

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

MISC. CIVIL APPLICATION NO. 288 OF 2023

(Arising from the decision in Civil Appeal No. 248 of 2017 Hon. A. R. Mruma, Judge,
dated 16th May 2023)

EDMUND VENANCE KAVISHE APPLICANT

VERSUS

ADVANS BANK (T) LTD 1ST RESPONDENT

FELISTA PASCAL LUSINDE 2ND RESPONDENT

RULING

26th Oct & 13rd Nov, 2023

KIREKIANO, J.:

This is an application for leave to appeal to the court of appeal against the decision of this court in Civil Appeal No. 248 of 2017. The application is preferred under Section 5(1) (c) of the Appellate Jurisdiction Act Cap 141 R.E [2019] and Rule 45 (a) of Court of Appeal Rules G.N 368 OF 2009 as amended by GN 344 of 2019.

The application is supported by an affidavit of the applicant Edmund Venance Kavishe. The 1st respondent contests the application and filed a counter affidavit sworn by Ladislaus Ragwe Muhagachi the 1st respondent's Company Secretary. The second respondent did not appear, the application

was heard ex-parte against her since efforts to serve her including substituted service proved futile.

Briefly stated, in Civil Appeal No. 248/2017 the 1st respondent sought to challenge the decision of Kinondoni District Court in Civil Case No. 76/2015. Upon hearing the appeal, this court (Hon Mruma, J) on 16/08/2023 allowed the appeal with costs and quashed the decree and judgment of Kinondoni District Court.

The applicant herein is aggrieved with this decision. On 13/6/2023 he lodged a notice of appeal determined to challenge the decision in the Court of Appeal. However, since under the circumstance appeal is not automatic, he thus lodged this application posing eight grounds which he wishes to argue in the Court of Appeal, the grounds are: -

- 1. Whether the High Court Judge was right to set aside the trial judgment without determining the fate of the questionable mortgage arrangements.*
- 2. Whether the High Court Judge was justified to treat the whole matter between the parties as a matrimonial dispute.*
- 3. Whether the High Court was justified to leave out some other grounds of appeal in determining the appeal before it.*

4. *Whether the High Court Judge was right to decide in favour of the 1st Respondent based on the wrong evaluation of the evidence which does not support the findings.*
5. *Whether the High Court Judge was right to give orders as he did, rendering the judgment contradictory.*
6. *Whether the High Court was right after finding out that the applicant and the 2nd respondent were not husband and wife then proceeded to set aside that trial judgment without determining the legality of the applicant's properties to be subjected to mortgage arrangements between the 1st respondent and the 2nd Respondent.*
7. *Whether the High Court was right to make a declaration that the applicant and the 2nd respondent were not under the presumption p marriage.*
8. *Whether the High Court was right to decide the matter without resolving as to whether there was a lawful mortgage agreement between the 1st respondent and the 2nd respondent.*

When this application was called for hearing the applicant was represented by Mr. Frank Chundu while the 1st respondent had the service of Mr. Leonard Masatu.

Submitting in support of the application Mr. Chundu referred to eight grounds stated in the affidavit and as shown above arguing that the same makes a good case to be argued before the court of appeal. He cited the

decision in **British Broadcasting Corporation vs. Eric Ng'maryo, Civil Application No. 138 of 2004** to the effect that, based on the potential grounds of appeal the applicant has sufficiently demonstrated that there is an arguable case to make in the Court of Appeal.

On his part, Mr. Masatu for 1st respondent submitted in response to the grounds posed. Seemingly, Mr. Masatu was somehow considering the merit or otherwise of the issues or grounds posed. In substance, Mr Masatu stance is that the grounds posed are not worthy of Court of Appeal consideration. He thus asked this court to dismiss the application with costs.

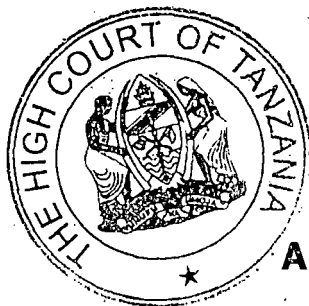
In his brief rejoinder, Mr. Chundu was of the view that given the grounds proposed this application has merit.

I have considered the parties' submissions, while the applicant laid down grounds which he is of the view that the same will be arguable in the court of appeal, the respondent countered the same ostensibly challenging their merit or otherwise. It is a well-settled position that, this court shall consider the grounds for seeking leave to appeal in isolation of the submissions seeming to challenge the findings of the High Court. This is a clear position stated in numerous decisions including **Jireys Nestory**

Mutalemwa vs. Ngorongoro Conservation Area Authority, CAT, Application No. 154 of 2016, Lilia, JA (Unreported). In this case, the Court of Appeal citing its decision in **The Regional Manager-TANROADS Lindi vs DB Shapriya and Company Ltd, Civil Application No. 29 of 2012 CA** (unreported) 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 to avoid making decisions on substantive issues before the appeal itself is heard..."

Having considered the applicant's grounds I am of a settled mind that the same have passed the test in the cited case of **British Broadcasting Corporation vs Eric Sikujua Ng'maryo** for court of appeal consideration. In the end, this application is merited, I therefore grant leave to the applicant to appeal to the Court of Appeal. I make no order as to cost.



A. J. KIREKIANO

JUDGE

13/11/2023

COURT: Ruling delivered in chamber in presence of the applicant and Mr. Matter Khalfan for applicant and in absence of the 1st and 2nd respondent.

Sgd: A. J. KIREKIANO

JUDGE

13/11/2023