

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

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 155 OF 2021

*(Application for leave to appeal to the Court of Appeal of Tanzania
against the Judgment and Decree of the High Court of Tanzania in Land
Appeal No. 43 of 2019)*

ABDUALY ALLY MAJUTO.....APPLICANT

VERSUS

PAULO PETRO KIHWILI.....RESPONDENT

RULING

Date of Last Order: 23/8/2021

Date of Ruling: 1/11/2021

M. J. CHABA, J;

The applicant Abdually Ally Majuto has filed this application under section 47 (1) of the Land Disputes Courts Act [CAP. 216 R.E. 2019] as amended and section 5 (1) (a) of the Appellate Jurisdiction Act [Cap.141 R.E. 2019] and section 45 (a) of the Court of Appeal Rules 2009, seeking for leave to Appeal to the Court of Appeal of Tanzania. The application is supported by the affidavit deposed by the applicant himself.

In this application, the applicant appeared in person unrepresented, whereas the respondent was represented by Mr. Christopher Mgalla, learned advocate. Essentially, the matter was scheduled to be disposed by way of written submissions and the parties complied accordingly.

The applicant's prayer for leave to appeal to the Court of Appeal against the decision of High Court (Hon. Mango, J.) in Land Appeal No. 43 of 2019, basically relied on his submission, explicit on two (2) grounds of the intended appeal which specifically have been encompassed in his affidavit under paragraph 7 and 8.

The applicant's first point which he seeks intervention of the Court of Appeal is to the effect that this Court erred in law and facts for entering a judgment in favour of the respondent by ordering the appellant to pay the sum of Tshs. 38,150,200/= within 30 days from the date of ruling and failure of which his house which is a loan security, situated at Plot No. MVDC/LD/MDZ/32 at Turiani Madizini stand in Morogoro Region will be declared the property of the respondent. He contended that he had agreed to pay the loan in instalments basis but that was not considered. Again, he contended to be entitled to redeem his property regardless of the due date.

It was the contention of the applicant that the decision was entered contrary to the contract signed by the parties on 31/05/2017 and 6/6/2017 from which, in the first one, the amount effected to the respondent was Tshs. 15,000,000/= and he was obliged to pay the to the respondent Tshs. 25,000,000/=. He further argued that the loan security was worth Tshs. 40,000,000/= at a time. In a later contract, the respondent advanced Tshs. 23,750,200/= to the applicant/appellant and it was his contention that there is a contradict issue as to what amount advanced that can be realized from the loan security given the fact that only fifteen million had acted as security.

He then cemented that the property to be transferred by the respondent is worth Tshs. 100,000,000/= (One Hundred Million Shillings) recently compared to the amount ordered by the respondent which is the sum of Tshs. 38, 150,200/=. The applicant further accentuated that, the issue of payment of loan is a private arrangement between the parties and therefore could not be intervened by the court to give an order that in case of default on the side of applicant/appellant, then the property had to be transferred to the respondent. To bolster his proposition, he cited the case of **NBC v. Dar es Salaam Education Office Stationery Ltd** [1995] TLR 272.

The second point advanced by the applicant proposed as a ground of Appeal before the Court of Appeal is that the trial court erred in law and fact to enter judgment on the respondent breached term of contract and further failed to consider at all a counter claim in respect of monthly rents which the respondent had refused to honour the applicant's request ever since September, 2018. The applicant stressed that the trial court was duty bound to make her findings on this facet. To cement his argument, he cited the case of **Charles Lwanga v. Centenary Rural Development Bank** [1999] 1 E.A. 175 (CAU) where the Court of Appeal of Uganda was faced with alike situation and held that:

"It is elementary principle that the respondent had the duty to prove its claim in the counter claim to succeed. As it adduced no evidence in proof of claim, the trial judge ought to have made appropriate findings thereon; unfortunately, she did not, think this was an error".

The applicant then concluded by explicating that the respondent is using the loan so as to take advantage and transfer the said property. He

thus referred section 16 (1) of the Law of Contract Act [Cap. 345 R.E. 2019] as relevant law which entails of undue influence by the dominating party against the other which is not permitted in law.

