

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

MISC.LAND APPLICATION NO.409 OF 2019
(Arising from Land Appeal No. 22 of 2018)

GODWIN D. MSHANA.....APPLICANT

VERSUS

POSTAL BANK TANZANIA 1ST RESPONDENT

MSOLOPA INVESTMENT CO. LTD.....2ND RESPONDENT

FRANCIS MAFURU3RD RESPONDENT

GODWIN DAUDI MSHANA4TH RESPONDENT

RULING

Date of Last Order: 14/07/2021

Date of Ruling: 25/08/2021

A. MSAFIRI, J:

This is ruling in respect of the Application for leave to appeal to the Court of Appeal against the judgment of this Court in Land Appeal No. 22 of 2018 delivered on 25th June 2019. The application is made under the provisions of Section 5(1) (c) of the Appellate Jurisdiction Act, Cap 141 R.E 2002 and Rules 45 (a) and 47 of the Tanzania Court of Appeal Rules, 2009 and supported by the affidavit of Harry Mwakalasya, learned Counsel representing the applicant dated 11/07/2019. The application has been countered for through the joint counter affidavit of Emanuel George Mwakyembe, learned counsel representing 1st and 2nd respondents, one

counter affidavit of the 3rd respondent and one counter affidavit of Juma Ahmed Mwakimatu, learned counsel for the 4th respondent.

The application was argued by way of written submission, where it was ordered by my predecessor Judge that submission to be limited to 3 pages in Tahoma, size 14, spacing 1.5. Both parties complied except for the joint submission of the 1st and 2nd respondent whereas the counsel submitted four pages and thus I will not consider the fourth page.

Predecessor Judge Hon. S. Kalunde being transferred to another working station, this application has been re assigned to me and upon perusal I find that the submissions are complete and therefore this ruling.

In this court, the applicant was represented by Advocate Harry A. Mwakalasya while 1st and 2nd respondent was represented by Advocate Emanuel George Mwakyembe, the 3rd respondent was represented by Advocate Alexander Kyaruzi and the 4th respondent was represented by Advocate Juma Ahmed Mwakimatu.

In his submissions to support the application, Mr. Mwakalasya referred to paragraph 4 of the affidavit that it has introduced proposed grounds anticipated for the Court of Appeal to consider and reverse the lower Court findings. He submitted that his lordship did not test any of the seven grounds of appeal presented before him however recorded the rival submission from both parties. He then cited the case of ***Harban Haji Mosi and another vs. Omary Hilal Seif and another (2001) TLR 409*** to strengthen his point on how leave to appeal to court of appeal can be granted. He then went

further to discuss the merits of the appeal that I hesitate to reproduce and discuss herein.

In reply Mr. Mwakyembe submitted that the grounds indicated in the intended appeal to the Court of Appeal are on matters of facts which is not the province of Court of Appeal sitting as a second appellate court. He added that all grounds stated under paragraph 4 of the affidavit have already been decided upon by first appellate court, there is no good reason adduced by the applicant as to why this court should grant him a leave to appeal to the Court of Appeal contrary to what was stated by the Court of Appeal in the case of ***Rutagina C.L vs. The Advocate Committee and Another, Civil Application No. 98 of 2010 (Unreported)***.

Mr. Kyaruzi submitted that when you look at the affidavit you will note that the same does not point out any point of law or fact which needs consideration by the court of appeal. He added that the intended appeal has no chances of success since trial Chairman and Appellate Judge has both decided the matter by basing on the evidence on record. He then submitted on the merits of the application and as I have indicated earlier, I will not go there and lastly prayed for the dismissal of the application with costs.

On his reply, Mr. Mwakimatu did not contest the application and he went further to invite this court to grant this application.

Having heard the submissions from both parties, the only issue before me is whether this application has merits.

The applicant moved this court under section 5(1) (c) of the Appellate Jurisdiction Act, which provides that,

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

(c) with the leave of the High Court or of the Court of Appeal, against every other decree, order, judgment, decision or finding of the High Court."

The above provision gives this court power to grant leave to appeal to the Court of Appeal, where the applicant has sufficient grounds. In considering an application for leave to appeal to the Court of Appeal the main issue which the Court is supposed to examine is;

*"... if there is good reason, normally on a point of law or on a public importance that call for this Court's intervention" {see **Rutagina's case (supra)}**}.*

Also, in the same case of ***Rutagina***, the Court of Appeal quoted the case of ***Harban Haji Mosi and Another vs. Omar Seif and Another***, Civil Reference No. 19 of 1997 (unreported) where it was stated that,

"Leave is grantable where the proposed appeal stands a reasonable chance of success or where, but not necessarily the proceedings as a whole revealed such disturbing features as to require the guidance of the Court of Appeal. The purpose of the provision is therefore to spare the Court the specter of unmeriting matters and enable it to give adequate attention to cases of true public importance"

From the decisions above, the High Court has discretion to grant leave to appeal to the Court of Appeal, on the part of applicant, he has duty to establish sufficient grounds which attract consideration of the Court of Appeal. Now, guided by the above principles and authorities it is clear that in this Application, the applicant has to show that there is point of law or both law and facts, which requires further consideration by the Court of Appeal. As such, the important issue for this Court to consider is whether there is a point of law involved fit for the consideration by the Court of Appeal.

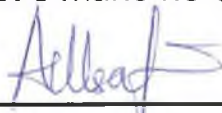
In the instant Application, Mr. Mwakalasya has clearly indicated in his submission that the issues which they want the Court of Appeal to examine are;

- (a) The Honourable Appeal Judge (sic) erred in law and facts for not construing and holding that the trial Chairman erred in law and facts for deviating from pleadings filed in the court and holding on deviated issues not pleaded.*
- (b) The Honourable Appeal Judge (sic) erred in law and facts for upholding the Trial Chairman decision which accounts liability to the appellant's property erroneously sold despite of distinction of title describing the pledged and unpledged land.*
- (c) The Honourable Appeal Judge (sic) erred in law and facts for relying on wrong impression and misinterpretation over the existing title of ownership of land tendered in court and mere expression of document as far as equitable and legal mortgage is concern(sic).*

(d) The Honourable Appeal Judge (sic) erred in law and facts for upholding decision of the trial chairman that, 1st and 2nd Respondent lawful sold the appellant's land to the 3rd Respondent.

Considering the above points raised by the applicants, and having cautioned myself into going to the merits of the intended appeal, I am satisfied that, the intended grounds of appeal raise points of law which suffice the attention of the highest court of the land bearing in mind that the Judgment and Decree of this court are appealable to the Court of Appeal.

Having said that I find the application to have merits and hence the applicant is granted leave to appeal to the Court of Appeal against the decision of this Court in Land Appeal No. 22/2018. I make no order as to costs.



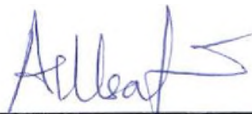
A. MSAFIRI

JUDGE

25/8/2018

COURT:

Ruling delivered in Court Chambers before both parties.



A. MSAFIRI

JUDGE

25/8/2021