

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(LAND DIVISION)  
AT DAR ES SALAAM**

**MISC. LAND APPLICATION NO. 15 OF 2020**  
*(Arising from the decision of the High Court Land Division at Dar Es Salaam, vide Land Appeal No.176 of 2017,)*

**ROBERT WEMA BAYONGA BUKURU..... APPLICANT**

**VERSUS**

**CLARA BARABOJI.....1<sup>ST</sup> RESPONDENT**

**OMARY MOHAMED BAWAZIR.....2<sup>ND</sup> RESPONDENT**

**RULING**

*25<sup>th</sup> June & 2<sup>nd</sup> July, 2021*

**J.M. KARAYEMAHA, J.**

The applicant is seeking leave to appeal to the Court of Appeal of Tanzania against the whole decision of this court given by His Lordship Kakolaki, J. delivered on 20<sup>th</sup> of December, 2019, in Land Appeal No. 176 of 2017. It was brought under section 47 (2) of the Land Disputes Courts Act, [Cap 216 R.E 2002]. The application is accompanied by the affidavit of the applicant sworn by Robert Wema Bayonga Bukuru.

The factual setting giving rise to the present application is to the effect that, the applicant instituted a Land case at Mwananyamala District Land and Housing Tribunal for Kinondoni, against the respondents jointly, vide Land Application No.58 of 2015. The judgment of the tribunal delivered on 18<sup>th</sup> August, 2017 went in favour of the respondents. Dissatisfied with the decision of the trial tribunal, the applicant unsuccessfully sought an appeal

before this court, vide Land Appeal No. 176 of 2017. Aggrieved with the decision of this court rendered, the applicant now seeks leave of this court to challenge the said decision at the Court of Appeal.

On 35<sup>th</sup> June, 2021, when the matter came for hearing, Mr. Victor Joseph Mhana learned advocate featured for the applicant, the 1<sup>st</sup> respondent appeared in person and the 2<sup>nd</sup> respondent was represented by Mr. Jamal learned advocate.

Submitting for the application, the counsel for the applicant argued that, the presiding judge erred in law and facts by deciding that the deed of gift ought to be registered by the registrar of titles while the option to register it or not was endowed to parties. He observed that parties to the deed were supposed to comply with procedures on the completeness of the same.

The learned counsel submitted adding that in order to allow the application, the applicant must demonstrate that there is a point of law in terms of section 5 (1) of the Appellate Jurisdiction Act [Cap 141 R.E. 2019] and Rule 45 (a) of the Court of Appeal Rules, 2009. It was his submission the point of law is indicated in the 3<sup>rd</sup> paragraph of the affidavit.

He submitted further that the proceedings reveal disturbing feature demonstrating that the Judge did not direct his mind properly when he admitted the deed of gift and later devalued it. To him, this factor creates a chance for the application to be granted.

Mr. Mhana stated further that the appeal stands chances of success a fact that makes this application tenable.

In his reply, Mr. Jamal first adopted the counter affidavit. He conceded that granting leave to appeal to the Court of Appeal is in the discretion of the court. He, nevertheless, held the view that the discretion this should be exercised where there are grounds that need intervention of the Court of Appeal.

The learned advocate submitted that in this application there is no point of law that calls for the intervention of the Court of Appeal. In respect of the complaint that the Hon. Judge admitted the deed of gift and gave no value it, he observed that the deed of gift was admitted by the trial tribunal. What the Hon. Judge did was to evaluate it and on noting defects he accorded no weight to it. He submitted further that the judge observed that the document did not contain important information and that its existence was not known for over 14 years. The weight of the deed of gift was questionable hence of less value, submitted Mr. Jamal.

He submitted adding that since, the 1<sup>st</sup> respondent had sold the land to the 2<sup>nd</sup> respondent, the latter had the option of giving the applicant another piece of land. He referred this court to the case **David Mwakifunga v Mzumbe University (successor in Title of IDM-Mzumbe)**, Civil Application No. 131 of 2002 and the case of **Daud Suleiman Daud v Issa Hamad & 11 others**, ZNZ Civil Application No. 8 of 1999.

