

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

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 481 OF 2020

(Arising from Misc. Land Application No.500 of 2019)

GRACIA LUBAO..... APPLICANT

VERSUS

BAHATI PEMBE RESPONDENT

RULING

S.M. MAGHIMBI, J:

The applicant filed this application under the provisions of Section 47(1) of the Land Dispute Court Act No.2 of 2002 (as amended) and Section 95 of Civil Procedure Code Cape 33 R.E 2019 and any other enabling provisions of the law, seeking for the following orders:

- a) Leave to appeal to the Court of Appeal of Tanzania against the Judgment and Decree of the High Court Land Division dated 27th July 2020 in Land Application No. 500 of 2019 before Hon. Judge Opiyo.
- b) Costs of this application
- c) Any other relief(s) this Court might deem fit, just and necessary to grant.

This application was supported by an affidavit of the applicant, Gracia Lubao dated 27th August 2020. Both parties were represented, the applicant was represented by learned advocate Mr. Bartalomew L.

Tarimo while the respondent was represented by Advocate Desideriy Ndibalema. This application was disposed by way of written submission and the parties adhered to the submission schedule.

When submitting in support of the application, Mr. Ndibalema submitted that the decision that leave to appeal is sought for emanated from Land Appeal No. 100 of 2018 filed by the applicant against the decision of the District Land and Housing Tribunal for Morogoro. That when the matter was coming for hearing on the 21st August 2018 before Hon. Mgonya, J. that they (the applicant and his advocate) did not appear on the said date as the advocate was sick and it was not easy for the applicant to appear on a very short notice because she resides in Morogoro. Further that her mobile phone was off therefore the applicant's appeal was dismissed for want of prosecution.

Mr. Ndibalema continued to submit that the applicant filed an application for restoration of the dismissed appeal which was scheduled for the hearing on the 29th August 2019 before Hon. Malaba, J. The applicant and her advocate appeared on that date but unfortunately they did not hear when the same was called before the presiding judge, that after a long wait they decided to ask and the court clerk told them that the matter was dismissed for want of prosecution.

He continued to submit that the applicant filed an application to set aside the dismissal order which was refused by this court in the ruling dated 27th July 2020, a subject of this application. He listed his intended grounds of appeal to include:

1. That the court failed to consider that the failure to appear was not negligence on the part of the applicant.

2. That the court erred in law and in fact by holding that the absence of the affidavit of the applicant and that of the court clerk has no proof of the facts while the applicant's affidavit was very clear.

Mr. Ndibalema continued to submit that the applicant's appeal has overwhelming chances of success and that appeal is the applicant's constitutional rights. To support his case Mr. Tarimo cited the case of **Nurbhai N. Rattansi Vs Ministry of Water Construction Energy And Environment And Hussein Hirj (2005) TLR 220** where the Court of Appeal held when a matter raises contentious issue of law it is a fit case for further consideration by the Court of Appeal. He prayed that the application is allowed.

In reply, Mr. Tarimo submitted that no sufficient reasons have been advanced or disclosure of any illegality or error or impropriety to call for the attention of the Court of Appeal of Tanzania to interfere. That the matter before this court is clear, there was no proof at all that the counsel for the applicant or the applicant herself was present in court at the material time when the matter was called up for hearing. He finalised his submission by arguing that the applicant has totally failed to disclose sufficient reasons for her non-appearance, as they failed to tender their affidavits plus that of the court clerk to corroborate their allegation that at the particular date they really appeared before the court but did not hear when their case was called for hearing. Therefore, he prayed the court to dismiss the application with costs.

I have considered the parties' submissions for and against the application. An application for leave to appeal to the Court of Appeal will be allowed upon the following considerations among others; (i) the

court ought to consider the rights of parties against who the decision of court which the intended appeal is sought, (ii) satisfy itself whether the said decision is an appealable one and that there must be valid grounds as opposed to chance of success that the party wishes to appeal.

As for the case at hand, the applicant has argued that her grounds were not considered by this court hence she deserves a forum for the re-assessment of her assertions. Owing to the above observations, I find this application to be meritorious, and it is hereby allowed. The applicant is granted leave to appeal to the Court of Appeal against the decision of this court in Misc. Land Application No. 500 of 2019.



Dated at Dar Es Salaam this 01st day of June, 2021.

**S.M MAGHIMBI,
JUDGE.**