

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF)

AT MWANZA

CIVIL APPLICATION NO. 56 OF 2023

(Arising from the Judgement of the High Court in Civil Appeal No. 30 of 2022 originally in the Ruling in Misc, Civil Application No 14 of 2022 before Nyamagana District Court)

LETSHEGO BANK (T) LTD -----APPLICANT

VERSUS

MATHIAS JAMES BUSAJO-----RESPONDENT

RULING

*Last Order date: 26.05.2023
Ruling Date: 23.06.2023*

M. MNYUKWA, J.

This application is made under Section 5(1)c of the Appellate Jurisdiction Act, Cap 141 R.E 2019 and Rule 45(a) of the Court of Appeal Rules. Cap 141 R.E 2019. The applicant supported his application with the chamber summons supported by the affidavit of his counsel, Inocent Michalel.

In order to appreciate the gist of the matter, it is apposite to state the facts of the case. It goes thus; the respondent sued the applicant in



the trial court in Civil Case No 95 of 2020 claiming among other things payment of Tsh 60,000,000/- being a purchase price of the mortgaged house situated at Plot No 442 Block D Nyegezi, He also claimed the payment of interest per year of the purchase price from 17th February 2018 to 12th December 2020 and payment of interest at the commercial rate from the date of judgement to the date of the satisfaction of the decree. He also prayed for damages, loss of the profit and costs of the suit.

As the applicant defaulted to appear when the matter was scheduled for hearing, the respondent managed to prove the case *ex parte* and the trial court awarded him as indicated in the judgement. The records reveal that the applicant did not make an early attempt to set aside the *ex parte* judgement hence prayed an extension of time before the trial court to set aside *ex parte* judgement, and the same was found to be devoid of merit and thereby dismissed.

Aggrieved, he filed an appeal to this court. Fortunately, the appeal was allowed and he was granted 14 days time to file an application before the trial court to set aside *ex parte* judgment. After hearing the application, the applicant's prayer was not granted. As he found justice was not done on his part, he lodged an appeal to this Court. Again, it was not luck on his party since the appeal was dismissed with costs.



Believing that justice was not done on her part, he filed the present application pleased this Court to grant leave so as to appeal to the Court of Appeal against the decision of this Court delivered on 25th April, 2023. According to paragraph 6 of the applicant's affidavit, he wishes to challenge the decision of this Court on the following grounds of law alleged to be worth for consideration and determination by the Court of Appeal. The grounds are:

- (i) *Whether the the Hounourable High Court Judge was legally justified to hold that the applicant did not adduce sufficient causes to set aside ex-parte judgement.*
- (ii) *Whether the Hounourable High Court Judge was legally justified to upheld the decision of trial court while he appreciated the fact that the applicant was not notified on the date set for delivery of ex-parte judgment.*
- (iii) *Whether the Hounourable High Court Judge was legally justified to hold that the trial court was rightly in exercising his discretonary powers.*

When the matter was called for hearing, the applicant was represented by the learned counsel Mr. Innocent Michael whereas the respondent enjoyed the service of Constantine Mutalemwa who filed the counter affidavit opposing the application. By an order of the Court dated



26th May 2023, the application was disposed of by way of oral submissions.

Submitting in support of the application, the learned counsel for the applicant averred that this Court has to consider the disturbing features that requires consideration by the Court of Appeal. He referred the case of **Harbar Haji Mesi & Another v Omari Hilal Seif & Another** 2001 TLR 49 and the case of **Lightness Damian & 5 others v Saidi Kassim**, Civil Application No 450/17 of 2020 as well as the case of **Vumi Mgunila v Mayanga Njile**, Misc, Civil Application No 55 of 2021. He enlightened that, the above cases insisted the application for leave must state the factual and legal issues that the proposed grounds of appeal fit for appeal.

He etires by stating that, paragraph 6 of his affidavit pointed out the distrurbing features worth for consideration and determination gy the Court of Appeal. He therefore prayed the application to be granted.