In short, Mr. Jamal's wrap up of the whole application is that there was no see any point of law inviting the Court of Appeal to determine.

The 1<sup>st</sup> respondent being a layperson had no useful submission as far as this application is concern.

In rejoinder, Mr. Mhana reiterated what he submitted in chief.

I have considered the parties' submissions for and against the application as well as the affidavit and counter affidavit from both of them. It is a mandatory precondition that any person intending to appeal to the Court of Appeal must obtain leave of this Court or of the Court of Appeal in order to appeal, Section 5(1) (c). It reads:

*"5. -(1) In civil proceedings, except where any other written law for the time being in force for the time being in force provides otherwise, an appeal shall lie to the Court of Appeal-*

*a. NA*

*b. NA*

*c. With the leave of the High Court or the Court of Appeal, against every other decree, order, judgment, decision or finding of the High Court.*

The principle of law governing grant of leave to appeal to the Court of Appeal is well settled. In a proper application, the duty of this court is just to gauge out whether there are contentious issues needing determination by the Court of Appeal.

This position of the law was tested by my Brother Hon. J. C. Tiganga, J. in the case of **Roti Kadasi vs. Emmanuel Lugombola**, Miscellaneous Civil Application No. 87 of 2019 (unreported), guided, on this point, by two

decisions by the Court of Appeal in **Harban Haji Mosi and Another vs. Omar Hilal Seif and Another**, Civil Reference No. 19 of 1997 of (unreported) and in the case of **British Broadcasting Corporation vs. Erick Sikujua Ng'maryo**, Civil Application No. 138 of 2004 (unreported). In the former case the Court of Appeal *inter alia* said:

*"Leave is grantable where the proposed appeal stands reasonable chances of success or where, but not necessarily the proceedings as a whole reveals such disturbing feature as to require the guidance of the Court of Appeal. The purpose of the provision is therefore to spare the court the spectre of un-meriting matters and enable it to give adequate attention to cases of true public importance"*

In the latter case the Court of Appeal, insisting on discretionary use of powers in granting leave, said:

*"Needless to say, leave to appeal is not automatic. It is within the discretion of the work of the court to grant or refuse leave. The discretion should 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 point 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."*

From these cases Hon. J. C. Tiganga, J. deducted five grounds to be considered by the court when deciding to grant or not to grant leave to appeal to the court of Appeal namely:

- i. That the intended appeal raises issues of general importance or novel point of law;
- ii. That the grounds show a prima facie or arguable appeal;
- iii. That the grounds are not frivolous, vexatious, useless or hypothetical;
- iv. That the appeal stands reasonable chances of success; or
- v. That the proceedings reveal that there is disturbing feature(s) which require the guidance of the Court of Appeal;

I would add one more from **Nurbhai N. Rattansi vs. Ministry of Water Construction Energy Land and Environment and Hussein Rajabali Hirji** [2005] TLR 220, and **Saidi Ramadwani Mnyanga vs. Abdallah Salehe** 1996 TLR 74 that is where there are contentious issues needing determination by the Court of Appeal. These grounds must be clearly seen in the proceedings, impugned decision and records of the case.

In respect of chances to succeed the guiding principle is found in the famous case of **Rutagatina C. L. vs. The Advocate Committee and Another**, Civil Application No. 98 of 2020 (CAT) at Dar es Salaam (unreported) which cited with approval the authority in **Harban Haji Mosi and Another vs. Omar Hilai Seif and Another**, Civil Reference No. 19 of 1997 (unreported) where it was held that:

*"leave is grantable where the proposed appeal stands reasonable chances of success or where, but not necessary,*

*the proceedings as whole reveal such disturbances feature as to require the guidance of the Court of Appeal. The purpose of provision is therefore to spare the Court the spectra of unmeriting matters and to enable it to give adequate attention to cases of true public importance."*

