

**THE UNITED REPUBLIC OF TANZANIA**  
**(JUDICIARY)**  
**THE HIGH COURT**  
**(IN THE DISTRICT REGISTRY OF MUSOMA)**

**AT MUSOMA**

**Misc. CIVIL APPLICATION No. 21 OF 2022**

*(Arising from the High Court (Musoma District Registry) in Civil Appeal Case No. 29 of 2021;  
originating from the Resident Magistrates' Court of Musoma at Musoma in Civil Case No. 31 of 2020)*

**SHABAN SAID MGANDA ..... APPLICANT**

***Versus***

**FINCA TANZANIA LTD ..... RESPONDENT**

**RULING**

16.02.2023 & 17.02.2023

**Mtulya, J.:**

Two officers of this court appeared yesterday afternoon and agreed that leave from this court to the Court of Appeal (the Court) is granted where grounds of appeal raise issues of general importance or novel point of law or *prima facie* case or arguable appeal or where proceedings as a whole reveal disturbing features as to require the guidance of the Court.

In the same agreement, the dual learned minds had no contest on the settled law that during hearing of an application for leave to access the Court, this court should refrain from considering substantive issues that are to be determined by the Court. The reason in favour of the thinking is to avoid this court

in making decisions of the Court before the appeal is heard and determined by the Court in substantive justice.

In moving this court to take the settled courses of the law in precedents, the dual cited two decisions of the Court. **Mr. Cosmas Tuthuru**, learned counsel for the applicant, on his part cited the Ruling of the Court in **Jireys Nestory Mutalemwa v. Ngorongoro Conservation Area Authority**, Civil Application No. 154 of 2016, whereas **Mr. Stephen Kaswahili**, learned counsel for the respondent, had produced the judgment of the Court in **Hamisi Mdida & Said Mbogo v. The Registered Trustees of Islamic Foundation**, Civil Appeal No. 232 of 2018.

However, the dual learned minds were in contest on whether the present application has merit to warrant leave of this court to enter into the Court. According to Mr. Tuthuru, the present application has merit for two reasons, namely: first, this court in the **Civil Appeal Case No. 29 of 2021** (the appeal) did not properly address the issue of compensation to the applicant; and second, complaint on extraneous matters in the judgment of the appeal.

In substantiating his submission, Mr. Tuthuru stated that the applicant had prayed for specific and general damages in

terms of non-user category of damages in the **Resident Magistrates' Court of Musoma at Musoma** (the resident magistrates' court) in **Civil Case No. 3 of 2021** (the case). According to Mr. Tuthuru, the idea of non-user category was introduced by this court in the precedent of **Daudi Magezi v. Lutheran Church of Tanzania & E.L.C.T Garage**, Civil Case No. 16 of 1983. In the opinion of Mr. Tuthuru, the appeal in this court had declined the same category of general damages to the applicant for want of strict proof of the claim.

Regarding extraneous matters, Mr. Tuthuru submitted that this court introduced more facts which were not complained or replied by the parties during the contest and after raising the new facts, this court went further to resolve them. In justifying his statement, Mr. Tuthuru contended that this court was invited to determine reasons of fair trial and misapprehension of evidences in the case at the resident magistrates' court. However, this court took further steps to determine issues of compensation without affording the parties the right to be heard.

Responding to the submission of Mr. Tuthuru, Mr. Kaswahili submitted that the second reason relates to fair trial and admission of exhibits in the trial court hence related to evaluation of the registered evidences, which was part of the parties

submissions and this court had picked from the submissions and resolved the matters. Regarding the first reason, Mr. Kaswahili contended that the applicant had preferred the case at the resident magistrates' court for specific and general damages and that was the base of the appeal, but this court had declined to grant of specific damages without specific proof of the same.

