

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF MBEYA
AT MBEYA

MISC. LAND APPLICATION NO. 94 OF 2021

(From the High Court of Tanzania at Mbeya Land Appeal No. 62 of 2019, originating from the District Land and Housing Tribunal for Mbeya at Mbeya in Land Application No. 89 of 2017)

MSALENI LINNER COMPANY LTD.....APPLICANT

VERSUS

1. BANK OF AFRICA (T) LIMITED

2. ADILI AUCTION MART

3. SADIQUE MARIAH

4. JOSEPH MAULA

.....RESPONDENTS

RULING

Date of last Order: 24.11.2022

Date of Ruling: 19.12.2022

Ebrahim, J.

The instant application traces back from Land Application No. 280/2018 filed at the District Land and Housing Tribunal for Mbeya at Mbeya by the applicant herein. The above mentioned land application was filed after the 1st respondent initiated loan recovery proceedings after the High Court had dismissed Land Case No. 15 of 2015 where one Austack Mushi, a director of the applicant herein was the applicant. Austack Mushi preferred an appeal at the Court of Appeal. While the matter is still pending at the Court of Appeal, the applicant herein filed the above mentioned Land Application

No. 280/2018 and Miscellaneous Application No. 89 of 2017 seeking for temporary injunction. The trial Tribunal first granted the ex parte order but later upon hearing the application inter-parte, dismissed the application for failure to show that there is a substantial issue to be determined in the main case.

Aggrieved again, the applicant intends to appeal against the judgement of this court hence she has filed the instant application praying to be granted leave to Appeal to the Court of Appeal.

The application has been preferred under **section 47(2) of the Land Disputes Court Act, Cap 216 RE 2019** and it is supported by an affidavit sworn by Austack Alphonse Mushi, the Managing Director of the applicant.

In this application, the applicant was represented by her Executive Director, one Austack Mushi whereas the 1st and 2nd respondents were represented by advocate Kamru Habibu Msonde. The 3rd respondent appeared in person and the 4th respondent could not enter appearance as the court was informed that he is sick. Consequently, the application was scheduled to be argued by way of written submission. Save for the 4th respondent, all parties submitted their written submissions as scheduled. However, I have also noted that all respondents did not file their counter affidavits. Therefore, this court shall only consider their submissions in

relation to the legal points. It should also be noted that the applicant was allowed by the court to file his submission on 21.10.2022 as there was a registered problem in court system to issue control number on 20.10.2022. Submitting in support of the application, Mr. Mushi prayed to adopt the contents of his affidavit and while referring to the case of **Atilio Vs Mbowe** (1969) TLR 17 he argued that the Hon. Judge erred on point of law to hold that the District Court was correct to dismiss the application for temporary injunction as the applicant had not demonstrated any material evidence. Referring to the case of **Prakash Singh Vs State of Haryana**, 2002 (4 Civil L.J. 71 PH) he argued that prima facie case means that the applicant has a case which cannot be rejected or dismissed summarily.

He submitted also that the hon. Judge erred in holding that the main case which is pending before the trial tribunal had not been indirectly determined by dismissal of the application for temporary injunction because according to **Order 41 Rule 1 of the Civil Procedure Code, Cap 33 RE 2019**, the purpose of temporary injunction is to preserve status quo.

He lastly argued that the fact of irreparable loss is clear because the residential house was targeted to be sold off.

The 3rd respondent submission was mainly on how he was stopped by the Manager of the 1st respondent to deposit the auctioned amount of Tshs.

168,000,000/- after being told the said house has been sold to BOA Manager of Tunduma Branch.

Responding to the submission by the applicant, counsel for the 1st and 2nd respondents argued that the applicant has not shown in his affidavit any point of law or legal issue of general importance or a novel point of law or arguable appeal for consideration by the Court of Appeal as required by law.

Submitting on the complaint by the applicant that the applicant was not given right to be heard, counsel for the 1st and 2nd respondents contended that failure by the applicant to satisfy the court on pre-requisite condition for granting temporary injunction cannot amount to points of law. He referred this court to the case of **British Broadcasting Corporation Vs Eric Sikujua Ng'maryo**, Civil Application No.138 of 2004, CAT (DSM Unreported) cited by this court in the case of **Paul Francis Mugasha Vs Mwananchi Communication Ltd & Another**, Misc. Civil Application No. 370 of 2018.

