

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM**

MISC. APPLICATION NO.333 OF 2023
(Originating from Civil Appeal No.9 of 2022)

**ALPHA KRUST LIMITED..... APPLICANT
VERSUS**

EQUITY BANK TANZANIA LTD.....RESPONDENT

Date of Last Order: 01.11.2023
Date of Ruling: 27.11.2023

RULING

DING'OHI, J;

The Applicant, **ALPHA KRUST LIMITED**, is seeking leave to appeal to the Court of Appeal of Tanzania against the decision of this court in Civil Appeal No. 9 of 2022.

The application is made of chamber summons under section 5(1) of the Appellate Jurisdiction Act Cap 141 RE 2019 and Rule 45 (a) and 47 of the Tanzania Court of Appeal Rules, 2009. It is supported by an affidavit deposed by Mr. Stephen Mosha, the learned counsel for the applicant.

In this matter, the Respondent was represented by Mr. Philip Irungu and Mr. Gerald Lufungulo, the learned counsel.

By consent, the application was disposed of by way of written submissions.

In his submissions, Mr. Stephen Mosha prayed the court to adopt the contents of the supporting affidavit.

He further argued that, under paragraph 6 (i) of the supporting affidavit, the issue is whether the High Court was correct not to nullify the trial court's judgment, decree, and proceedings and remit the matter back to the trial court. He contended that there is no doubt that the procedure for initiation of a third party was not followed and the matter was heard ex parte against the third party Mr. David George Mrutu.

Citing Order 1 Rule 19 (1) (b) of the Civil Procedure Code, Cap 19 RE 2019 the learned counsel contended that, by entering an ex parte hearing against a third party and if the same was so, the third party was never a party to the suit per the cited provisions of the law above. That the law provides that in the failure of the third party to file a written statement of defense the court should enter a judgment for the defendant against the third party when the defendant has suffered judgment against him. This, he said, is a matter of procedure and law and was never adhered to by the trial magistrate.

It was the learned counsel submissions that the first appellate court never addressed that matter. It was the learned counsel's submissions that this court did not hold that the Trial court proceedings were vitiated and the judgment and decree were nullity. Essentially, the learned counsel concluded that the procedures laid down by the law were never followed. He reminded this court of the principle of law that leave to appeal to the Court of Appeal may be granted only where it is established that there is a contentious legal point worth consideration by the Court of Appeal. Counsel prayed for the application to be granted.

In reply, the learned counsel for Respondent submitted that the main concern by the applicant is that the issue raised was not decided by the trial court, not the High Court, and thus can not be subject to appeal by the Court of Appeal. The grounds for discussion at the High Court were no.2, 6, and 7 of which none were discussed about the third-party procedure. Even if the third-party procedure was discussed, the grounds of appeal must raise issues of general importance or novel point of law or *pre mafacie* arguable appeal. He relied on the case of **Rutagatina C.L vs The Advocate Committee & Another**, Civil Application No.98 of 2010 to cement the point. The learned counsel further, submitted that all five grounds of the

intended appeal found in the applicant's affidavit do not raise any issue of general importance or novel point of law as the court proceedings show that the third-party procedure was followed. According to the counsel for the respondent, there is no point of law or issues of general importance raised by the applicant in this application worth to be considered by the court of appeal. He prayed that this application be dismissed with costs.

I have carefully gone through the affidavit, counter affidavit, and submissions by both sides for and against this application. The relevant issue here is whether this application has merit.

The law is very clear that leave to appeal to the Court of Appeal is granted where the intended appeal stands reasonable chances of success or where, but not necessarily, the proceedings as a whole reveal such disturbing features as to require the guidance of the Court of Appeal. It is said, that the rationale behind that requirement is to spare the Court of Appeal of stream of matters, that have no merit, and or that have already been dealt with by the lower courts.

In the case of **British Broadcasting Corporation vs. Eric Sikuja Ng'maryo, Civil Application No. 133 of 2004** (unreported) it was observed as follows: -

*"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, be judiciously exercised on the materials before the court. As a matter of general principle, leave to appeal will be granted where the grounds of appeal raise issues of general importance or a novel point of law or where the grounds show a prima facie or arguable appeal (see: **Buckle v Holmes** (1926) ALL E.R. Rep. 90 at page 91). However, where the grounds of appeal are frivolous, vexatious or useless or hypothetical, no leave will be granted".*

It is, therefore, the duty of the applicant to demonstrate serious points of law that need to be considered by the Court of Appeal (see **Simon Kabaka Daniel vs. Mwita Marwa Nyanga'nyi & 11 Others** [1989] TLR 64).

The point for determination now is whether the applicant has advanced points of law that need the intervention of the Court of Appeal.

It is on the records that the first ground of appeal at the High Court concerned the procedure taken by the trial Court against the third party. In the analysis, this court embarked on grounds no.2,6, and 7 for disposal of the impugned appeal. Subsequently, in the last paragraph of the judgment, it is well stated that the appeal has been

allowed based on grounds no.2,6 and 7. Now what was the first ground about? It was questioning the failure of the trial court to make an order against a third party. The third-party procedure is a matter of law under Oder 1 (supra), thus it is my considered view that there needs a step higher to the Court of Appeal of Tanzania to deliberate on the legality of the procedure taken by the trial Court on third-party order. That will suffice for this application as digging more will amount to the disposition of the intended appeal which has never been the aim of applications of this nature. Suffice it to say, the point raised in this application is worth considerable by the Court of Appeal as per the principles set out in the case of **Simon Kabaka Daniel** and **British Broadcasting Corporation** (supra).

For the above reasons, I hereby grant the Applicant leave to appeal to the Court of Appeal as prayed.

Order accordingly;



S.R. DING'OHI

JUDGE

27.11.2023



Court: Ruling delivered this 27th day of November 2023 in the presence of Mr. Philip Irungu for the Respondent and holding brief of Mr. Stephen Mosha, the learned counsel for the applicant.



A handwritten signature in blue ink, appearing to be "S.R. Ding'ohi", is written above the printed name.

S.R. DING'OHI

JUDGE

27.11.2023