

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**MISC. COMMERCIAL APPLICATION NO. 223 OF 2022**

**(Arising from Misc. Commercial Application No. 153 of 2021)**

**BETWEEN**

**INTERNATIONAL COMMERCIAL**

**BANK TANZANIA LIMITED.....APPLICANT**

**VERSUS**

**NAWAB ABDULRAHIM MULLA.....1<sup>ST</sup> RESPONDENT**

**CRISPIN JOSEPH SEMAKULA.....2<sup>ND</sup> RESPONDENT**

**Date of Last Hearing: 21/03/2023**

**Date of Ruling: 28/04/2023**

**RULING**

**MKEHA, J:**

The applicant is moving the court for an order of leave to appeal to the Court of Appeal of Tanzania against the whole ruling and orders of this court dated 28<sup>th</sup> November 2022 in Miscellaneous Commercial Application

No. 153 of 2021. The application is made under section 5 (1) (c) of the Appellate Jurisdiction Act as well as Rule 45 (a) of the Court of Appeal Rules. The chamber summons is supported with an affidavit sworn by Marie Mang`enya, Head of Legal Department of the applicant. On the other hand, the application is resisted through a counter affidavit affirmed by Nawab Abdulrahim Mulla, the 1<sup>st</sup> respondent.

Mr. Zacharia Daudi learned advocate appeared for the applicant. During hearing of the application, the learned advocate adopted the affidavit supporting the application as part of his submissions. The learned advocate referred to paragraph 12.1 to 12 .6 of the said affidavit in explaining the grounds he proposed for grant of leave in the circumstances of this case. In terms of the submissions by the learned advocate and the said paragraph of the affidavit supporting the application, the following are issues of general importance worth consideration by the Court of Appeal:

- (i) Whether there was denial of right to be heard to the parties before the executing court held that the decree presented before it for execution had not been properly extracted.
- (ii) Whether it was an error on part of the executing court to hold that the decree holder was required to recover the decretal

sum through proper execution proceedings in a manner provided under Order XXI rules 63 to 71 of the Civil Procedure Code.

- (iii) Whether it was an error on part of the executing court to hold that every sale in execution of a decree has to be made by way of public auction.
- (iv) Whether it was an error on part of the executing court to order the applicant to refund the purchase price with interest of 7% to the auction purchaser.
- (v) Whether the executing court erred in not holding that the application for setting aside the disputed sale was res judicata.
- (vi) Whether the executing court erred in not holding that the application for setting aside the disputed sale was time barred.

According to Mr. Zacharia Daudi learned advocate, the issues hereinabove contain novel points of law and of general importance demonstrating an arguable appeal before the Court of Appeal. He therefore pressed for grant of leave to appeal to the Court of Appeal.

In the counter affidavit of the 1<sup>st</sup> respondent, all the contents of paragraph 12 of the applicant`s affidavit were disputed. The learned advocate for the

1<sup>st</sup> respondent did not however appear in court on the date fixed for hearing of the application to address the court on what premises he was contesting the application.

The only issue for determination is **whether the applicant has demonstrated presence of issues of general importance, novel points of law or arguable grounds to be determined by the Court of Appeal on appeal.** According to the established position, the guiding principle is, *leave to appeal is not automatic. It is within the discretion of the court to grant or refuse. The discretion must however, be judiciously exercised and 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 novel points of law or where the grounds show a prima facie or arguable appeal.....However, where the grounds of appeal are frivolous, vexatious, useless or hypothetical, no leave will be granted.* See: **SAFARI MWAZEMBE VS. JUMA FUNDISHA, CIVIL APPLICATION NO. 503/06 OF 2021, CAT, (UNREPORTED).**

In the case cited hereinabove the Court clarified that, much as the grant of leave is the discretion of the court, the same is not automatic in the sense that, the court has to be satisfied that the grounds of the intended appeal

raise issues for consideration by the Court. The Court clarified further that, the court determining the application for leave has to be satisfied that the grounds raised should merit a serious judicial consideration by the Court in order not to waste the precious time of the Court.

It is true that after delivery of the ruling sought to be challenged on 28<sup>th</sup> November 2022 the applicant timely lodged a Notice of Appeal. The same was lodged on 13<sup>th</sup> December 2022. Copy of the Notice of Appeal is annexed to the applicant`s affidavit as annexure P9.

Although the applicant suggested six grounds to be her intended grounds of appeal, substantially, the applicant seem to be determined challenging the court`s ruling on the following points:

- (i) Whether there was denial of right to be heard to the parties before the executing court held that the decree presented before it for execution had not been properly extracted.
- (ii) Whether it was an error on part of the executing court to hold that the decree holder was required to recover the decretal sum through proper execution proceedings in a manner

provided under Order XXI rules 63 to 71 of the Civil Procedure Code.

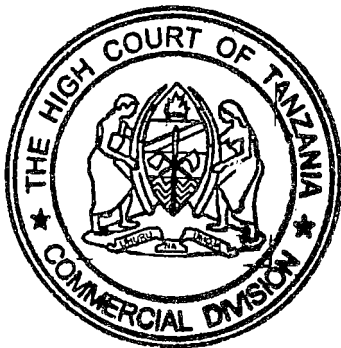
- (iii) Whether it was an error on part of the executing court to hold that every sale in execution of a decree has to be made by way of public auction.
- (iv) Whether it was an error on part of the executing court to order the applicant to refund the purchase price with interest of 7% to the auction purchaser.

The four grounds listed hereinabove, are indeed issues of general importance to be determined by the Court of Appeal. The grounds raise issues of considerable legal importance whose determination would set guidance to trial courts on how to extract executable decrees and whether improperly extracted decrees should be executed as they are. Further, determination of the grounds hereinabove would be instructive to the executing courts and bankers on how mortgage decrees are to be executed and when and how a bona fide purchaser should be compensated on setting aside of sale.

For the foregoing reasoning, I hold the application to be meritorious. I consequently grant leave for the applicant to appeal to the Court of

Appeal against this court`s ruling dated 28<sup>th</sup> November 2022 in Miscellaneous Commercial Application No. 153 of 2021. In the circumstances, I make no order as to costs.

Dated at DAR ES SALAAM this 28<sup>th</sup> day of APRIL 2023.



  
**C. P. MKEHA**

**JUDGE**

**28/04/2023**

**Court:** Ruling is delivered in the presence of Mr. Zacharia Daudi learned advocate for the applicant.



  
**C. P. MKEHA**

**JUDGE**

**28/04/2023**