

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM SUB-REGISTRY)

AT PAR ES SALAAM

MISC. CIVIL APPLICATION NO. 318 OF 2022

(Arising from Revision No. 33 of 2021 dated 1st July, 2022, before Hon. Kakolaki J,)

Between

JUDITH GEORGE NYEMBELA APPLICANT

VERSUS

EDGAR HERMAN BEREGE..... APPLICANT

RULING

S.M MAGHIMBI J.

This ruling is on an application for leave to appeal to the Court of Appeal of Tanzania, against the judgment of this Court in Revision Application No. 33 of 2021. The impugned decision was delivered on 1st July, 2022 before Hon. Kakolaki J. Unsatisfied with the decision of this court, she intends to challenge the decision before the Court of Appeal hence this application which was lodged by way of Chamber Summons supported by an affidavit sworn by Ms.

Judith George Nyembela, the applicant herein. The applicant has come up with six issues that she proposes to ask the Court of Appeal to deliberate on in the intended appeal namely :

- (i) Whether learned judge erred on striking out the revision application of the Applicant on preliminary objection and requiring her to file the fresh suit while apparent it was a suit in which the executing Court interfered by way of objection proceedings and thereby removed the property in the judgment and decree of the same Court in Matrimonial Cause No. 19 of 2018.
- (ii) Whether the honourable judge erred in law in refusing to exercise his revision jurisdiction under the law.
- (iii) That the judge erred in holding that executing Court have jurisdiction to entertaining objection proceedings challenging the attachment or sale of the property forming part of the decree and remove or release it from attachment under XXI Rule 59 of the CPC, Cap 33 R.E 2019.
- (iv) That the learned judge did not appreciate that decision, proceedings, ruling and drawn order of the Resident Magistrates' Court of Dar-es-salaam in the matter had serious

errors, tainted with illegalities, irregularities and irrationality material to the merits of the case involving injustice which called for immediate intervention of the high Court for interest of justice to be preserved before it is irretrievably lost by way of invoking revision jurisdiction.

- (v) Whether order granting objection proceedings by the executing Court having the effect of altering the judgment and decree in Matrimonial Cause No. 19 of 2018 is revisable.
- (vi) Whether the executing Court had jurisdiction to grant the objection proceedings in the circumstance of this matter was a ground for revision.

The Respondent did not file a reply to the affidavit. When the parties appeared before me, an order was issued to the effect that disposal of the application should take the form of written submissions, whose filing conformed to the schedule drawn by the Court and parties duly filed their submissions.

In his submissions to support the application, Mr. Mwaiteleke submitted that the main grounds of this application emanated from illegalities, irregularities, and irrationality of the ruling of the Resident Magistrates' Court of Kisumu vide Civil Application No. 39 of 2020 which granted an order to

withdraw the property described as business premise and one floor in a flat at plot No. 8 Block 43, Kijitonyama at Mwenge which was subject of the judgement and decree of the same Court vide Matrimonial Cause No. 19 of 2018. He then reproduced areas of consternation that he considers to be points of law and fact which are likely to engage the mind of the Court of Appeal through the intended appeal.

While acknowledging that leave to appeal is not an automatic right of a party, Mr. Mwaiteleke contended that the instant application has shown the reason as to why the matter merits the attention of the superior Court. He was of the view that on account of the reasons stated in the application, the Applicant's Revision in Civil Revision No. 33 Of 2021 was struck out owing to the objection and the Court directed the Applicant to file a fresh suit, while aware that the property was adjudicated by the Court in Matrimonial Cause No. 19 of 2018. His argument was that the objection proceedings tantamount to challenge the judgment and decree of the Court which was wrong and therefore, he believe that this contentious issue is worth consideration by the Court of Appeal. To buttress his stance, he cited the case of; **Winford Mlagha vs Dinales Paulo Mwasile (Administratrix of the Estate of the late Paulo Mwasile), Ruth Mlagha, Mbeya City Council, Civil Application No. 112/06 of 2022, CAT, At Mbeya (Unreported)**, it was

held that; in an application for leave to appeal to the Court of Appeal, the Court will only grant the application if there are prima facie grounds of appeal which merit serious judicial consideration.

