

**IN THE HIGH COURT OF TANZANIA  
(IN THE SUB-REGISTRY OF MWANZA)**

**AT MWANZA**

**MISC. LAND APPLICATION NO. 8 OF 2023**

*(Originating from Land Appeal No. 20 of 2021 at the High Court (Mwanza Sub-Registry))*

**PROCHES LAURENT (Guardian of**

**Samwel Proches).....APPLICANT**

**VERSUS**

**ASNATH W. MADENGE.....1<sup>ST</sup> RESPONDENT**

**BROWN NJAU.....2<sup>ND</sup> RESPONDENT**

**MWANZA SACCOS LIMITED.....3<sup>RD</sup> RESPONDENT**

**SAMBO AUCTION MART..... 4<sup>TH</sup> RESPONDENT**

**RULING**

*Date of Last Order: 10/03/2023*

*Date of Ruling: 15/03/2023*

**Kamana, J:**

The applicant is aggrieved by the decision of this Court in Land Appeal No.20 of 2021. Given that, the Applicant issued a notice of appeal against such decision. Following that notice, he preferred this application for leave to appeal to the Court of Appeal. The application is made under section 47(2) of the Land Disputes Courts Act, Cap. 216 [RE.2019] and section 19(2) of the Law of Limitation Act, Cap.89

[RE.2019. The application is supported by an affidavit deposed by Mr. Denis Kahangwa, learned Counsel for the Applicant.

In support of the application, Mr. Kahangwa prefaced by referring to paragraphs 5, 6, and 7 of his affidavit as they form the intended grounds of appeal. The paragraphs are reproduced hereunder as follows:

- 5. That the learned Judge in the said appeal erred in law and in fact by holding that the property subject matter of the appeal does not belong to the Applicant on the reliance of the evidence of the second Respondent while the testimony at trial was at war and or not supported by the pleaded facts.*
- 6. That the learned Judge failed to properly reevaluate the evidence on record which led to non-direction of the same hence coming out with an erroneous judgment.*
- 7. That the learned Judge erred in law by making a finding on the issue of compensation while the said issue was not among the grounds of appeal before it and no appeal to that effect was ever lodged by the second Respondent as such denied the Applicant his basic right of being heard.*

As regards those grounds, Mr. Kahangwa submitted that they contain points of law worthy of determination of the Court of Appeal. In substantiating his argument, the learned Counsel contended that the third Respondent who was the 2<sup>nd</sup> Respondent in the appeal averred issues which were not in her pleadings. In that case, he was of the opinion that the appellate Judge was convinced by the evidence which was not supported by the facts and pleadings. To buttress his position, the learned Counsel cited the case of **The Registered Trustees of Islamic Propagation Centre (IPC) v. The Registered Trustees of Thaaqib Islamic Centre (TIC)**, Civil Appeal No.2 of 2020.

Mr. Kahangwa submitted further that a reevaluation of the evidence at the appeal stage was not properly conducted. He argued that the learned Judge shifted the burden of proof from the Respondents to the Applicant which is contrary to the law. To buttress his argument, the learned Counsel cited the case of **Agatha Mshote v. Edson Emmanuel and 10 Others**, Civil Appeal No. 121 of 2019.

Responding, Mr. Akram Adam for the 1<sup>st</sup> Respondent was of the view that the third Respondent did not depart from the Written Statement of Defence filed on 16<sup>th</sup> June, 2016. He further contended that the High Court did reevaluate the evidence and did not shift the

burden of proof. In that case, he submitted that the grounds do not disclose any disturbing feature to warrant granting of the leave to appeal. To bolster his case, the learned Counsel referred this Court to the case of **British Broadcasting Corporation v. Erick Sikujua Ng'maryo**, Civil Application No. 138 of 2004. The second, third and fourth Respondents did not oppose the application.

Rejoining, Mr. Kahangwa reiterated his position in submission in chief. He insisted that the grounds stated in his affidavit vividly disclose the disturbing features in the impugned judgment.

Having heard the rival arguments, I think it is worth pointing out at this juncture the duty of this Court when dealing with applications for leave to appeal. As a matter of principle, when this Court is convened to determine the application for leave to appeal, it must warn itself that the same is not an appellate Court. It must confine itself to the determination of the application as to whether the application is meritorious or otherwise. The merits at this stage are the domain of the Court of Appeal. This position was enunciated in the case of **Jireys Nestory Mutalemwa v. Ngorongoro Conservation Area Authority**, Civil Application No. 154 of 2016 where the Court of Appeal observed:

*'Similarly, in applications of this nature, it is a well-established principle of law that the Court is not expected to determine the merits or otherwise of the substantive issues before the appeal itself is heard.'*

**See: The Regional Manager-TANROADS Lindi v. DB Shapriya and Company Ltd**, Civil Application No. 29 of 2012.

Reverting to the question at issue, principally, for the leave to appeal to be granted, an Applicant must satisfy the Court that there are issues of general importance, point of law or prima facie or arguable appeal. This position has been accentuated in a number of cases including the case of **British Broadcasting Corporation v. Erick Sikujua Ng'maryo** (Supra) where the Court of Appeal stated:

*'... leave to appeal will be granted where the grounds of appeal raise issues of general importance or a novel point of law or where the grounds show a prima facie case or arguable appeal.'*

Fortified by that position, it is my considered opinion that the intended grounds of appeal disclose an arguable appeal worthy consideration of by the Court of Appeal. I thus grant leave to the

Applicant to appeal to the highest Court as prayed. Considering the circumstances of the case, I order no costs. Order accordingly.

**DATED** at **MWANZA** this 15<sup>th</sup> March, 2023.



A handwritten signature in blue ink, appearing to read "KS Kamana". The signature is fluid and stylized, with a large initial "K" and a long, sweeping underline.

**KS KAMANA**

**JUDGE**