

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(SUB REGISTRY OF DAR ES SALAAM)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 518 OF 2022

(Arising from the Ruling in Civil Revision No. 16 of 2022 High Court at Dar es Salaam dated 21/10/2022 Hon. E.E. Kakolaki, J)

SADOCK D. MAGAI..... APPLICANT

VERSUS

**TAHERA SEIFFUDDIN DAWOOBHAI (Administrator of the estate
of the late SEIFFUDDIN DAWOODBHAI).....RESPONDENT**

RULING

09th February & 24th March, 2023

POMO, J;

The applicant Sadock D. Magai has filed this application under Section 5 (1) (c) of the Appellate Jurisdiction Act, [Cap 341 R.E. 2019], seeking for leave to Appeal to the Court of Appeal of Tanzania against the decision of this Court in Civil Revision No. 16 of 2022 contending that there are illegalities. The application is supported by the affidavit deposed by the applicant himself.

The application is strenuously contested by the respondent Seiffuddin Dawoobhai through his counter affidavit. His averments are to the effect that there were no commission of such illegalities asserted by the applicant.

Briefly stated, the respondent is the daughter and administratrix of the estate of her late father one Seiffuddini Dawoodbhai. Before, the applicant's father had instituted a RM Civil Case No. 72 of 2000 at the Resident Magistrate Court of Dar es Salaam at Kisutu against the respondent. Among the reliefs sought, he had prayed to be declared as a rightful owner of the suit premise described as; Upper Floor on Plot No. 1459/94, Market (Indira Gandhi) street Dar es salaam under C.T No. 2585. As well, he requested the court to prevent the respondent (defendant by then) from evicting him in the suit premise.

It is apparent that, the suit was unsuccessful and the respondent's father appealed to this court in *Civil Appeal No. 128 of 2000* however, the same didn't bear fruit as a result he opted to take initiatives to realize his rights before the Court of Appeal of Tanzania. It appears that, he had lodged a Notice of Appeal to the respective Court but upon failure to lodge the appeal, the said notice was struck out by the Court of Appeal vide *Misc. Civil application No. 81 of 2014*. Thereafter, the respondent herein

as an administratrix of the estate of her late father was served with *Execution No. 71 of 2020* which was mainly intended to execute the orders met in *RM Civil Case No. 72 of 2000*. The decision in *Execution No. 71 of 2020* was made in favour of the applicant herein (the Decree holder by then) of which the respondent herein (the judgment debtor) was ordered to be evicted from the suit property.

As depicted from the record, the respondent was dissatisfied with the decision thereof, he then decided to file Revision application before this Court, *Civil Revision No. 16 of 2022*, contending that, there were illegalities in execution. Fruitfully to the respondent, this Court ruled out in his favour that, there were serious illegalities as the drawn order of the trial court sought to be executed by the executing court did not bear the description of the property while the same was an immovable property. This Court then proceeded to quash the proceedings in both *Misc. Civil Application No. 46 of 2018* and *Execution No. 71 of 2020*, as well set aside the ruling and orders thereto and advised the respondent to rectify the drawn order in accordance with the law before applying for execution.

The Applicant is not happy with the above decision hence the Application herein intending to challenge the decision to the Court of

Appeal of Tanzania ground of which being set under paragraph 6 (i)-(ii) of his affidavit in support of the application. The same read as follows: -

- (i) *That the impugned decision of the High Court is tainted with illegality since the learned Judge of the High Court erred on point of law in raising an issue suo motu while composing the decision regarding to the merits of Misc. Civil Application No. 46 of 2018 on whether the act of the Court in importing description of the property in Misc. Civil Application No. 46 of 2018 which followed by Executing Court in Execution No. 71 of 2020 was lawful in law and decided it without inviting the parties or their counsel to address the Court on that issue which formed the basis for quashing of the proceedings in both Misc. Civil Application No. 46 of 2018 and Execution No. 71 of 2020 and the rulings and Orders made thereto.*

- (ii) *That the learned judge of the High Court erred in law in deliberating and quashing the proceedings in Misc. Civil Application No. 46 of 2018 which were uncontested by the parties nor were they before the Court for consideration, without giving opportunity to the parties or their counsel to be heard.*

The matter was agreed to be heard by way of written submissions, and in the course the applicant was represented by the Mr. John Kamugisha, learned advocate whilst the respondent enjoyed the services of Mr. HamisI Katundu, learned advocate.