On the other hand, Mr. Mgalla for the respondent, commenced to replied by first drawing attention of this court on the discrepancies on the face of the applicant's written submission as well as the application itself. **One**, he addressed that the heading of the written submission by the applicant was titled "IN THE COURT OF APPEAL OF TANZANIA" while the application is determined by the High Court. The learned counsel prayed the filed submission be expunged or disregarded. **Two**, the respondent's counsel argued that the application is time barred. Mr. Mgalla submitted further that the applicant is appealing against the judgment and decree of this court in Land Appeal No. 43 of 2019 delivered on 3/7/2020. That the applicant had filed Miscellaneous Land Application No. 444/2020 seeking for extension of time to apply for leave to appeal against the decision of this court and was granted 14 days to lodge such an application from the date of ruling dated 12/03/2021. However, he filed it on 29/03/2021 instead of 23/03/2021 and delayed for three (3) days. He prayed the same be dismissed with costs. To support his proposition, he cited the case of **Micky Gilead Ndetura (A minor suing through Gilead Ndetura Lembai, A next friend) vs. EXIM BANK (T) LIMITED**, Commercial Case No. 4 of 2014, HCT At Arusha; from which it was held:

"That the Court order should be respected and complied with and that the Court should always exercise firm control over proceeding and not condone failures by a party to respect and comply with Court orders, otherwise, it will set bad precedent and invite chaos in Court in the administration of justice."

Three, Mr. Mgalla contended that another ground which attract dismissal of instant application is that the applicant has preferred wrong provision or citation of the law; to wit the Appellate Jurisdiction Act [Cap. 141 R.E. 2002] and the Court of Appeal Rules 2009 which have been revised in 2019. He prayed the same to be dismissed. In support of his prayer, he cited the case of **Rashid Abdullah Rashid El-Sinan v. Musa Haji Komba and Ali Mohamed Musa** (1998) TLR 560.

As to the question whether instant application has merit or otherwise, Mr. Mgalla expressed his stance that the applicant's application should not be granted on the ground that upon being examined the accuracy of the contents of the affidavit in support of an application, he found that there is no any paragraph that contained a point of law. He further stressed that this court (Hon. Madam Z. D. Mango, J.) gave a right order directing the applicant to pay back the borrowed money to the respondent within thirty (30) days from the date of judgment under condition that once could fail to effect the payments the house which was the subject as loan security automatically could become the property of respondent.

In his rejoinder, the applicant cemented on what he submitted in chief and further asked this court to invoke the overriding objective principle to cure the alleged defects. To back up his argument he cited the case of **Yakobo Magoiga Gichere v. Peninah Yusuph**, Civil Appeal No. 55 of 2015 (unreported) where the Court held that:

"With advent principle of overriding objective brought by the written laws (Miscellaneous Amendments (No. 3) Act 2018 Act No. 8 of 2018 which now requires the court to deal with cases justly and to have regard

to substantive justice, section 45 of the Land Disputes Courts Act (which prohibits reversing decisions on account of errors which do not occasion failure of justice) should be given more prominence to cut back on over reliance on procedure technicalities”.

To end up his submission, the applicant prayed the court to grant this application with costs.

Upon hearing the rivalry submissions by the parties and upon carefully examined the court record, the central issues for consideration, determination and decision thereon are:

1. *Whether the raised objections have merits.*
2. *Whether the application is meritorious.*

Without wasting time, I am convinced to enlighten the following three (3) observations which will assist me to easily determine the raised issues.

One, I have prior considered the three (3) objections raised by the respondent which have been responded by the applicant, but it is apparent from the pleadings that no notice was given stating to that effect. It has been stated often than not that a preliminary objection must be raised in time and on reasonable notice. See the case of **M/S Majembe Auction Mart v. Charles Kiberuka**, Civil Appeal No. 110 of 2005 (Unreported).

Even though the objections in our case was raised without any alarm by the respondent, but the applicant positively responded. On this facet, I commend him for that. Be as it may, and for that reason, I proceed to address them accordingly.

