

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 652 OF 2022

(Arising from the Judgment of the High Court of Tanzania (Land Division) at Dar es Salaam in Land Appeal No. 179 of 2021 Hon. Mgeyekwa, J.)

DEVOTHA DAVID MKWAWA

t/a FIRST SUPERMARKETS.....APPLICANT

VERSUS

CLASSIC MALLS LIMITED.....RESPONDENT

Date of last order: 28/11/2022

Date of Ruling: 30/11/2022

RULING

A. MSAFIRI, J.

On 18th October 2022, the above named applicant lodged the present application, by chamber summons under Section 47 (2) of the Land Disputes Courts Act [CAP 216 R.E 2019] (the Act) and Section 5(1) (c) of the Appellate Jurisdiction Act, [CAP 141 R.E 2019], (the AJA) Rules 45 (a) and 47 of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules), seeking for the following reliefs namely;

- i. This Honourable Court be pleased to grant leave to the applicant to appeal to the Court of Appeal against the*

Adls

*judgment and decree of the Court by Hon. Mgeyekwa,
J. in Land Appeal No. 179 of 2021 dated 19th September,
2022.*

ii. Costs.

*iii. For any other order (s) as this Honourable Court may
deem just and fit to grant.*

The application has been taken at the instance of G & C Law Chambers and is supported by an affidavit sworn by Devotha David Mkwawa the applicant herein.

When this application was called on for hearing on 28/11/2022, Messrs. Charles Lugaila and Silvanus Mayenga learned advocates appeared for the applicant and the respondent respectively. The matter was disposed of orally.

Having adopted the affidavit in support of the application, Mr. Lugaila prayed for the Court to grant the application as there are sufficient reasons as provided for under paragraph 7 (i) (ii) of the affidavit in support of the application. The learned advocate contended further that this application emanates from Land Application No. 593 of 2019 which proceed ex parte

Adls.

against the applicant. It was submitted further that the applicant filed Misc. Land Application No. 868 of 2020 before the District Land and Housing Tribunal seeking for extension of time to set aside the ex-parte decision of the trial Tribunal, the application was dismissed on ground of lack of merits.

Mr. Lugaila submitted further that following dismissal of the application, the applicant lodged Land Appeal No. 179 of 2021 before this Court with intention to challenge the decision in Misc. Land Application No. 868 of 2020. However the appeal was dismissed on grounds of lack of merits. Mr. Lugaila contended that there are illegalities on the decision sought to be challenged as stated on paragraph 7 of the affidavit in support of the application. Mr. Lugaila contended further that there are numerous decisions of the Court of Appeal in which allegation of illegality is a sufficient reason for extension of time hence he urged the Court to grant the application.

On reply Mr. Mayenga learned advocate having adopted the counter affidavit, he prayed for the Court to dismiss the application with costs for lack of merits.

On rejoinder Mr. Lugaila essentially reiterated his submission in chief. *Alls.*

Having gone through submissions of the parties' rival and in support of the application, the sole issue that calls for the Court's determination is whether the application has merits.

As required by Section 47 (2) of the Act, a person aggrieved with the decision of this Court in the exercise of its appellate jurisdiction is required to seek leave of this Court before appealing to the Court of Appeal. As in the decision sought to be challenged namely Land Appeal No. 179 of 2021 this Court was exercising its appellate jurisdiction, the applicant was mandatorily required to seek leave of this Court.

It is trite law that in an application for leave to appeal like the present one, in order for the Court to grant leave there must be grounds to show that there is an arguable appeal.

In the decision of the Court of Appeal in **British Broadcasting Corporation v Erick Sikujua Ng'maryo** Civil Application No. 138 of 2004 (unreported) the Court stated that;

"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 *Acle.*

*the court. As a 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 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 foregoing quoted decision, it is imperative to note that the grant of leave to appeal is not automatic but conditional in that it can only be granted where the grounds of the intended appeal raise arguable issues in the appeal before the Court.

Furthermore, the duty of the Court in this application is not to determine the merits or demerits of the points of law raised when seeking leave to appeal. Instead a Court has only to consider whether the proposed issues are embraced in conditions set out in the authorities referred above. My position is fortified by the decision of **The Regional Manager-TANROADS Lindi v DB Shapriya and Company Ltd**, Civil Application No. 29 of 2012 CAT (unreported), it was held;

Alls.

"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."

Going by the applicant's affidavit in support of the application on paragraph 7, there are points of law which the applicant intends them to be addressed by the Court of Appeal. The said grounds allege noncompliance with the law regarding payment of stamp duty as well as service of summons. Hence, I find that the application has disclosed points of law worthy of consideration by the Court of Appeal. Consequently leave is hereby granted to the applicant to appeal to the Court of Appeal as prayed. Costs to follow the events in the intended appeal.

It is so ordered.



.....
A. MSAFIRI,

JUDGE

30/11/2022