

THE UNITED REPUBLIC OF TANZANIA

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

MISC. LAND APPLICATION NO. 37 OF 2023

**(Arising from the Decision of the High Court of Tanzania at Mbeya in Land
Appeal No. 86 of 2022)**

CRDB BANK PLC.....1ST APPLICANT

RAISA FINANCIAL DEBT.....2ND APPLICANT

COLLECTORS & AUCTIONING

JOSEPH CONSTANTINE MUSHI.....3RD APPLICANT

VERSUS

JONAS MARCO MGENI.....RESPONDENT

RULING

02 & 10 November 2023

SINDA, J.:

The applicants seek for leave to appeal to the Court of Appeal of Tanzania to (the **CAT**) against the decision of this Court (Karayemaha, J.) in Land Appeal No. 86 of 2022. The application is made under section 47 (2) of the Land Disputes Courts Act Cap. 216 R.E. 2019 (the **LDCA**) and section 5 (1) (c) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019 (the **AJA**). The application is supported by the sworn affidavit of Alex Job Giriyago, counsel for the applicant. The respondent did not file an affidavit in reply to oppose the application.

The brief facts of the case are on 17 February 2021, the respondent instituted Application No. 20 of 2021 before the District Land and Housing Tribunal at Mbeya (the Trial Tribunal) against the applicants, claiming that the sale of the mortgaged property was null and void as the applicant was not a defaulter. The Trial Tribunal delivered its Judgment in favour of the respondent on 13 July 2022. The applicants were dissatisfied with the decision. Land Appeal No. 86 of 2022 was lodged with this Court. The Court delivered its Judgment on 19 May 2022 in favour of the respondents. The applicants are dissatisfied with the decision of the Court as the first appellate court and wish to appeal to the CAT.

The applicant's grounds for leave are reproduced hereunder:

1. Whether the High Court was right to hold that the burden to prove the market value of the disputed property lies with the first applicant;
2. Whether the High Court was right to interpret the provision of section 115 of the Evidence Act Cap. 6 R.E. 2022 as an exception to the rule he who alleges must prove;
3. Whether the High Court was right to hold the third applicant deserved no protection as a bonafide purchaser under section 135 (3) of the Land Act Cap. 113 R.E. 2019;
4. Whether the respondent had proved the existence of fraud, misrepresentation and dishonest conduct to be reasons sufficient

for nullifying the public auction held by the second applicant on behalf of the first applicant;

5. Whether the High Court was right to rule out the first applicant had breached the duty of care upon the respondent to which no evidence was led to prove the same; and
6. Whether the High Court was right to grant costs of appeal to the respondent, taking into account the circumstances of the case.

When the matter came for hearing of this application on 2 November 2023, the applicant was represented by Mr. Job Alex Giryago, learned advocate. The respondent was represented by Mr. Omari Issa Ndamungu, learned advocate.

Mr. Giryago prayed for the Court to adopt the contents of his affidavit as part of his submission. Mr. Ndamungu readily supported the application. In rejoinder, Mr. Giryago urged the Court to grant leave because Mr. Ndamungu supported the application.

I have considered the instant application, the grounds in support thereof, the affidavit sworn by the applicant's counsel, the record of this application and the law. Section 47 (2) of the LDCA provides as follows:

"(2) A person who is aggrieved by the decision of the High Court in the exercise of its revisional or appellate jurisdiction may, with leave of the High Court or Court of Appeal, appeal to the Court of Appeal."

In addition, section 5 (1) (C) of the AJA provides as follows:

"5 (1) (C) In civil proceedings, except where any other written law for the time being in force provides otherwise, an appeal shall lie to the Court of Appeal with the leave of the High Court or of the Court of Appeal, against every other decree, order, judgment, decision or finding of the High Court."

The applicants invoke the foregoing provisions of the LDCA and the AJA and seek leave to appeal to the CAT. This Court has been moved to determine whether the arguments raised by the applicant are worth of consideration by the CAT.

It is settled law that leave to appeal to the CAT is granted only when the intended appeal has some merits, factual or legal. See ***British Broadcasting Corporation vs Erick Sikujua Ng'maryo***, Civil Application No. 138 of 2004 (CAT, Dar es Salaam, unreported), ***Rutagatina C.L vs The Advocates Committee & Clavery Mtindo Ngalapa***, Civil Application No. 98 of 2010 (CAT, Dar es Salaam, unreported), ***Lightness Damian & Others vs Said Kasim Chageka***, Civil Application No. 450/1 of 2020 (CAT at Dar es Salaam, Tanzlii) and ***Jireys Nestory Mutalemwa vs Ngorongoro Conservation Area Authority***, Civil Application No 154 of 2016 (CAT Arusha).

The CAT gave the test for granting leave to appeal to the CAT in the case of ***Lightness Damiani and 5 Others vs Said Kasim Chageka*** (supra), whereby it stated that:

*"In the light of the above stance of the law, and with respect to the learned judge, it seems clear to us that all that applicants are required to do in applications of this kind is **simply to raise arguments whether legal or factual which are worth of consideration by the Court.** Once they pass that test, the court is obligated to grant leave to appeal. It is not the duty of the judge to determine whether or not they have any merit."*

In the case of **British Broadcasting Corporation vs Erick Sikujua Ng'maryo**, (supra) the CAT stated that:

*"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 a matter of general principle, **leave to appeal will be granted where grounds of appeal raise issues of general importance or a novel point of law or where the grounds show a prima facie arguable appeal** (see: **Buckle vs Holmes** (1926) ALL ER. 90 at page 91). However, where the grounds of appeal are frivolous, vexatious or useless or hypothetical, no leave will be granted."*

In the case of **Jireys Nestory Mutalemwa vs Ngorongoro Conservation Area Authority**, (supra) the CAT further stated that:

"Similarly, in applications of this nature, it is a well-established principle of law that the Court is not expected to determine the

merits or otherwise of the substantive issues before the appeal itself is heard..."

The issue for consideration now is to determine whether or not the arguments raised by the applicants in support of the application for leave to appeal to the CAT are pertinent questions for determination by the CAT and meet the conditions explained in the cases above.

I have analysed the grounds of appeal raised, particularly paragraphs 7 (a) to (f) of the affidavit of the applicant's counsel. I believe the present application raises matters worth considering by the CAT as established in the cases mentioned above.

The application is merited. I therefore grant leave to appeal to the CAT. No order as to cost is made.

DATED at MBEYA on this 10th day of November 2023.


A. A. SINDA
JUDGE

The Judgment is delivered on this 10th day of November 2023 in the presence of the applicants represented by Mr. Ipyana Charles Mwantoto, holding brief for Mr. Alex Job.




A. A. SINDA
JUDGE