In respect of the objection that the written submission in support of instant application titled "COURT OF APPEAL OF TANZANIA" while the matter is before this court, I believe the applicant had mistakenly titled the same since the heading had to contain the name of the court which entertains the application. Something to be noted is that the written submission is the substitution of oral submission. The fact that the applicant filed his written submission in compliance to the schedule timely, and the respondent had opportunity to understand the gist of his opponent's application and replied thereof, I believe such anomaly on the heading of the applicant's written submission had not prejudiced neither of the parties in arguing this application, which I find it reasonable to invoke the overriding objective principle under section 3A of the Appellate Jurisdiction Act [Cap. 141 R.E. 2019] to cure the said defect for purpose of facilitating the just and expeditious dispensing of the matter at hand.

As to the question of wrong citation of law which the respondent contends that the applicant preferred the outdated Revised Edition to move this court instead of the Revised Edition 2019, of course, I agree with the learned brother. It is apparent that there are few laws of the land that were revised under the General Laws Revision Notice, 2020; Government Notice No. 140. The laws cited in the instant application which are the Appellate Jurisdiction Act (Supra) and the Court of Appeal Rules (Supra) which are made under the same Act were included too. The respective Government Notice was published and came into effect on 28th February, 2020 and the instant application as the records reveals was filed to this court on 29th March 2021 after the Revision Notice came into operation. Therefore, I am in agreement with Mr. Mgalla that the proper Revised Edition ought to have been cited is that which came into operation

on the 28th day of February, 2019. However, as alluded to above, it is the current law of the land that courts should uphold the overriding objective principle to disregard minor irregularities and unnecessary technicalities and deal with the cases justly to achieve substantive justice.

I find the call made by the applicant to invoke the overriding objective principle adds more value in administration of substantive justice. Upholding the objections raised by the respondent will cause wastage of time and resources to both litigants and to the court as well. Further will reduce multi-application of unnecessary cases and overburdening the litigants with unnecessary costs. I think, upholding the raised objections will not resolve the dispute of the parties and the court might be used as a vehicle of miscarriage of justice at the expenses of technicalities. This court is embraced to borrow the wisdom of the Court of Appeal of Tanzania which is contained under **Rule 48 of the Court of Appeal Rules, 2009** which read:

"Provided that where an application omits to cite any specific provision of the law or cites a wrong provision, but the jurisdiction to grant the order sought exists, the irregularity or omission can be ignored, and the Court may order that the correct law be inserted".

The imported wisdom of Rule 48 (*supra*) into this court is limited to the circumstances where the jurisdiction to grant the order sought exists, of which in our case, this court is mandated with the powers to grant leave as sought by the applicant. Hence, the objection is overruled.

As regards to the third objection that this application is time barred for being filed three (3) days late, I think the counsel for the respondent has contradicted himself, simply because the Court's Order in

Miscellaneous Civil Application No. 444/2020, directed the applicant to lodge his application for leave to appeal to the Court of Appeal within 14 days from the date of extraction of the drawn order and not from the date of the ruling as he contended. Henceforth, this objection lacks merit. Thus, from the above stated reasons, the first raised issue is disposed negatively.

Two, coming to the second issue, it should be firstly noted that, an application for leave to appeal to the Court of Appeal is usually granted if there is good reason, normally on a point of law or on a point of public importance, that calls for the Court's intervention. Principally, the aspect of leave to appeal, the underlying principle was well articulated by the Court of Appeal in **Harban Haji Mosi & Another v. Omar Hilal Seif & Another [2001] TLR 409**, where the Court held that:

"Leave is grantable where the proposed appeal stands reasonable chances of success or where, but not necessarily, the proceedings as a whole reveal 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 unmeriting matters and to enable it to give adequate attention to cases of true public importance. "

The same principle was restated and in lucidity expounded by the Court of Appeal of Tanzania in **British Broadcasting Corporation v. Eric Sikujua Ng'maryo**, Civil Application No. 138 of 2004 (Unreported). In that case, as it was cited in the case of **Rutagatina C.L. v. The Advocates Committee and Another**, Civil Application No. 98 of 2010 (Unreported), the Supreme Court of the land had this to say:

