

IN THE HIGH COURT OF TANZANIA

LAND DIVISION

AT DAR ES SALAAM

MISC. APPLICATION NO. 319 OF 2021

(Arising from the Extended Land Appeal No. 163 of 2020 and High Court file No. 93 of 2020)

FANIKIWA MICROFINANCE CO. LTD.....1ST APPLICANT

M/S KIMBUNGA AUCTION MART & CO LTD.....2ND APPLICANT

HUSSEIN ABDUL SHAMARI.....3RD APPLICANT

VERSUS

LYDYA MANGASU.....RESPONDENT

RULING

Date of last Order: 22/10/2021

Date of Ruling: 29/10/2021

T. N. MWENEGOHA, J

The applicants herein filed this application seeking to be granted leave to appeal to the Court of Appeal against the decision of Hon. Ngunyaie, SRM (as he then was) with extended jurisdiction in Extended Land Appeal No. 163 of 2020, High Court file No. 93 of 2020. The application is made under section 47 (2) of the Courts (Land Disputes Settlements) Act, Act No. 2 of 2002 as amended by the Written Laws (Miscellaneous Amendment) Act No. 3 of 2018 and Section 5(1) (c) of the Appellate Jurisdiction Act, Cap 141 R.E 2002 and

Rule 45 (a) of the Court of Appeal Rules, 2009. Applicants filed their Chamber Summons supported by an affidavit.

The applicants enjoyed the services of Mr Flavian A John, learned counsel while on the other hand the respondent was represented by Ms Agness Uisso, learned advocate. Hearing was by way of written submissions.

In his submission, Mr. Flavian submitted that the main ground of appeal is deposed at paragraph 7A of the affidavit. He started by citing the cases of **British Broadcasting Corporation vs Eric Sikujua Ng,maryo Civil Appeal No. 138 of 2004** and **Twiga Bancorp Limited and two others vs. Mrs. Shakila Parves and Another (Misc. Land App. No. 238 of 2017** which outlined principles governing courts to grant leave to appeal to court of appeal.

He submitted that based on those laid principles the intended appeal is not frivolous or vexatious as there is no concrete reason given for the award of Tshs. 15,000,000/= to the borrower while the respondent borrowed 5,000,000/= and upon default lender auctioned the security property. That on the date of auction without any notice to the lender or auctioneer, the respondent deposited the amount to the lenders' bank account. He added the auction was not halted since applicants were not aware of the deposited

sum. That the court ordered general damages to a tune of Tshs. 15,000,000/= and for the auctioned house to be returned to the respondent. The court further ordered for the 3rd applicant to be repaid the sum paid for purchase of auctioned house; which is like punishing the 1st applicant twice.

In reply Ms Agness submitted that the grounds raised by the applicants in their application raises no issues of general importance and/or a novel point of law which needs determination of the Court of Appeal to warrant an order granting of this application.

She submitted that the purpose to impose the requirement of law that a party aggrieved with the decision of the High Court on its appellate jurisdiction to firstly obtain leave of the High Court before appealing to the Court of Appeal of Tanzania, is to place a filtering device against impulsive appeals which otherwise would be frivolous, vexatious or baselessly at the Court of Appeal of Tanzania.

She submitted that the case of **British Broadcasting Corporation** (supra) and the case of **Rutagatina C L. Vs. The Advocate's Committee and Another, Civil Application No. 98 of 2010**, which were quoted with approval in **Civil Application No. 364 of 2017, Bulyanhulu Gold Mine Limited and 2 Others vs. Petrolube (T) and Another**, provided that

leave to appeal will be granted where the grounds of appeal raise issues of general importance or a novel point of law. She further submitted that the applicants have not shown at all that their ground of appeal raises issues of general importance or there is a novel point of law or any arguable grounds of appeal which really needs to move the great legal minds of Justices of the Court of Appeal for determination and that the intended appeal is nothing other than the delaying tactics in view of denying the respondent enjoyment of the fruits of her judgment and decree.