He concluded therefore that the points proposed by the applicant do not raise issues of general importance or a novel point of law or a prima facie case or arguable appeal. He concluded that as the main suit is still pending in the DLHT, the applicant will have opportunity to prove his case against the respondents but otherwise this appeal is interlocutory as the main case

has not yet been determined. He prayed for this application to be dismissed with costs.

I have considered the submissions by the parties. I am also mindful of the principle that in an application of this nature the applicant must demonstrate that there are some arguable points of law or matters of general importance emanating from the impugned decision to convince the court to exercise its judicial discretion to grant the sought prayer.

This court is therefore tasked to determine as to whether the applicants have advanced such arguable points for this Court to grant leave to appeal to the Court of Appeal.

The law is settled. Leave may be granted where there is a point of law, or there is arguable appeal or there is a point of public importance to be determined by the Court of Appeal. There are a number of cases that has insisted on establishment of sufficient cause for grant of leave to appeal to the Court of Appeal. See the cases of **Nurbhain Ruttansi v. Ministry of water Construction, Energy and Environment** [2005] TLR 220, **Butto Shushu MacDougal v. Studi Bakers Tanzania Limited and Khalid Shabani Mtwangi**, Misc. Land Case Appeal No. 220 of 2008. In the case of **Harban Haji Mosi and Another v. Omar Hulal Seif and another**, civil Reference No. 19 of 1997 (unreported) which was quoted with approval in the case of **Rutagatina C.L v. The Advocates Committee**

and Clavery Mtindo Ngalapa, Civil Application No. 98 of 2010, the Court of Appeal stated that:

"Leave is granted where the proposed appeal stands reasonable chances of success or where/ but not necessarily the proceedings as whole reveal such disturbing features as to require the guidance of the Court of Appeal. The purpose of the provision is therefore to spare the Court the spectra of unmeriting matter and to enable it to give adequate attention to cases of true public importance."

The same principle was reiterated in the cited case of **British Broadcasting Corporation v. Eric Sikujua Ng'amaryo**, (supra) that:

"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 issue of general importance or a novel point of law or where the grounds show a prima facie or arguable appeal."

At para 2 of the instant application, the applicant at items (a) to (c) is mainly faulting the appellate judge for upholding the decision of the trial Tribunal. In her submission he faulted the appellate judge after re-

evaluating of the material presented before the trial Tribunal for seeing that there is no substantive material that qualify under the celebrate case of **Atilio Vs Mbowe** (supra) to grant temporary injunction. The applicant also in her submission condemned the appellate court for not seeing that there is prima facie case. The appellate court observed that indeed that the applicant was availed right to be heard and the matter was disposed of by way of written submission at the DLHT but it joined hands with the trial Tribunal and found that the main case is still pending and has not been indirectly determined by dismissal of the temporary injunction. As for the danger of disposing of the residential house, the appellate court equally dealt with the matter and found the argument to be insufficient.

In a bid not to discuss the perhaps would be grounds of appeal at this stage, it is clear that the applicant is not satisfied with the merits of the decision which was decided against her but not because there was nothing left to be covered by the appellate court. In essence, he is merely seeking for further re-evaluation of the interlocutory proceedings. The applicant has mostly placed her arguments on the issue of facts and dissatisfaction of the outcome. This court at the stage of hearing the application is not required to go to the merits of matter but only to peruse the record and see if the proceedings or the judgment reveals any disturbing feature worth for

consideration by the appellate Court. It was held in the case of **MS Airport Properties Limited vs The Registrar of Titles & Another** Civil Application No. 389/17 of 2020 (unreported) that:

"...We unreservedly hold this opinion cognizant of the fact that at this stage, the Court should concern itself with the determination as to whether the proposed grounds of appeal raises points of law or issues of public importance without considering substantive issues that are to be dealt by the appellate court"

Having carefully perused the proceedings and the judgment of the trial Tribunal which the applicant's complaints are based on and having cross checked the proceedings and judgment of this court during the first appeal; and having also considered the position of law stated above, I find no any disturbing feature worth for consideration by the Court of Appeal that has been established by the applicant.

The result of which, I dismiss the application with costs.

Order accordingly.



Mbeya

20.12.2022

A handwritten signature in blue ink, appearing to read "R.A. Ebrahim".

R.A. Ebrahim
Judge