

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

**MISC. LAND CASE APPLICATION NO. 584 OF 2020**

(Originating from Misc. Land Application No. 546 of 2019)

**FERDINAND BATUNGI..... APPLICANT**

**VERSUS**

**RAMADHANI MWADACHI.....1<sup>ST</sup> RESPONDENT**

**PRISCANNE BUSINESS ENTERPRISES**

**LIMITED T/A AUCTION MART.....2<sup>ND</sup> RESPONDENT**

**HAWA ABDALLAH.....3<sup>RD</sup> RESPONDENT**

Date of Last Order: 25.10.2021  
Date of Ruling 13.12.2021

**RULING**

**V.L. MAKANI, J**

This application is by FERDINAND BATUNGI. He is applying for this court to grant leave to appeal to the Court of Appeal against the Ruling and Drawn Order in Misc. Land Application No.584 of 2020 delivered on 23/09/2020 (Hon. Maghimbi, J).

The application is made under section 5(1) (c) of the Appellate Jurisdiction Act CAP 141 RE 2002, Rule 45(a) of the Court of Appeal Amendment Rules 2017 and section 95 of the Civil Procedure Code CAP 33 RE 2002. The application is supported by the affidavit and

supplementary affidavit of applicant herein. The 1<sup>st</sup> and 3<sup>rd</sup> respondents filed joint counter-affidavits to oppose the application.

With leave of the court, the application was argued by way of written submissions. The applicant drew and filed submissions in support of the application. I have gone through the submissions, the applicant submitted that the application is made under section 38(1) of the Land Disputes Court Act, and he prayed to adopt his supplementary affidavit. He said the supplementary affidavit portrays that this honourable court failed to consider points of law when entertaining the review which illegalities are in the records of the District Land and Housing Tribunal (the Tribunal) in that the High Court erred in fact and law in giving decision relying only on the issue of execution without reading the files in Misc. Land Application No. 369 of 2017 and Misc. Land Application No. 448 of 2017. He said the execution at the Tribunal was tainted with illegalities. He cited the case of **Kalunga & Company Advocates vs. National Bank of Commerce [2006] TLR 235.**

The applicant pointed out another illegality as that the applicant entered into a rent agreement with the house owner Abdallah

Mwadachi. The 1<sup>st</sup> and 3<sup>rd</sup> respondents were not parties to the contract and unfortunately Abdallah Mdachi died, and the said respondents were neither administrators of his estate, so they got illegal orders of eviction. He said despite the illegalities the court did not give an order for stay. Another illegality was that the execution was done at night and in the absence of the applicant and the execution was done two days before the set date. The applicant further submitted that despite that that he had instituted Misc. Land Application No. 764 of 2017 in this court for extension of time to file appeal, the Tribunal dismissed the Misc. Application No. 448 of 2017 (stay of execution) without assigning reasons and proceeded to appoint a court broker for eviction of the applicant in the suit premises. He said the Tribunal received court fees while knowing the matter originated from their Tribunal and that was improper. In that respect it was improper to punish the applicant in lieu of the error caused by the Tribunal clerks. He relied on the case of **Tropical Africa Bam Limited vs. Horace Were Muhwana, Civil Application NO. 3 of 2012 (Uganda)** where errors/mistakes of court officials were held to be sufficient grounds for granting extension of time for the applicant to file his or her appeal out of time.

The 1<sup>st</sup> respondent submitted that the application for leave has been filed without filing of notice of appeal contrary to Rule 83 of the Tanzania Court of Appeal Rules. Secondly, he said that the order in which the leave is requested is not appealable as per Order XLII Rule 7(1) of the Civil Procedure Code, CAP 33 2019.

