

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB- REGISTRY OF MWANZA
AT MWANZA

MISC. CIVIL APPLICATION NO. 114 OF 2023

(Arising from Civil Appeal No. 2 of 2023 and Originating from Commercial Case No. 39 of 2021.)

**BEATRICE IBRAHIM AUGUSTINO (*Administratrix of
the estate of the late Nyabenda A. Ntagaye*) APPLICANT**

VERSUS

AMANI ERASTO SHAMAJE RESPONDENT

RULING

3rd & 20th November, 2023.

MUSOKWA, J.

This is a ruling in respect of an application, preferred by the applicant, for grant of leave to appeal to the Court of Appeal against the decision of this court (Hon. Morris. J.), Civil Appeal No. 02 of 2023. The impugned judgment which was in favour of the respondent, was delivered on 6th July, 2023. The applicant, dissatisfied with the said decision seeks to challenge it in the Court of Appeal of Tanzania. The application has been preferred under the provisions of section 5 (1) (c) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019. Supporting the application is an affidavit sworn by Beatrice Ibrahim Augustino, the applicant herself, and it sets out grounds upon which the application is based. The respondent did not file a counter-affidavit.

In summary, the parties herein litigated over Tshs. 18,100,000/-. The respondent allegedly advanced a loan to the late Nyabenda Augustino Ntaganye (hereinafter called the deceased), amounting to Tshs. 20,000,000/- which was transferred to the deceased in two installments. It is alleged that the deceased made partial re-payment of the loan, a substantial amount, the litigated amount aforementioned, remained outstanding at the time of his demise. The appellant herein was appointed administratrix and was sued by the respondent upon failure to settle the outstanding loan amount. The original matter before the Resident Magistrates' Court of Mwanza ended in favour of the respondent. Aggrieved, the appellant herein appealed to this court where the judgment was again pronounced in favour of the respondent; hence this present application.

In the hearing of the application Mr. Emmanuel John, learned counsel, represented the applicant. Mr. Geoffrey Kange, learned counsel for the respondent, who showed no interest in contesting this application prayed the court to grant this application with no order as to costs.

Submitting in support of the application, Mr. John stated that the issues that are intended to be brought for determination on appeal are enshrined under paragraph 5 of the applicant's affidavit which contained

three grounds; **One**, whether it is correct that a total of Tshs. 20,000,000/- was deposited into the deceased account by the respondent in October, 2019; **Two**, whether it is proper to rule that the deceased was also known by the names of Ruhogoza/Luhongoza; and **Three**, whether without proof it was correct to rule that the telephone number belonged to the deceased. Mr. John, learned counsel, submitted further that; because the respondent did not contest the application, he prays for this leave to be granted without costs.

Submitting in confirmation, Mr. Kange reiterated that he does not object the application for leave to appeal to the Court of Appeal against the High Court decision in Civil Appeal No. 2 of 2023, and urges the court to grant it without costs. In rejoinder, Mr. John had nothing to submit.

From the submissions of learned counsels for the parties, this court is called upon to determine whether the application before it has raised sufficient grounds to justify the engagement of the Court of Appeal in the intended appeal. It is upon the party seeking the grant of leave, to demonstrate, with material sufficiency, that the intended appeal carries an arguable case with important legal issues for the attention of the superior court. It is considered that an appeal constitutes an arguable case where the prospective appellant is able to demonstrate, in an

application for leave, that disturbing features exist to require guidance of the Court of Appeal (see **Rutagatina C.L. Vs. The Advocates Committee & Another**, CAT-Civil Application No. 98 of 2010; and **British Broadcasting Corporation (BBC) Vs. Eric Sikujua Ng'maryo**, CAT-Civil Application No. 138 of 2004; (both unreported).

In both of the cited decisions, the position is that grant of leave to appeal must be upon satisfaction that the intended appeal raises issues of general importance, or a novel point of law, giving rise to a prima facie or arguable appeal. Instructively, the decision in **Abubakari Ally Himid Vs. Edward Nyalusye**, CAT-Civil Application No. 51 of 2007; quoted with approval, **Harban Haji Mosi & Another Vs. Omar Hilal Seif & Another** (2001) TLR 409, in which it was underscored that the grounds for a prospective appeal must reflect serious points of law, or disturbing features which warrant the attention of the Court of Appeal. It was held:

"Leave is grantable where...the proceedings as a whole reveal such disturbing features as to require the guidance of the Court of Appeal. The purpose of the provision is therefore to spare the Court the specter of unmeriting matters and to enable it to give adequate attention to cases of true public importance." [Emphasis added].

However, it is important to note that an application of this nature is no longer considered on the ground that the prospective appeal “has an overwhelming chance of success”; or “the appeal stands chances of success”. In the case of ***Airtel Tanzania Limited Vs KMJ Telecommunications Limited***, Civil Application No. 393/16 of 2021, the Court of Appeal stated that: -

*“...for more clarity, it is no wonder that whether **“an appeal stands chances of success”** is no longer a requirement and ground for granting an extension of time to appeal or, as here, leave to appeal. See- Murtaza Mohamend Raza Viran v. Mehboob Hassanali Versi, Civil Application No. 168 of 2014 and Victoria Real Estate Development Limited v. Tanzania Investment Bank and 3 others, Civil Application No. 225 of 2014 (both unreported)”. [Emphasis added].*

It is evident that this court is endowed with discretion to refuse to grant leave where it holds the view that the application for leave falls short of meeting the requisite threshold for its grant (See: **Saidi Ramadwani Mnyanga Vs. Abdallah Salehe** [1996] TLR 74); and **Nurbhain Rattansi Vs. Ministry of Water Construction Energy Land and Environment and Another** Civil Application No. 3 of 2004 [2005] TLR 220.

In ascertaining whether this application meets the legal threshold for granting an application for leave, this court shall confine itself to a critical review of the deposition made in support of the application. My review of the averments made in the supporting affidavit embody grounds for leave that are premised on matters of evidence and not points of law or disturbing features as to require the guidance of the Court of Appeal. This is also reflected in the judgement, the subject of this application delivered by this court (Morris J.). On page one of the said judgement, this court stated that:

*"Three grounds form the basis of the appeal. The trio-grounds may be merged into one major ground that: **the respondent failed to prove his case on balance of probabilities.**" [Emphasis added].*

I have further carefully examined the decision of this court the subject of the intended appeal to the Court of Appeal in relation to the purported legal issues advanced by the applicant. Undoubtedly, I have not found any arguable issue or any issue of general importance or point of law worth consideration by the Court of Appeal. The purported legal issues advanced by the applicant are matters of evidence and the respective standard of proof; which were sufficiently addressed by this

court, to say the least. For instance, on the last page of the said judgement, Morris J. stated that: -

*"From that evidence I am inclined not to fault the trial court's findings. To me, too, **the case was proved by the respondent on the required standard -balance of probabilities.** In other words, the evidence of the **respondent carried more weight than the counter arguments...** I, therefore, uphold the findings of the trial court. The appeal is devoid of merit." [Emphasis added].*

Consequently, I hold that the application for leave has failed to meet the legal threshold. Accordingly, the same is dismissed. As suggested by both parties, and this court is entirely in agreement, that each party to bear own costs.

It is ordered accordingly.

DATED at **MWANZA** this 20th day of November, 2023.



I.D. MUSOKWA
JUDGE