Responding, the counsel for the respondent prayed to adopt the counter affidavit challenging the application be adopted to form part of his submissions. He submitted that, this Court has no power to look on the chances of success as stated in paragraph 6 of the applicant's counsel affidavit. He went on by referring to the case of **Bulyanhulu Gold Mine Ltd & 2 others v Petrolube Tanzania Limited and Another**, Civil



Application No 364/16 of 2017 that this Court is restrained from considering the substantive issues that are to be dealt with by the Court of Appeal.

He added that, the wording of paragraph 6 of the affidavit of the applicant's counsel invites the grounds of appeal of while the applicant is supposed to disclose factual and legal issues and not the grounds of appeal as he did. He insisted that, the applicant is required to state the factual and legal issuea which are missing in his application.

He further submiited that, in the case of **Bulyanhulu Gold Mine Ltd & 2 others v Petrolube Tanzania Limited and Another** (supra), the Court of Appeal insisted that. grants of leave is not automatic as it is granted only where the grounds of appeal raises arguable issues before the Court of Appeal.

The counsel for respondent went on to the impugned judgment and averred that, the applicant's counsel conceded that non appearance of the applicant was because of the adovocate negligence. He remarked that, there is no point of law worth for determination because advocate negligence is not an arguable issue befoe the Court of Appeal.

He went on to attack the other issues raised by stating that, a notice of ex-parte judgement enabled the parties to know their right of appeal and therefore this cannot be arguable issue before the Court of Appeal.



He retires by challenging the third issue that it is not worth for determination because the impugned judgement shows that the discretionary power was exercised judiciously. He therefore prayed the application not to be granted.

In a short rejoinder, the applicant's counsel submitted that, in **Bulyanhulu Gold Mine Ltd & 2 others v Petrolube Tanzania Limited and Another** (supra), the Court of Appeal insisted that this Court must be restrained to consider the substantive issues to be considered by the Court of Appeal. He concluded by submitted that, the submissions for the counsel of the respondent argued the grounds of appeal. He prayed the application to be granted because right of appeal is a constitutional right of the applicant.

I have considered the parties' submissions for and against the application. The main issue for determination is whether there are arguable issues worth for determination by the Court of Appeal for this Court to grant leave to the applicant to appeal to the Court of Appeal.

In the determination of this application, the Court is mandated to see if there are factual and legal issues that need the attention of the Court of Appeal . This court lacks jurisdiction to go into the merit or



deficient of the judgment since doing so, will be contrary to the law as this court is not mandated to do so.

In the case of **Jireyes Nestory Mutalemwa vs Ngorongoro Conservation Area Authority**, Application No 154 of 2016, the Court of Appeal observed that;

"The duty of the Court at this stage is to confine itself to the determination of whether the proposed grounds raise an arguable issue(s) before the Court in the event leave is granted. It is, for this reason, the Court brushed away the requirement to show that the appeal stands better chances of success as a factor to be considered for grant of leave to appeal. It is logical that holding so at this stage amounts to prejudging the merits of the appeal."

Guided by the above decisions, it is upon this Court to scrutinize the legal issues advanced by the applicant and exercise judiciously the discretion to grant or refuse to grant leave to appeal to the Court of Appeal.

After going through the impugned judgment sought to be challenged, the pleadings and the submissions by the parties, I find that there are points of law worth to be determined by the Court of Appeal as demonstrated by the applicant's counsel in his affidavit and submissions.




It is my observation that, the first and the third legal issues seems to be similar as they all challenge the exercise of the discretionary power in refusing to grant to set aside the ex parte judgement.

From the foregoing reasons and to the extent as stated above, an application for leave to appeal to the Court of Appeal against the decision of this Court in Civil Appeal No 30 of 2022 is hereby granted. Costs shall follow the cause.

It is so ordered.




M. MNYUKWA
JUDGE
23/06/2023

Court: ruling delivered on 23rd June, 2023 in the presence of the applicant's counsel through video conference.


M. MNYUKWA
JUDGE
23/06/2023