

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**  
**IN THE SUB REGISTRY OF MANYARA**  
**AT BABATI**

**MISC. LAND APPLICATION NO. 23 OF 2023**

*(In the matter of an application for leave to appeal to the court of appeal of Tanzania in the intended appeal from the decision of the High Court in Land Appeal No. 4 of 2023)*

**FERDINAND GILGO LULU.....APPLICANT**

**VERSUS**

**MAGRETA BASSO.....RESPONDENT**

**RULING**

*7<sup>th</sup> & 29<sup>th</sup> September, 2023*

***Kahyoza, J.:***

**Ferdinand Gilgo Lulu** (the applicant) seeks leave to appeal to the Court of Appeal against the decision of this Court in Land Appeal No. 4 of 2022. The Court nullified the proceedings, judgment and decree of the trial tribunal (the DLHT) and ordered a retrial before another Chairman with a new set of assessors. Eager to appeal to the Court of Appeal, he instituted the current application.

**Magreta Basso** (the respondent) filed a counter affidavit and notice of preliminary objection on point of law to resist the application. On the 7<sup>th</sup> day of September, 2023, among other things, this court ordered the

applicant to amend his affidavit so as to indicate source of information and he complied by filing an amended affidavit.

The issue for determination is whether the applicant has an arguable case or there is a disturbing feature to require guidance of the Court of Appeal. It is not disputed that the law does not provide in no uncertain terms what to take into account in deciding whether to grant leave as the Court of Appeal stated in **Wambele Mtumwa Shamte v. Asha Juma**, Civil Application No. 45 of 1999 (unreported). However, the Court of Appeal has been giving guiding principles on factors or matters to consider in granting leave to appeal. One of such cases is **Gaudencia Mzungu v. Institute of Development Management Mzumbe**, Civil Application No. 94 of 1999 (unreported), where the Court of Appeal stated that-

*".. for the purpose of granting leave, **what is important is whether there is a prima facie** ground meriting an appeal."*

Yet in another case of **Harban Haji Mosi and Another v. Omary Hilal Seif and Another** [2001] T.L.R. 409, the Court of Appeal issued another guidance that-

*"Leave is grantable... where, but not necessarily, the proceedings as a whole reveal such disturbing feature as to require the guidance of the Court of Appeal..."*

The Court of Appeal cautioned a Court considering an application for leave to abstain from making determination on substantive issues of the appeal. It pronounced a caution in the case of **The Regional Manager-TAN ROADS Lindi vs DB Shapriya and Company Ltd**, Civil Application No. 29 of 2012 CA (unreported) in which it stated that: -

*"It is now settled that a Court hearing an application should restrain from considering substantive issues that are to be dealt with by the appellate Court. This is so in order to avoid making decisions on substantive issues before the appeal itself is heard..."*

The task ahead of this Court is determine whether the applicant established *prima facie* ground meriting an appeal or a disturbing feature as to require the guidance of the Court of Appeal. I am alive that this Court has no duty to assess the merit of the intended appeal.

The applicant intends to raise the following grounds of appeal to the Court of Appeal-

- i. *"Whether it was proper for the Hon. Judge to nullify judgment, Decree and Proceedings of the tribunal and order retrial on the ground that the trial chairperson heard the testimonies of DW1 with new set of assessors while that was not the case at trial.*
- ii. *Whether it was proper for the High Court to adjudge that the chairperson did not comply with the requirement of the law regarding change of assessors without considering facts and orders transpired on the trial proceedings of 20/07/2021.*

- iii. *Whether an order dated 20<sup>th</sup> July, 2021 vacating an order issued on 21 May, 2021 does not amount to clarity for the chairperson to proceed with the hearing of the case without assessors.*
- iv. *Whether it is correct for the Hon. High Court Judge to nullify Judgment, decree and proceedings of the trial tribunal for reasons of a defective decree while the defect is curable under the law.*
- v. *Whether the Hon. Judge had analysed properly issues of law and facts transpired at the trial and on appeal.”*

A brief background is that; **Magreta Basso** sued her son **Ferdinand Gilgo Lulu** before the DLHT for a declaration that she is the lawful owner of the suit land. The DLHT dismissed **Magreta Basso's** claim for want of merit and ordered each party to bear its own costs. Aggrieved, **Magreta Basso**, the respondent, appealed to this Court, which nullified the judgment, decree and proceedings of the trial tribunal, and ordered trial *de novo*.