Also, **Rutagatina's case (supra)** cited the case of **British Broadcasting Corporation vs. Eric Sikujua Ng'maryo**, Civil Application No. 133 of 2004 (unreported) where it was said that

*"Needless to say, leave to appeal is not automatic. It is within the discretion of the court to grant or to refuse leave. The discretion must, however be judiciously exercised on the material before the court. As a matter of general principle, leave to appeal will be granted where the grounds of appeal raise of general importance or a novel point of law or where the grounds show a prima facie or arguable appeal .... However, where the grounds of appeal are frivolous, vexatious or useless or hypothetical no leave will be granted."*

In my opinion, the applicant has met all the above requirements. Firstly, the impugned judgment of Hon. Kalokola J. in the Land Appeal No 176 of 2017 is appealable, and there are proposed grounds of appeal calling for determination as to:

1. whether the 1<sup>st</sup> appellate court erred in law and fact to declare the 2<sup>nd</sup> respondent lawful owner of the suit land while there was a deed of gift issued by the 1<sup>st</sup> respondent;

2. Whether the 1<sup>st</sup> appellate court erred in law and fact by failing to appreciate the fact that the 1<sup>st</sup> respondent herein had no title to pass to the 2<sup>nd</sup> respondent as the former gave it under deed of gift to the applicant.
3. Whether the 1<sup>st</sup> appellate court erred in law and fact by deciding that it was necessary for the registration of the deed gift by Registrar of Title.

I have noted that counsels have deeply argued the substance of these grounds instead of whether there are prima facie grounds meriting an appeal to the Court of Appeal. I am supported by the case of **Gaudensia Mzungu vs. IDM Mzumbe**, Civil Application No. 94 of 1999 (unreported) where the Court of Appeal said that:

*"Again, leave is not granted because there is an arguable appeal ... What is crucially important is whether there are prima facie grounds meriting an appeal to this Court.*

What is to be done by the High Court, in my view, is not rehearing of the appeal, it is only required to decide whether the said proposed grounds are prima facie worth of consideration of the Court of Appeal. The guidance is also found in the case of **Hamisi Mdida and Another vs. the Registered Trustees of Islamic Foundation**, Civil Appeal No. 232 of 2018 (unreported) where the Court of Appeal *inter alia* said;

*"secondly that **an application for leave does not involve a rehearing of the matter** for which leave to appeal is being sought While the application for leave must*



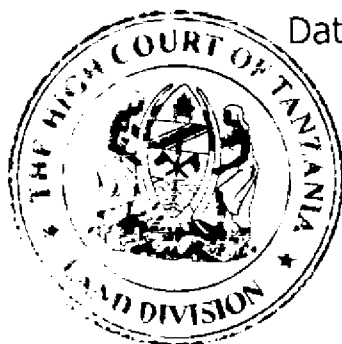
*state succinctly the factual or legal issues arising from the matter and demonstrate to the court that the proposed grounds of appeal merit an appeal, the court concerned should decide whether the said proposed grounds are prima facie worthy of the consideration of the Court of Appeal. The court would generally look at the judgment or ruling sought to be appealed against to assess whether there are arguable grounds meriting an appeal. **Certainly, such a determination will be made at the end of the day after some deliberation but not an adjudication on the merits of the proposed grounds.**" (emphasis added)*

Conclusively, as pointed out earlier here in above, in seeking leave to appeal to the Court of Appeal, the applicant is not required to prove existent of a point of law as argued by the counsel for the 2<sup>nd</sup> respondent. A point of law would have been a dominant factor if the applicant was seeking a certificate on point of law from this Court to appeal to the Court of Appeal and not on a leave to appeal as in the instant application.

In the end, leave is hereby granted.

It is so ordered.

Dated at Dar es Salaam this 2<sup>nd</sup> day of July, 2021



A handwritten signature in black ink, appearing to read "J.M. Karayemaha".

.....  
**J.M. KARAYEMAHA**  
**JUDGE**