The Respondents' rebuttal submission was preferred by Mr. John Seka, learned advocate. He began by castigating the applicant by submitting that, in this case, the applicant seeks the inevitable by seeking leave to appeal a decision that ultimately is not appealable. He contends that, in an effort to live by the principles that **litigations must come to an end**, this leave application must be rejected because what it intends to seek is futile. To fortify his stance, he pointed out that from the submissions addressed by the applicant, the central contentious question that the applicant is intending to present to the Court of Appeal is whether the High Court was correct to refuse to entertain a revision application arising out of objection proceedings while, the question whether an applicant can file an appeal or a revision from objection proceedings is now well settled. He supported his argument he referred this Court the case of; **National Housing Corporation vs Peter Kassidi & Others [2022] TZCA 475** where the Court of appeal at page 8 and 9 of the typed judgment stated its position on the settled view that they took in their earlier decisions in **Kezia Violet Mato v. The National Bank of Commerce and three Others, Civil Application No. 122 of 2005**

(unreported) and **Mohamed Enterprises Tanzania Ltd v. The Tanzania Investment Bank Ltd and Others [2012] 1 EA 173** which had created a situation of what Benjamini Cardozo called the *"inevitable law"* which must now determine the destiny of the case under scrutiny.

He further submitted that going by the above-cited two authorities, it is now a firmly established law that, pursuant to Order XXI Rule 57(1) of the CPC, where an objection is preferred and an order determining that objection is subsequently made, in terms of Rule 62 of the same Order, the only remedy available to the party against whom that order is made is to institute a regular suit to prove his claim. He went on to submit that put in other words, after the decision on an objection proceeding has been made by a competent court, there is no remedy for appeal or revision and the rationale behind the above-stated stance of the law is not farfetched.

In response to the above cited authorities, the counsel for the Respondent alleged that, their hope will be immediately appreciated even by the doubting Thomases that, not emanating from a suit, an order determining objection proceedings is not appealable. To bolster his argument cited the case of; **Ibrahim Mohamed Kabeke v. Akiba Commercial Bank and Another, Civil Application No. 71 of 2004 c/f No. 141 of 2004 (unreported)**.

In a short rejoinder, the counsel for the Applicant reiterated that this application should be granted so as to address the Court of Appeal as to whether the executing Court had jurisdiction to grant the objection proceedings in the circumstances and the ground for revision is that the case whether an order granted by the executing Court has effect of altering the judgment and decree in Matrimonial Cause No. 19 of 2018 is revisable.

Having gone through the rival submissions of both counsels, I have a firm view that the critical issue for determination in this application is whether the application carries some merit to warrant its grant. Mr. Mwaiteleke is of the view that the intended appeal contains an arguable point, sufficient enough to merit the attention of the Court of Appeal, constitutes the basis for granting. It is therefore undisputed that leave to appeal will only be granted where there are solid grounds to engage the minds of the Court of Appeal. The grounds of appeal must constitute serious points of law, or law and fact (See: **National Bank of Commerce v. Maisha Mussa Uledi (Life Business Centre)**, CAT-Civil Application No. 410/07 of 2019; **Abubakari Ally Himid v. Edward Nyalusye**, CAT-Civil Application No. 51 of 2007; and **Junaco (T) Ltd and Justin Lambert v]. Hare Mallac Tanzania Limited**, CAT-Civil Application No. 473/16 of 2016 (all unreported); and **British Broadcasting Corporation (BBC) v. Eric**

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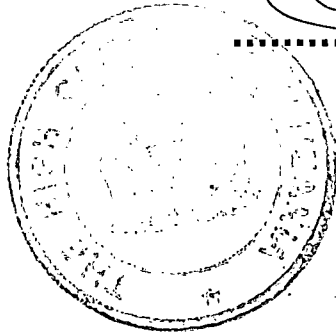
Needless to say, the intended appeal must carry with it issues of general importance; a novel point of law, and that the same should arguable or bear a prima facie case. It means, therefore, that an application that falls short of these prerequisites must fall through (See: **Saidi Ramadwani Mnyanga v. Abdallah Salehe [1996] TLR 74**; and **Nurbhain Rattans! v. Ministry of Water Construction Energy Land and Environment and Another [2005] TLR 220**).

Having thoroughly gone through the records of this application particularly paragraph 14(a)(e)(f) of the affidavit supporting the application, I am of a settled view that the intended appeal carries with it an arguable case of sufficient importance to justify the attention of the Court of Appeal. The proposed grounds, as gathered from paragraph 14(a)(e)(f) of the affidavit, raise an arguable case that convinces me to see merit in the application.

In the upshot, I am satisfied that the application has met the legal threshold for grant of leave and accordingly, the same is hereby granted. The Applicant is granted leave to appeal to the CAT against the decision of this court in Civil Revision No. 33 of 2021. I have considered the nature of the case, as it emanated from Matrimonial dispute, I refrain to make order as to

the costs hence each part shall bear his/her own costs.

DATED at **DAR ES SALAAM** this 29th day of **May**, 2023.



S.M MAGHIMBI
JUDGE