The hearing of this application proceeded on written submissions, the applicant enjoyed the services of Mr. Lengai Nelson Merinyo, Advocate, and the respondent was represented by Mr. Raymond Kim, Advocate. Mr. Lengai adopted the amended affidavit and added that issues raised under paragraph 4 of the amended affidavit are worthy to be considered by the Court of Appeal.

Mr. Kim, for the respondent, submitted that he opposes the instant application for, that the grounds of appeal raised are not worthy to get the attention of the court of appeal, as they are not novel points of law citing the rule in **Njunwa Majula vrs. Eustidia Rweikiza** (Misc. Civil Application No. 1 of 2022) [2022] TZHC 3033 (28 March 2022) as cited in approval in **Ali Vuai Ali vrs. Sowed Mzee Suwed**, Civil Appeal No. 72 of 1998 (unreported).

Mr. Lengai, in his rejoinder, emphasised that the raised grounds of appeal are worthy for the determination of the Court of Appeal and he has demonstrated that there are arguable issues that needs the attention of the Court of Appeal.

The issue is whether the applicant has disclosed arguable issue(s) worthy to be considered by the Court of Appeal. The three out of the five intended grounds of appeal are based on change of assessors during trial or trial without assessors. The effect of trial without or change of assessors during trial is settled that is to render the proceedings and the subsequent judgment and a decree a nullity. Thus, the intended appeal does not *reveal such disturbing feature as to require the guidance of the Court of Appeal*. For that reason, the first three intended grounds of appeal cannot be the basis of granting leave to the applicant to appeal.

Further, the intended appeal seeks to challenge the decision of this Court for holding that defects in the decree were fatal while they are curable. I examined the decision and found that nowhere did the Court decide on non-curability of the decree. To grant leave to the applicant to appeal on the ground that this Court erred to hold that the decree was fatally defective would be to invite a second appellate court to canvass on matters not considered and decided upon by the first appellate court. It is an established principle of law that a second appellate court cannot adjudicate on a matter which was not raised and decided upon by the first appellate court. I wish to refer to **Simon Godson Macha (Administrator of the late Godson Macha) v Mary Kimaro (Administrator of the late Kesia Zebadayo Tenga)**, Civil Appeal No 393/2019, **Juma Manjano v R.** Cr. Appeal No. 211/2009, **Sadick Marwa Kisase v. R.** Cr. App. No. 83/2012 and **George Mwanyingili V. R.** Cr. App. No. 335/2016. In **Juma Manjano v R.** the Court held-

*"As a second appeal court, we cannot adjudicate on a matter which was not raised in the first appellate court. The record of appeal at page 21 to 23 shows that this ground of appeal was not among the appellant's ten grounds of appeal which he filed in the High Court. In the case of **Abdul Athumani v. R** [2004] TLR 151 the issue of whether the Court of Appeal may decide on a matter not raised in and decided by the High Court on the first appeal was raised. The Court held that the Court of Appeal has no such*

*jurisdiction. This ground of appeal is therefore struck out....the Court has repeatedly held that matters not raised at the first appellate court cannot be raised in the second appellate court"*

In the upshot, I find that the applicant has not revealed such disturbing feature as to require the guidance of the Court of Appeal. Consequently, I dismiss the application for leave to appeal to the Court of Appeal with costs.

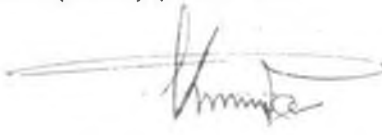
I so order.

Dated at **Babati** this **29<sup>th</sup>** day of **September**, 2023.



  
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**John R. Kahyoza,**  
**Judge**

**Court:** Ruling delivered in the virtual presence of the advocate who could not communicate and another person recorded as Christina Lutangilo Mwinuka. B/C Ms. Ombeni (RMA) present.

  
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**John R. Kahyoza,**  
**Judge**

**29.09.2023**