Rejoining the submission of Mr. Kaswahili, Mr. Tuthuru contended that the respondent filed the appeal in this court complaining on exhibits and fair trial at the resident magistrates' court and prayed the proceedings, judgment and decree to be quashed, but this court determined issues of compensation and upheld the decision of the lower court without any prayer. On the second reason, Mr. Tuthuru submitted that there is already decisions of this court on non-user category of general damages and refusing the same to the applicant, this court is conflicting its own previous decision. In his opinion, the Court has to intervene and resolve the matter for the sake of settled precedents.

I have scanned the pronouncement of this court in the precedent of **Daudi Magezi v. Lutheran Church of Tanzania & E.L.C.T Garage** (supra), at page 3 of the typed judgment and found the following words: *claims for non-user are in the category of general damages which can be assessed by court and the*

*plaintiff need not prove them specifically.* On the other hand, the perusal in the decision of this court in the appeal, at the last paragraph of page 23 in the judgment, shows that: *as per evidence in this case, there is such pleading. But particulars and proof of the said specific damages were not established as per law. As regard to general damages of 100,000,000/=, there is no such pleading in the plaint.*

The complaint of the applicant at the resident magistrates' court in the case shows that the applicant claimed for: first, specific damages of Tshs. 200,000,000/=; second, compensation of Tshs. 20,000,000/= for loss of document; third, compensation of Tshs. 2,000,000,000/= for making follow ups of the documents; fourth, costs of the delay of the documents; fifth, compensation of Tshs. 500,000/= for loss of profit; sixth, commercial interest on the subject; and finally costs of the suit. After registration of all relevant materials, this court replied at page 28 of the typed judgment that: *I allow the appeal with costs. I award very minimal general damages to the respondent at the tune of Tshs. 500,000/= considering the aspect of delay of return of the said Right of Occupancy, but accompanied with good explanation.*

From the record of the present application, it is obvious that there are disturbing features in the two raised reasons of the application by the applicant's learned counsel, which need attention and guidance of our superior court. I am aware that this court is restrained from considering and determining the indicated complaints (see: **Jireys Nestory Mutalemwa v. Ngorongoro Conservation Area Authority** (supra) and **The Regional Manager-TANROADS Lindi v. DB Shapriya & Company Ltd**, Civil Application No. 29 of 2012). The reason is understandable. To avoid moving into the substance of the matter and prejudging the merit of the case. The duty in resolving the cited issues is reserved to the Court (see: **Murtaza Mohamed Viran v. Mehboob Hassanali Versi**, Civil Application No. 168 of 2014 and **Victoria Real Estate Development Limited v. Tanzania Investment Bank & Three Others**, Civil Application No. 225 of 2014).

I am quietly aware that leave to access the Court is not automatic. It is within the discretion of this court to grant or refuse (see: **Rutagatina C.L. v. The Advocates Committee & Another**, Civil Application No. 98 of 2010 and **Buckle v. Holmes** (1926) All E. R. 90). However, the discretion must be exercised judiciously depending on the relevant materials registered in each particular case (see: **British Broadcasting Corporation v. Eric**

**Sikujua Ng'maryo**, Civil Application No. 138 of 2004). In the end, and having said so, I am moved by discretionary powers of this court to grant leave to the applicant to access the Court so that the merit or otherwise the raised issues can be considered and resolved at the apex court of this State. In that case, the applicant will also be cherishing the right to access and be heard at the final court as enshrined under article 13 (6) (a) of the **Constitution of the United Republic of Tanzania** [Cap. 2 R.E. 2002]. The applicant has to access the Court in accordance to the laws regulating appeals from this court to the Court. I award no costs in the present application. The reason is obvious that the contest is still on the course in search of the rights of the parties.

Ordered accordingly.



F. H. Mtulya

**Judge**

17. 02. 2023

This Ruling was delivered in Chambers under the seal of this court in the presence of the applicant's learned counsel, Mr. Cosmas Tuthuru and in the presence of the respondents' learned counsel Mr. Stephen Kaswahilli through teleconference.

F. H. Mtulya

**Judge**

17. 02. 2023