

**IN THE HIGH COURT OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**MISC. CIVIL APPLICATION NO. 198 OF 2022**

*(Arising from the Ruling of the High Court of Tanzania (Land Division) at Dar es Salaam in Misc. Land Application No. 381 of 2021 dated 31<sup>st</sup> March 2022 Hon. Mwenegoha, J.)*

**NATHANIEL MWAKIPITI KIGWILA.....APPLICANT**

**VERSUS**

**MAGRETH ANDULILE BUKUKU.....RESPONDENT**

*Date of last order: 19/7/2022*

*Date of ruling: 27/7/2022*

**RULING**

**A. MSAFIRI, J.**

On 29<sup>th</sup> day of April 2022, the above named applicant lodged the present application, by chamber summons under Section 5(1) (c) of the Appellate Jurisdiction Act, [CAP 141 R.E 2019], Rules 45 (a) and 47 of the Tanzania Court of Appeal Rules, 2009 as amended, seeking for the following reliefs namely;

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

*Tanzania (Land Division) in respect of Misc. Land*

*Alls*

*Application No. 381 of 2021 which was delivered on the 31<sup>st</sup> March 2022 by Madame T. N. Mwenegoha J.*

- ii. Costs of this application be borne by the Respondent.*
- iii. Any other reliefs the Honourable Court deems just and fit to grant.*

The application has been taken at the instance of Yakubu and Associates Chamber and is supported by an affidavit affirmed by Ashiru Hussein Lugwisa, learned advocate for the applicant herein.

When this application was called on for hearing on 19/7/2022, Mr. Ashiru Lugwisa and Mr. Denis Kahana learned advocates appeared for the applicant and the respondent respectively. The matter was disposed of orally.

Mr. Ashiru having adopted the affidavit in support of the application urged the Court to grant leave so that the applicant herein can appeal to the Court of Appeal against the decision of this Court in Misc. Application No. 198 of 2022.

According to Mr. Ashiru, there are conditions which must be fulfilled for an application for leave to succeed. He contended that the application *Acts*.

for leave must raise grounds which are of general importance, worthy to be considered by the Court of Appeal. Also the applicant must demonstrate a *prima facie* arguable appeal. The application must manifest contentious legal issues and also the proceedings being challenged must reveal disturbing features worthy to be considered by the Court of Appeal.

To fortify his stance, Mr. Ashiru has referred to this Court the decision of **Abubakar Ali Himid v Edward Nyelusye**, Civil Application No. 51 of 2007, Court of Appeal of Tanzania at Dar es Salaam (unreported). The learned advocate for the applicant contended that the present application has demonstrated the above conditions hence this Court has to grant the prayers sought. He contended that paragraphs 8 and 11 of the affidavit in support of the application indicate serious irregularities which should be addressed on appeal.


On reply Mr. Kahana for the respondent has contended that the present application emanates from Application No. 381 of 2021 whose ruling was delivered on 31/3/2022. The grounds stated under paragraph 11 of the affidavit in support of the application do not relate to the decision subject of which this application is being sought, the learned advocate submitted. *Adls*

On further submission, Mr. Kahana stated that the applicant has not demonstrated reasons to grant this application because the reasons advanced in the affidavit do not relate to this application.

On rejoinder, the advocate for the applicant, reiterated his submission in chief. He further contended that this application is clear and unequivocal. He contended that the present application seeks leave to appeal against the decision in Misc. Application No. 381 of 2021. The reasons are clear because in the said application this Court refused to give an order for extension of time to set aside the ex-parte judgment in Land Case No. 40 of 2018.

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.

However before touching on merits or otherwise of this application, a brief background is apposite.

The respondent instituted Land Case No. 40. of 2018 before this Court against the applicant for reliefs *inter alia* that the applicant be declared to occupy illegally the house on Plot No. 256/1 and 257/1 Block A, 

Kunduchi Salasala, Kinondoni Municipality in Dar es Salaam region (the property).

It is claimed that the respondent purchased the property from a public auction which was done by the International Commercial Bank on 14/02/2016 after the applicant had defaulted in loan repayment advanced by the Bank.


Having purchased the property described, the applicant continued to occupy the property hence to seek redress, the respondent instituted the case aforementioned under summary procedure. As required by the law, the applicant sought and was granted leave to appear and defend in the said suit however no written statement of defence was lodged by the applicant, consequently the matter proceeded *ex-parte* against him.

Having heard the respondent's case, this Court on 26/5/2020 entered judgment in favour of the respondent declaring her a lawful owner of the property and the applicant was ordered to vacate the same within 30 days and to pay the respondent a sum of Tsh 10,000,000/= being general damages. *Alle-*

As the matter went *ex parte* against the applicant, he lodged Application No. 381 of 2021 seeking an extension of time to set aside the *ex parte* judgment in Land Case No. 40 of 2018. Having heard the parties, this Court dismissed the said application for lack of merits. Hence the applicant being aggrieved with the said decision rejecting to grant an extension of time, he lodged notice of intention to appeal to the Court of Appeal. Also as mandatorily required to seek leave, the applicant preferred the present application.

Back to the present application, let me now turn to consider whether it has merits.

As submitted by the applicant's advocate, for application for leave like the present one, there are conditions to be considered upon which leave to appeal is grantable. Apart from the decisions referred to me by the learned advocate for the applicant, 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 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 decisions, 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 my duty in this application is not to determine the merits or demerits of the points 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.

I have gone through the applicant’s affidavit in support of the application. On paragraph 1, the applicant has listed grounds which he

*Alles*

intends the Court of Appeal to address them. These grounds are as follows;

*a) Whether it is legally proper for the court to refuse to extend time despite the fact that the applicant was never served with a notice of the date of delivery of the ex parte judgment in respect of Land Case No. 40 of 2018 which ultimately denied the applicant his fundamental right to be heard before an adverse decision was made to the detriment of his right to his matrimonial property.*

*b) Whether it is legally proper for the court to refuse to extend time despite the fact that the applicant was never notified of the proceedings in respect of Land Case No. 40 of 2018 despite an order for such notification which was made by the Court on the 16<sup>th</sup> July 2019.*

*c) Whether it is legally proper for the court to refuse to extend time despite the fact that the respondent's case (the summary suit) was first dismissed but then the*

*Alle*



*court allowed the respondent to proceed to prove her case thereby inventing and deciding a new case on its own.*

From the foregoing grounds raised in paragraph 11 of the applicant's affidavit, 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. The applicant will have his costs.

It is so ordered.



*A. Msafiri*

**A. MSAFIRI,**

**JUDGE**

**27/7/2022**