

**IN THE HIGH COURT OF TANZANIA  
(LAND DIVISION)  
AT DAR ES SALAAM  
MISC. LAND APPLICATION NO.195 OF 2016  
(Arising from the Land Case No. 115 of 2011)**

1. MISHED CHUNILAL KOTAK ..... 1<sup>ST</sup> APPLICANT  
2. SHAKESH CHUNILAL KOTAK ..... 2<sup>ND</sup> APPLICANT

**VERSUS**

1. ASILE ALLY SAID ..... 1<sup>ST</sup> RESPONDENT  
2. THEODICA MSELE ..... 2<sup>ND</sup> RESPONDENT  
3. YONO AUCTION MART & CO LTD ..... 3<sup>RD</sup> RESPONDENT  
4. IBRAHIM KASAMALI ..... 4<sup>TH</sup> RESPONDENT  
5. AMIRI KASAMALI ..... 5<sup>TH</sup> RESPONDENT

**RULING**

*Date of last order: 12.08.2021*

*Date of Ruling: 12.08.2021*

**A.Z.MGEYEKWA, J**

This application is brought under section 47 (1) of the Land Disputes Court Act of 2002. The applicant seeks leave to appeal to the Court of Appeal of Tanzania to impugn the decision of this Court in Land Case No. 115 of 2011 delivered on 2<sup>nd</sup> March, 2016. The application is supported

by an affidavit deponed by Mished Chunilal Kotak, the first applicant. The application has encountered formidable opposition from the respondent and has demonstrated his resistance by filing counter affidavit, deponed by Ms. Rehema Suleiman Nassoro, learned counsel for the respondent.

When the matter was called for hearing on 12<sup>th</sup> August, 2021, the appellant enjoyed the legal service of Mr. Francis Mgare, learned counsel. The first respondent was aware that the matter was set for hearing but she did not show appearance. Therefore, this court proceeded to determine the application *ex parte* against the respondents.

The learned counsel for the applicant reiterating what was deposed in the supporting affidavit, the learned counsel urged this court to adopt the applicant's affidavit and form part of his submission. He stated that the applicant has filed the instant application for leave to appeal against Land Case No. 115 of 2011 dated 2<sup>nd</sup> March, 2016. He added that the applicant was aggrieved by the *ex parte* judgment which was delivered by this court. Mr. Francis asserted that the applicant was not duly served to appear in court. He claimed that the substitution of service was not proper since he was required to appear not to file defence. The learned counsel went on to state that in paragraph 17 of the affidavit, they have raised arguable issues which merit the attention of the Court of Appeal of Tanzania as follows; whether the court had jurisdiction to try the case which was filed

subsequent to the issuance of a certificate of sale or whether the suit was barred under Order XXI Rule 90 (3) of the Civil Procedure Code, Cap.33. Whether this court had jurisdiction to entertain a suit for setting aside sale which was time barred, whether it was proper for this court not to exercise its discretion to extend time, whether it was proper for this court to order the applicants to pay damages to the first respondent, whether it was proper for the court not to take into account damages which the applicants have suffered for the whole period, whether it was proper for the court to deny the applicants to file a defence while there was no summons to file a defence and whether the purchaser has obligation to make an official search.

Mr. Francis continued to state that the applicant is required to demonstrate that there are points of law that attract the attention of the Court of Appeal of Tanzania. To fortify his submission, referred this court to the cases of **Simon Kabaka Daniel v Mwita Marwa Nyang'anyi' & 11 others** [1989] TLR 64 and **Said Ramadhani Mnyanga v Abdallah Salehe** [1996] TLR 74. He went on to submit that the matter which has been mentioned before this court are serious matters to allow the applicant to challenge the decision of this court.

The learned counsel for the applicant did not end there, he opposed the counter affidavit for being defective and it was his view that the verification clause is incurable defective since it was not affirmed by the same person who prepared the counter affidavit. He lamented that the deponented Rehema Nassoro had no *locus standi* to sign while Asilie is present. He added that the name of the Commissioner for oath is not stated, thus, the same is not a legal Power of Attorney. He claimed that the Rehema Nassor had the Power of Attorney to represent the first respondent in the main case thus, the same cannot be extended to the instant application. He concluded by stating that the first respondent has not filed any counter affidavit, therefore it was his view that the application was unchallenged.