Without prejudice to the above, the 1<sup>st</sup> respondent stated that the present application has been overtaken by the events of execution. He said the applicant lost in Land Application No. 240 of 2015 at the Tribunal. The respondents filed Execution of the decree vide Misc. Land Application No. 369 of 2017 and the applicant was duly evicted from the suit premises. The applicant filed an application for stay of execution at the Tribunal vide Misc. Land Application No. 448 of 2017 at the Tribunal and no order of stay was issued. He said the dispute ended on merits and the execution proceedings were over and the applicant was lawfully evicted. Therefore, this application has been overtaken by events and this makes the cases cited distinguishable. He thus prayed for the application to be dismissed with costs. He said the applicant if he so wishes the law is open to him for filing a fresh case concerned injury to his property if he can prove. He said the

submission filed by the applicant contain new facts which were not features before the other judges who determined various applications which were dismissed for want of merits. He prayed for the application to be dismissed with costs.

In rejoinder the applicant said that the Notice of Appeal was filed by the applicant on 09/10/2020 so the argument by the 1<sup>st</sup> respondent is misleading. He said the contention that the order is not appealable is baseless. The applicant reiterated what he submitted in his submissions in chief and stated that there is need for Court of Appeal intervention as there are sufficient reasons for the grant of the application for leave to appeal to the Court of Appeal. He also prayed for costs.

I have gone through the Chamber Summons, affidavit, supplementary affidavit and submissions by the applicant. The applicant did not rely on the affidavit at all. He only took into consideration the supplementary affidavit. In that respect the court will also confine itself on the supplementary affidavit. The Chamber Summons is seeking for leave to appeal to the Court of Appeal and so is the supplementary affidavit specifically in paragraph 5.

However, the submissions by the applicant are in respect of extension of time to file an application for leave to appeal to the Court of Appeal.

This is misleading because much as the affidavit enumerates reasons for the grant of leave, but the submissions are all on extension of time therefore have no relevance to the application at hand. Procedure requires the court to follow the orders sought for in the Chamber Summons and this would be in respect of leave to appeal to the Court of Appeal. The court will therefore confine itself on arguments based on the orders sought for in the Chamber Summons, that is, leave to file appeal to the Court of Appeal.

The 1<sup>st</sup> respondent raised two procedural issues which have to be decided first. One, that the order which leave is applied for is not appealable, and secondly there is no notice of appeal to warrant grant of leave to appeal to the Court of Appeal.

I will start with the Notice of Appeal. Rule 83(6) of the Court of Appeal Rules is explicit that:

*"Where an application for a certificate or for leave is necessary, it shall be made after the notice of appeal is lodged."*

In the present application there is no proof that there is a Notice of Appeal that has been filed. I have gone through the supplementary affidavit there is nothing to evidence that Notice of Appeal has been filed. The applicant has attached the Notice in the rejoinder submissions, but submissions are not evidence as they are narrations as regards the facts that have been stated and or raised in the affidavits and/or pleadings. The argument by the 1<sup>st</sup> respondent has merit as Rule 83 of the Court of Appeal Rules is mandatory in nature and goes to the root of the application itself. In the absence of the Notice of Appeal the application is rendered defective, and I hold as such.

As for the second argument I am also in agreement with the 1<sup>st</sup> respondent that the order for which the applicant is seeking appeal is not appealable. According to Order XLII Rule 7(1) of the CPC an order granting review may be appealed against but an order rejecting the review is not appealable. The said provisions of Order XLII Rule 7(1) of the CPC states:

*7(1) An order of the Court rejecting the application shall not be appealable; but an order granting an application may be objected to on the ground that the application was:*

- (a) in contravention of the provisions of rule 2;*
- (b) in contravention of the provisions of rule 4;*
- (c) after the expiration of the period of limitation prescribed therefor and without sufficient cause, and such objection may be taken at once by an appeal from the order granting the application or in any appeal from the final decree or order passed or made in the suit*

It is apparent from the affidavit by the applicant that that the application for review in Misc. Land Application No.584 of 2020 which leave is hereby sought was rejected by this court on 23/09/2020 (Hon. Maghimbi, J). In that respect the order thereof is not appealable in terms of the above cited provision.

For the reasons addressed above, this application is incompetent, and it is hereby to dismissed with costs.

It is so ordered.

  
**V.L. MAKANI**  
**JUDGE**  
**13/12/2021**

