

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO.36 of 2022

(Arising from Land Appeal No. 28 of 2021 Originating from Application No. 178 of 2017 of the District Land and Housing Tribunal for Ilala at Ilala)

BAKARI ABDI YUSUPH APPLICANT

VERSUS

MBEGU RAJABU MFAUME RESPONDENT

RULING

Date of last Order: 25.04.2022

Date of Ruling: 28.04.2022

A.Z.MGEYEKWA, J

This is an application whereas the applicant urged this court to exercise its discretion under section 45 (a) of the Tanzania Court of Appeal Rules and section 47 (2) of the Land Disputes and Courts Act, Cap. 216 [R.E 2019]. The applicant is applying for leave to appeal to the Court of Appeal of Tanzania against the decision of this inland Appeal No. 28 of 2021. The

application is supported by an affidavit deposed by Bakari Abdi Yusuph, the applicant. The respondent opposed the application by filing a counter-affidavit deposed by Leah Linus Kamanga, learned counsel.

When the matter was called for hearing before this court on 25th April, 2022, the applicant had the legal service of Mr. John Tendwa, learned counsel whereas the respondent had the legal service of Ms. Leah Kamanga, learned counsel.

Mr. Tendwa, learned counsel for the applicant was the first one to kick the ball rolling. Reiterating what was deposed in the supporting affidavit, the learned counsel urged this court to adopt the applicant's application and form part of his submission. Mr. Tendwa was brief and focused. He submitted that the applicant is seeking leave to appeal to the Court Appeal of Tanzania to certify whether there is point of law. It was his submission that there are arguable grounds such as why this court did not consider the issue of breach of contract. He added that in determining the appeal this court did not consider section 55 and 37 (1) of the Contract Act is related to obligation of parties to the contract.

The learned counsel for the applicant went on to submit that the second contract was not performed thus the respondent failed to honour the terms of the agreement. Fortifying his submission he cited the cases of **Mariam Abdallah v Aldof Murakanyuki**, Application No. 116 of 2021 and **DAWAPA Security Group v Eradius**, Misc. Civil Application No. 163 of 2020.

On the strength of the above submission, Mr. Tendwa beckoned upon this court to grant the applicant's application.

Responding, the learned counsel for the respondent urged this court to adopt the respondent's counter-affidavit and form part of his submission. Ms. Leah contended that the applicant's submission and application is frivolous. Ms. Leah submitted that leave of appeal cannot be granted by mere oral submission without stating good reasons. She argued that the applicant's counsel has not adduced good reasons and the applicant in his affidavit stated that he failed to complete the construction within time while he enjoyed the shares of the shop frames by leasing and collecting rent. She valiantly contended that it was the duty of the applicant to find tenants not the duty of the respondent. Insisting, she contended that there is no

arguable ground which attracts the attention of the Court of Appeal. To buttress his contention she cited the cases of **City Bank Tanzania Ltd v TTCL & 5 others**, HC Commercial Case No. 6 of 2003 at Dar es Salaam, **OTTU on behalf of Milanzi & 3 others v Blanket Manufactures Ltd**, Civil Appeal No.3 of 2003 and **Mabinza v General Manager Mbeya Cement Company**, Civil Application No.1 of 2019. He argued that all facts stated by the applicant are devoid of merit. She added that the facts could have merit only if the applicant could have stated that he did not receive rents. Ms. Leah went on to submit that the parties agreed that the respondent will construct 20 frames and the same be divided equally among the parties. In her view, the applicant failed to state grounds meriting the attention of the Court of Appeal. To support her submission she cited the case of **Sango Bay v Dresdner Bank A.G** [1971] EA 17.

On the strength of the above submission, Ms. Leah urged this court to find that the application before this court is devoid of merit.

In his brief rejoinder, the learned counsel for the applicant maintained his submission in chief. He added that the respondent at his own leisure constructed only 10 frames out of 20 frames. Mr. Tendwa argued that the

respondent is required to be compelled to honour the contract, that is the point of law which attracts the attention of the Court of Appeal of Tanzania.

Having heard the submissions of the learned counsel for the applicant and the respondent for and against the application. 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.*

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 which are weighty enough to engage the minds of the Court of Appeal. 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** (supra), 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 decision cited by the counsel for the applicant; **Bulyanhulu Gold Mine** (supra); and the cited case by the learned counsel for the respondent; **Nubhain Rattansa** (supra). The Court of Appeal in Nubhain Rattansa held that:-

" An application for leave will be granted if it is a fit case for further consideration by the Court 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. I am aware that in determining whether this court can grant leave or not, this court will do the same without assuming 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 vs. 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...."

Applying the above authority, I have noted that in paragraphs 9 and 10 of the applicant's affidavit, the applicant has raised arguable issues that the respondent has failed to honour the terms of agreement and that the respondent failed to accomplish and handover the frames and for the best reason known to himself.

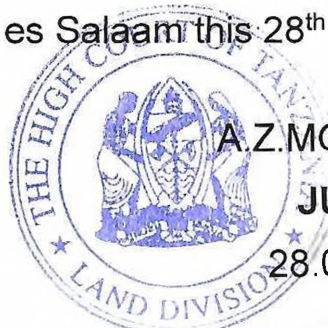
Additionally, the learned counsel for the applicant in his submission submitted to the extent that failure for the respondent to honour the terms

of contract and handing over the frames to the applicant is a point of law which attracts the attention of the Court of Appeal of Tanzania. In my view, the applicant has raised a point of law which attracts the attention of the Court of Appeal of Tanzania once an appeal is eventually lodged, the Court of Appeal of Tanzania will determine the above issues. Thus, I do not think these grounds raised in the applicant's affidavit are not serious enough to be determined by the Court of Appeal.

In consequence, this application succeeds. No order as to the costs.


Order accordingly.

DATED at Dar es Salaam this 28th April, 2022.



A.Z.MGEYEKWA
JUDGE
28.04.2022

Ruling delivered on 28th April, 2022 in the presence of Mr. Tendwa, learned counsel for the applicant and Ms. Lea Kamugisha, learned counsel for the respondent.



A.Z.MGEYEKWA
JUDGE
28.04.2022