Before, resting his submission, Mr. Francis informed this court that the instant application was lodged in 2016 whereas the law required an applicant to obtain leave in matter originated from the High Court. He added that after the Written Laws Miscellaneous Amendments No.3 of 2018 section 9 amended section 47 (1) of the Land Disputes Courts Act Cap. 216 whereby the applicant was required to appeal to the Court of Appeal of Tanzania without obtaining leave to appeal. Mr. Francis urged this court to grant the applicant's application with costs.

Having heard the submissions of the learned counsel for the applicant, a review of the rival depositions is centered on one grand question for settlement by the Court, this is as to *whether the application demonstrates a sufficient ground or a disturbing feature that requires the attention of the Court of Appeal of Tanzania.*

Before I proceed to determine the application on merit, I would like to address the issue raised by the learned counsel for the applicant that the application for leave to appeal to the Court of Appeal was lodged in 2016 at that time the law required an aggrieved party who wants to appeal against a matter originating from the High Court to seek leave to go the Court of Appeal of Tanzania. In 2018, through the Written Laws Miscellaneous Amendments No.3 of 2018, section 47 (1) of the Land Disputes Courts Act Cap. 216 [R.E 2002] was amended, the applicant was required to appeal to the Court of Appeal of Tanzania without obtaining leave to appeal. Therefore as long as the application was lodged before the aforesaid amendment then the same is properly filed before this court.

The issue for determination takes into account the settled position of the law to the effect that grant of leave to appeal to the Court of Appeal is not a matter of a mere formality. A party intending to be allowed to appeal must demonstrate, with material sufficiency, that the intended appeal carries an arguable case that merits the attention of the Court of Appeal.

Thus, a grant of leave is granted if *prima facie* grounds are meriting the attention of the Court of Appeal. In other words, there must be solid grounds that are weighty enough to engage the Court of Appeal of Tanzania. It is trite law that leave to appeal to the Court of Appeal is granted if *prima facie* grounds are meriting the attention of the Court of Appeal as it was held in the case of **Sango Bay v Dresdner Bank A.G** [1971] EA 17, it was held that:-

*“ Leave to appeal will be granted where **prima facie** it appears that there are grounds which merit serious judicial attention and determination by a superior Court.”*

Equally, in the case of **Gaudensia Mzungu v IDM Mzumbe**, Civil Application No. 94 of 1994 (unreported), the Court of Appeal of Tanzania held that:-

*“ Leave will be granted if, **prima facie** there are grounds meriting the attention and decision of the Court of Appeal.”*

These decisions are in consonance with the decisions cited by the counsel for the applicant; **Said Ramadhani Manyanga** (supra) and **Simon Kabaka** (supra); The Court of Appeal in **Said Ramadhani Manyanga** (supra) held that:-

*"For leave to appeal to be granted, the applicant must demonstrate that, there are serious and contentious issues of law or fact fit for consideration of appeal."*

Applying the above holding, the Court of Appeal of Tanzania emphasized that the disturbing features must be in the form of serious points of law that warrant the attention of the Court of Appeal. Gathering from these decisions, it is clear that it is within this Court's discretion to refuse to grant leave. I am aware that in determining whether this court can grant leave or not, this court will do the same without assuming the power of the appellate Court as this court is bound to assume such power which is vested in the Court of Appeal of Tanzania. In the case of **Grupp v Jangwani Sea Breeze Lodge Ltd**, Commercial case No.93 of 2002 (unreported) my brother Massati, J (as he then was) expressed the matter this way:-

*"... I have no jurisdiction to go into merits or deficiencies of the judgment or orders of my sister judge in this application. All that I am required to determine is whether there are arguable issues fit for the consideration of the Court of Appeal...."*

I have perused the applicant's affidavit specifically paragraph 7 whereby the applicant has raised arguable issues that this court raised an issue. In my view, once an appeal is eventually lodged, the Court of

Appeal of Tanzania will determine issues such as Whether this court had jurisdiction to entertain a suit for setting aside a sale that was time barred, whether it was proper for the court not to take into account damages which the applicants have suffered for the whole period and whether it was proper for the court to deny the applicants to file a defence while there was no summons to file a defence. I do not think this and other grounds raised in the applicant's affidavit are not serious enough to be determined by the Court of Appeal. I will, in the circumstances, grant leave to appeal to the Court of Appeal of Tanzania.

Order accordingly.

DATED at Dar es Salaam this 12<sup>th</sup> August, 2021.



  
A.Z. MGEYEKWA

**JUDGE**

12.08.2021

Ruling delivered on the 12<sup>th</sup> August, 2021 in the presence of Mr. Francis Mgare, learned counsel for the applicant.



  
A.Z. MGEYEKWA

**JUDGE**

12.08.2021