*"Needless to say, leave to appeal is not automatic. It is within the discretion of the court to grant or refuse leave. The discretion must, however judiciously exercised and on the materials before the court. As the matter of general principle, leave to appeal will be granted where the grounds of appeal raise issues of general importance or a novel point of law or where the grounds show a prima facie case or arguable appeal. (See: **Buckle v. Holmes** (1926) ALL E.R. 90 at page 91). However, where the grounds of appeal are frivolous, vexatious or useless or hypothetical, no leave will be granted."*

From the forgoing authorities, it is undisputed fact that for the applicant to succeed in the instant application, his affidavit in support of his application must show that the ground of the intended appeal raises arguable issues in the appeal. In other words, the raised grounds of appeal must suggest commendable appeal before the Court of Appeal.

Three; I have keenly taken time to peruse the suggested grounds of appeal uttered under paragraph 7 and 8 of the applicant's affidavit. Indeed, the factual setting in this application suggest that the applicant intends to challenge the decision of the High Court, Land Division which ordered the applicant to pay the amounts of money owed to him by the respondent, Tshs. 38,150,200/= within thirty (30) days from the date the judgment. The court further ordered that failure to pay the amount alluded to above within 30 days, the house placed as security will automatically be declared the property of the respondent. His grievance centred on the redeemable right of the borrower as expressed in his submission which he contends to be violated.

Looking at paragraph 7 and 8 of the applicant's affidavit, the same suggests issues of legal right's violation as well as non-consideration of the contractual arrangements of parties by the trial court.

It is my view that from the contents of paragraph 7 and 8 of the applicant's affidavit, nothing suggests that the issues raised by the applicant are frivolous, vexatious, useless or hypothetical.

The counsel for the respondent contended further that during perusal of the applicant's affidavit, did not come across with any paragraph that attracted a point of law. In his opinion, the entire application is deficient of merits, and therefore it deserves to be dismissed with costs. Frankly speaking, I think, on this facet the learned counsel misdirected himself. Just as a matter of guidance, the duty of this court in an application of this nature is only to consider the substantive issues raised for the intended appeal and not necessarily on law. That stance was pronounced by the Court of Appeal in the case of **Regional Manager-TANROADS Lindi v. DB Shapriya and Company Ltd**, Civil Application No. 29 of 2012 CA (Unreported) where the Court held among other things that:

"It is now settled that a Court hearing an application should restrain from considering substantive issues that are to be dealt with by the appellate Court. This is so in order to avoid making decisions on substantive issues before the appeal itself is heard."

Looking at the applicant's submission, the applicant submitted touching on the issue of counter claim which he contends that the trial court failed to resolve and determine it despite the fact that he raised it.

I have perused the affidavit in support of the application, and I am convinced to state firmly that this aspect has not been expressed in the applicant's affidavit which I find it to be an extraneous fact and an afterthought from the instant application. I say so because it is a trite principle of law that parties are usually bound by their own pleadings. The case of **Astepro Investment Co. Ltd v. Jawiga Company Ltd**, Civil Appeal No. 8/2015, CAT at Dsm (Unreported), is relevant. If the application thought it to be an important one to include, he was supposed to request the Court to file a supplementary affidavit in support of the application to include such aspect. For that reason, the issue of counter claim is as good as never existed.

In the final event, I am satisfied that the grounds raised by the applicant in the intended appeal as per paragraphs 7 and 8 of his affidavit, have in my opinion, raised a serious issue which is worth to be considered by the Supreme Court of our land. Accordingly, I allow the applicant's application and hereby grant leave to appeal to the Court of Appeal of Tanzania against the judgment and decree of the High Court of Tanzania in Land Appeal No. 43/2019. The appeal shall be lodged within sixty (60) days from the date of this ruling. Costs shall abide by the outcome of the intended appeal.

It is so ordered.

DATED at MOROGORO this 1st November, 2021


M. J. CHABA

JUDGE

1/11/2021

Ruling delivered at my hand and Seal of this Court in Chamber's this 1st November, 2021 in the presence of the appellant who appeared in person, unrepresented; but in absence of the respondent.




M. J. CHABA

JUDGE

1/11/2021

Rights of the parties have been explained.




M. J. CHABA

JUDGE

1/11/2021