Mr. Kamugisha's submission was preceded with a short history of the matter and he then made assurance on the mandate of this Court to grant reliefs sought under the chamber summons and his preposition was backed by section 5 (1) (c) of the Appellate Jurisdiction Act (*supra*). To buttress on this point, he cited the cases of **Said Ramadhani Mnyanga vs. Abdalah Salehe** (1996) T.L.R 74 and **Sango Bay Estates Ltd & Others vs. Dresdner Bank** (1971) E.A 17 of which the Courts held on what the Courts considers when entertaining applications of this nature. In the former decision it was decided that, the applicant should demonstrate that there is a serious and contentious issue of law or fact fit for consideration by the Court of Appeal. As well, in the latter decision, the Court decided that, this Court can grant leave if , prima facie, there is a ground of appeal which merit serious consideration of the Court of Appeal.

Mr. Kamugisha's argument was that, the raised grounds under paragraphs 6 (i) and (ii) are worth consideration by the Court of Appeal and hence this Court should grant leave.

In respect to ground one as stipulated under paragraph 6 (i) of the affidavit in support of application, the learned counsel for the applicant submitted that, in the impugned decision of this Court at page 12, Hon. Judge had raised an issue of which the parties were never invited to address on it. He went further to indicate the specific part which I see it suitable to quote: -

"The follow up question would be was the act of the Court in importing description which were followed in Execution No. 71 of 2020 lawful in law. In my considered view the answer is no..."

His argument was that, Misc. Civil Application No. 46 of 2018 was not before the High Court for Consideration and the said issue was raised *suo motto* by learned High Court Judge in respect to what transpired in Misc. Civil Application No. 46 of 2018 where the court imported the description of the property at the execution stage while the same was not reflected in the drawn order to be executed. According to Mr. Kamugisha, the issue was raised as to whether the Court was right in doing so and

without affording opportunity to parties to address on the issue, it proceeded to give decision thereof. Henceforth from Mr. Kamugisha's point of view, this was violation of Principles of natural justice, namely right to be heard. To cement on his argument, he cited the decision in **VIP Engineering and Marketing Ltd & 2 Others vs. Citibank Tanzania Ltd**, Consolidated Civil References No. 6, 7 and 8 of 2006 (Unreported) where the Court of Appeal stressed on necessity of adherence to the principles of natural justice when adjudicating cases.

On the second ground intended to be brought under recognisance of the Court of Appeal to wit paragraph 6 (ii) of the affidavit in support of application, the applicant complains on involvement of ***Misc. Civil Application No. 46 of 2018***. On that point, Mr. Kamugisha accentuated that the respondent herein did file Civil Revision No. 16 of 2022 seeking for the order of this Court to call for the records of the Resident Magistrate Court of Dar es Salaam at Kisutu in Execution No. 71 of 2020 and revise the same to determine whether Hon. G.N. Isaya, SRM (as he then was) acted with jurisdiction and without material irregularity in his ruling and order. According to Mr. Kamugisha, it was strangely to see the Court *suo motto* calling for record of proceedings in Misc. Civil Application No. 46 of 2018 which were previously presided over by Hon. K.D Mhina, SRM (as

he then was) and proceeded to quash and set aside the proceedings, ruling and its orders. He insisted that, these orders were never solicited by neither of the parties nor afforded opportunity to address the Court before arriving at such decision and prayed the Court to be guided by the decision in **John Tilito Kisoka vs. Aloyce Abdul Minja**, Civil Application No. 3 of 2008 (Unreported) where the Court of Appeal granted leave to appeal upon noticing that there were illegalities.

Mr. Kamugisha concluded that, the question in respect to the second ground will focus on whether the High Court was legally justified to interfere and determine the legality of Misc. Civil Application No. 46 of 2018 which was an objection proceeding in the application of revision as it did after a lapse of 3 years.

In rebuttal, Mr. Katundu in his brief but focused submission argued that, the raised grounds are not worth to be considered by the Court of appeal. His contentions were *one*, the court did not *suo motto* raise the issue regarding merit of Misc. Civil Application No. 46 of 2018 as the reply submission in opposing Civil Revision No. 16 of 2022, the applicant at page 2, 3 and 4 discussed at lengthy on the merit of Misc. Civil Application No. 46 of 2018. *Two*, the proceedings in Execution No. 71 of 2020 derives its basis from Misc. Civil Application No. 46 of 2018 which purportedly

interpreted the original order of the Court and for that reason, even though the Civil Revision No. 16 of 2022 was for Execution No. 71 of 2020 it was inevitable for the Court to deliberate on Misc. Civil Application No. 46 of 2018.

In his rejoinder, Mr. Kamugisha mainly reiterated what he had already submitted in chief and supplemented that, the submission in reply is untenable and thus he maintained his position.

