELVESTER 3RD RESPONDENT

KARIBA PIUS MWEMBE 4TH RESPONDENT

PAULO PIUS MWEMBE 5TH RESPONDENT

RULING

22nd September & 22nd September, 2022

F. H. MAHIMBALI, J.

This court in Civil Revision No. 01 of 2021, dismissed the applicants' revision in contest of the consent judgment entered in the Resident Magistrates' Court Civil Case No. 7 of 2017. The dismissal order aggrieved the applicants, thus dully lodged her notice of appeal to the Court of Appeal Tanzania.

Since the applicants intend to appeal to the Court of Appeal, it is the legal requirement pursuant to Rule 45 (a) of the Court of Appeal Rules of 2009 that they first seek and obtain leave of this court. This is now the said application preferred under Rule 45 (a) of the Court of Appeals Rules of 2009.

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

- 1. That, the 1st appeal court erred facts and law for failure to determine that Shukrani Mwambe was not dully appointed as administrator of estate of Pius Paulo Mwembe.*
- 2. That, the 1st appellate court erred in law and facts for failure to notice that Shukrani Mwembe was executor on his own wrong as he sold the house in his capacity and not in capacity of administrator of estate of Paul Pius.*
- 3. That, the 1st appellate court erred in law and facts for failure to determine that, the Primary Court revoked the application of Shukran Mwambe and it cannot nullify the sale of House sold by Shukrani mwambe as by that time he was not yet already appointed to be administrator of estate of Pius Paulo Mwembe.*
- 4. That, the 1st court appellate court erred in law and facts for failure to determine that consent judgment it caused the applicants lost their rights as beneficiaries in the estate of Paul Pius.*

5. *That, the 1st appellate court erred in law and facts for failure to consider the affidavit of the Applicants which argue and state clearly that shukrani Mwembe was not legally entitled to sell the deceased estate.*
6. *That, the 1st appellate court erred in law and facts for failure to determine that, Mwijarubi Pius sued the 1st and 2nd respondent in Land Application No 34 of 2014 in capacity of administrator estate of Paul Pius, so it is correct the District land and Housing Tribunal to nullify the sale agreement and declare the house to be the property of Mwijarubi Pius in his capacity as administrator of estate.*

During the hearing of the application, Mr. **Mr. Emmanuel Gervas** learned advocate represented the applicant whereas the respondent appeared in person.

In support of the application, Mr. **Mr. Emmanuel Gervas** submitted that this is an application for leave to appeal to Court of Appeal Tanzania against the decision of this court in Land Appeal No 106 of 2021. The application is brought under Rule 45 (a) of the Court of Appeals Rules of 2009 and is supported by an affidavit of the applicants in which he prayed that it be adopted to form part of his submission

He contended that as per paragraph 3 of the applicant's affidavit, there are six grounds as to why this application is sought for the CAT determination.

As per paragraph 3 (1), the concern is, the said Shukrani Mwembe was not dully appointed by the court. This is because her application for the appointment as administrator was opposed, before the trial court dismissed the said application. Unfortunately, the High Court blessed the said appointment of Shukran Mwembe.

On the second ground, the High Court erred in determining that the said Shukrani Mwembe was dully appointed administrator of the said estate and thus sold the house unlawfully. By this dismissal order by the High Court and recognizing him as administrator is to bless the unlawful acts committed by him under the umbrella of administrator.

With the third ground, the High Court erred in not considering that the nullification was proper.

On the 4th ground, the High Court failed to consider that the consent judgment was unlawful. By blessing it, it caused injustice to the applicants.

The 5th grounds was abandoned. However, with the 6th ground, he submitted that the High Court's failure to determine that the decision of the DLHT in land application No 34 of 2014 was just and proper for reverting the disputed house to the family as it was wrongly sold by the purported administrator of the said estate.

With these arguments, Mr. Emmanuel Gervas prayed that this court to grant leave to appeal to the Court of Appeal of Tanzania for the determination of the said appeal.

The respondents on the other side, who were not represented had nothing material to submit but just condemned the applicants as prolonging this matter unnecessarily. As they agreed to sell the deceased's property, it is unjust to the buyer of it. They claimed that so far, there is someone collecting the rent in the said sold house unjustly while each heir had obtained his or her share/portion.

It is important to note that at this stage, this Court is enjoined to respond that 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, the 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 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 are worth of CAT's determination, 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 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 and hereby grant leave to appeal to the applicants to appeal to the Court of Appeal against the decision of the High Court of Tanzania (Musoma – Sub Registry) in Civil Revision No. 01 of 2021 which is dated 13th May, 2021. The appeal shall be lodged within sixty (60) days of the delivery of this ruling.

DATED at MUSOMA this 22nd day of September, 2022.



F. H. Mahimbali

Judge