She submitted that, since it is not disputed that the 1st respondent seriously breached the contract, the trial chairman was justified when awarding general damages to the tune of Tshs. 15,000,000/= to the respondent and stating the reasons of inconveniences caused as the result of breach of contract by the 1st applicant. The award for damages is statutory as it is specifically provided under the **Law of Contract Act (Cap 345 R.E 2019)** and it's upon discretion of the Court after considering the inconveniences caused as a result of such a breach. The respondent clearly demonstrated during trial how she suffered emotionally and physically as a result of the 1st and 2nd applicants' acts of auctioning of the respondent's house even after the respondent had paid the amount she owed.

She further submitted that, *"it is a cardinal principle the reason in a judgment has to be read in as a whole in the context of the issue that was before the court to have its true meaning and logic "*, as it was held in the case of **Tumaini Massaro v Tanzania Ports Authority, Civil Appeal No 36 of 2018, CAT at Dar es Salaam, (Unreported)**. That it was wrong for the counsel for the applicants to pick some few paragraphs and sentences in the decision of the Court and read it in isolation from the entire judgment to drive home his argument that there was no reason given by the Court in awarding of general damages to a tune of Tshs. 15,000,000/= . She submitted that leave should not be granted and instead this application should be dismissed with costs.

In his brief rejoinder Mr Flavian reiterated his submission in chief and submitted that the applicant did not breach contract because the respondent failed to honor her obligation to pay back the loan which led to sale of her house which was the security for the loan. On the issue of physical and mental suffering he submitted that, it was the respondent herself who contributed to the damages after default to pay her loan as agreed in the loan agreement. He stated that the auction was the consequence of default and the amount claimed to be paid by the respondent and the defaulted

amount was deposited on the 1st applicant's bank account on the very date of the auction.

He submitted that all authorities cited by the respondent in her submission cannot be considered in this matter for the reason that the circumstances of this matter are quite different to the circumstance of the said authorities and they should be ignored. That the present application has merit and the applicant deserve to be given a chance to be heard by the Court of Appeal of Tanzania.

After having read submission from both counsels, I will now turn to discuss whether this application is meritorious. An application for 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 give sufficient reasons that the intended appeal carries arguable grounds on points of law and/or fact which needs the attention of the Court of Appeal on serious points of law or law and fact. The applicant praying for grant of leave must demonstrate that he stands reasonable chances of success. This was held by the Court of Appeal in **Rutagatina C.L. v. The Advocates Committee & Another, Civil Application No. 98 of 2010.**


In his sworn affidavit, applicant's counsel at paragraph 7 of the affidavit stated that the issues which require the attention of the Court of Appeal is on the award for general damages by the honourable magistrate at the tune of Tshs. 15,000,000/= without giving legal reasons. Respondent's counsel submitted that an award for damages is statutory after a breach of contract between parties. The respondent's response to the issue raised by the applicant by itself indicate that there are arguments which are going to the merits of the issue which is an indication that the issues are arguable. It is not duty of this Court to discuss the issues but to find whether there is merit in the issues which require determination of the Court of Appeal. In **Jireyes Nestory Mutalemwa vs.Ngorogoro Conservation Area Authority/ CAT, Application No.154 of 2016 (Unreported)**, the Court of Appeal observed that;

"The duty of the Court at this stage is to confine itself to the determination of whether the proposed grounds raise an arguable issue (s) before the Court in the event leave is granted. It is for this reason the Court brushes away the requirement to show that the appeal stands better chances of success a factor to be considered for the grant of leave to appeal. It is logical that

holding so at this stage amounts to prejudging the merits of the appeal.

Guided by the above quotation it is my view that it is not within the power of this Court to go into details of the case which appeal is sought but rather find whether there *are arguable grounds for appeal and whether there are chances for the appeal to succeed.* In the upshot, I am convinced that the application meets the legal threshold for its grant. Accordingly, I grant it as prayed. Each party to bear own costs.




T. MWENEGOHA
JUDGE
29/10/2021