I have examined the court record and the rival submissions by the parties, the central issue for determination is *whether the grounds raised by the applicant are worthy consideration and adjudication by the Court of Appeal.*

In so doing, I am convinced to enlighten the following observations which will assist me in arrive in an easy determination.

Firstly, it should be noted that, an application for leave to appeal to the Court of Appeal is usually granted if there is good reason, normally on a point of law or on a point of public importance, that calls for the Court's intervention. Lucidly, it was well expounded by the Court of Appeal of Tanzania in **British Broadcasting Corporation vs. Eric Sikujua Ng'maryo**, Civil Application No. 138 of 2004 (Unreported). In that case, as cited in the case of **Rutagatina C.L vs. The Advocates Committee**

and Another, Civil Application No. 98 of 2010 (Unreported), the Court of the Appeal had this to say: -

*"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 judiciously exercised and on the materials before the court. **As the matter of general Principle, 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.** (See: **Buckle vs. Holmes** (1926) ALL E.R 90 at page 91). However, where the grounds of appeal are frivolous, vexatious or useless or hypothetical, no leave will be granted."*[Emphasis is added]

See also **Bulyanhulu Gold Mine Ltd and 2 others vs. Petrolube (T) Ltd and another**, Civil Application No. 364/16 of 2017 CAT at Dar es Salaam, **Shaban Mkakanze vs. Teresia Judi Mkakanze**, Civil Application No. 135/13 of 2020 CAT at Tanga, **The Registered Trustees of Joy in the Harvest vs. Hamza J. Sungura**, Civil Appeal No. 149 of 2017 CAT at Tabora, **Rweyemamu Constantine & 2 Others vs. Uwamateda Group & Another**, Civil Application No. 563/17 of 2019 CAT at Dar es Salaam, **Ziada Willium Kamanga vs. Amanda Briton**

Kamanga & Another, Misc. Civil Application No. 390 of 2021 (HCT) at Dar es Salaam (All Unreported).

From the forgoing authorities, it is undisputed fact that an applicant to succeed in the instant application, his obligation is to show that the intended grounds of appeal suggest commendable appeal before the Court of Appeal.

Secondly, the duty of this Court in applications of this nature is not to determine the merits or demerits of the grounds of appeal raised , instead, a court has only to consider the substantive issues raised for the intended appeal. See **Regional Manager-TANROADS Lindi vs. DB Shapriya and Company Ltd**, Civil Application No. 29 of 2012 CA (Unreported).

Guided by the two observations above, now it is a disposal journey to see whether the raised grounds are worth consideration and determination by the Court of Appeal as contended. As pointed out, the Applicant's two proposed grounds of appeal are found under paragraph 6(i)&(ii) of the affidavit supporting the application. The applicant complaint is that, the High Court judge did raise *suo mottu* an issue in respect of legality of the act by the executing officer of importing the description of property in his decision of Misc. Civil Application No. 46 of

2018 without affording the parties the right of hearing. Again, there is a complaint that the revision initiated by the respondent only was intended to call for determination on the legality of Execution Cause No. 71 of 2020 but the Court had *suo mottu* called for Misc. Civil Application No. 46 of 2018.

Technically, the applicant intends to challenge the decision of the High Court when entertaining a revision application to determine an application which it is alleged that it was not before the High Court. Besides, there are allegations as to invocation of revisionary powers by the Court without affording opportunity to the parties to address over the *suo mottu* issue raised thereof by the Court. The respondents have resisted the application and went into details into the Court records.

In considering whether to grant the leave sought or not, I warned my self on the danger of likelihood of going into determining the substantive part of issues in the intended appeal. My task here is not to consider whether the learned judge rightly or wrongly decided the matters in question. The respondent's response to the proposed grounds by the applicant by itself indicate that there are arguments which are going to the merits and this is an indication that the issues are arguable. Guided by the wisdom in **British Broadcasting Corporation vs. Eric Sikuja**

Ng'maryo (*Supra*), the merits of the issues raised by the applicant cannot be resolved without going into the details of the decision which in my opinion is not within the power of this Court. Going into details of the decision of the High Court is a business of the Court of Appeal. See **Hamis Mdida & Another vs. The Registered Trustees of Islamic Foundation**, Civil Appeal No. 232 of 2018, CAT at Tabora (Unreported).

In the event, I am satisfied that the two grounds raised by the applicant under paragraph 6(i) and (ii) of the affidavit supporting the Application, raises a serious issues which are worth consideration by the Court of Appeal.

That said and done, I accordingly grant the Application with no order as to costs.

Order accordingly.

DATED at **DAR ES SALAAM** this 24th day of March, 2023.



MUSA K. POMO

JUDGE

24.03.2023

