

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT PAR ES SALAAM

MISC. LAND APPLICATION NO. 835 OF 2022

(Originating from the Judgement and Decree of the High Court of Tanzania, Land Division at Dar es Salaam before Hon. Makani, J dated 28th November, 2022 in Land Appeal o. 111 of 2021)

AKIBA COMMERCIAL BANK APPLICANT

VERSUS

PAULO RWEYEMAMU 1ST RESPONDENT

PATRICK ELIAS NYATO 2ND RESPONDENT

RULING

Date of last Order: 16.03.2023

Date of Ruling: 17.03.2023

A.Z.MGEYEKWA, J

This Court is called upon to leave to appeal to the Court of Appeal of Tanzania. The Judgment was in respect of Land Appeal No.111 of 2021 which was dismissed by this Court. The application is preferred under the provisions of section 47 (2) of the Land Disputes Courts Act Cap. 216 [R.E 2019]. The Application is premised on the grounds appearing on the Chamber Summons together with the supporting affidavit of Mr. David Benjamin Wasonga, the applicant.

The Application is contested. The respondent filed the counter affidavit of Paulo Elias Nyato, the 1st respondent sworn on 7th March, 2023 in which he averred that the application is devoid of merit. The hearing proceeded *ex parte* against the 2nd respondent who was duly summoned to appear in Court.

When the matter was called for hearing on 16th March, 2023, the applicant had the legal service of Mr. David Wasonga, learned counsel, and the 1st respondent appeared in person, unrepresented.

The applicant through his advocate urged for this court to adopt the affidavit and form part of his submission. In a summary, the learned counsel submitted that the applicant was aggrieved by this court decision, hence, he has lodged the instant application and has raised several grounds which attract the attention of the Court of Appeal of Tanzania.

The applicant's counsel submitted to the effect that the appeal before this court was tainted with illegality and irregularities. He stated that in the application for leave the applicant must state points of law for consideration by the Court of Appeal of Tanzania. To support his submission he cited the case of **Rutagatina C.L v Attorney General & Another**, Civil Application No. 98 of 2010. He went on to submit that the applicant's points of law are stated in paragraph 7 of the affidavit.;

Some of the grounds which are considered to be worthy of consideration by the Court of Appeal are summarized and crystalized hereunder:-

1. *Whether it was proper for this Court to determine an issue that was not framed by parties.*
2. *Whether it was proper to hold that the issue of spousal consent was pertinent at the trial despite the fact that the suit property was a matrimonial property.*
3. *Whether this Court was justified to disregard exhibit 1 on account of the lack of the applicant's seal.*
4. *Whether this Court was justified to make a finding that there was no proof that the 2nd respondent borrowed from the applicant despite the fact that exhibit 1 was admitted during the trial.*
5. *Whether this Court was justified to hold that spousal consent was required to be in a standard format.*

Expounding more on the above stated reasons, the applicant's counsel submitted that grant of an application for leave to the Court of Appeal depends on the applicant's ability to demonstrate that there is a point worth consideration by the Court of Appeal of Tanzania. In his view, the applicant has managed to raise arguable points of law worth of consideration by the Court of Appeal of Tanzania.

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

Submitting in rebuttal, the 1st respondent strenuously contended that the applicant has failed to adduce good reasons. He asserted that this Court determined issues that were not framed at the trial court, but it had to do as an appellate Court. He added that an appellate Court has a duty to determine an issue which was not determine at the trial tribunal.

The 1st respondent went on to submit that the applicant has raised six points of law that might attract the attention of the Court of Appeal of Tanzania. He defended this Court Judgment as sound and reasoned. He submitted that this Court examined the proceedings of the trial tribunal and found that the same was tainted with illegalities such as there was no any contract tendered by the Bank to prove that the loan was guaranteed and there was no any spousal consent. The 1st respondent This Court was correct in its findings. He valiantly argued that at the trial tribunal, the Bank tendered only letters and the same do not suffice to rule out that the spouse had consented to the loan. He distinguished the cited case of **Rutagatina** (supra) by stating that the same is irrelevant in the circumstances at hand.

In conclusion, the 1st respondent stressed that there are no points of law worth consideration by the Court of Appeal. He urged this Court to dismiss the applicant's application.

In his short rejoinder, the learned counsel for the applicant reiterated his submission in chief concerning spousal consent. He stated that the cited case is relevant to the case at hand.

Having heard the rival submissions of the learned counsel for the applicant and respondent, it now behooves the Court to determine whether the applicant has raised sufficient grounds or a disturbing feature capable of engaging the Court of Appeal of Tanzania to intervene.

It is trite law that grant of leave to appeal to the Court of Appeal is premised on the applicant's ability to demonstrate that there are points of law or fact that have been decided by the High Court but need to be revisited by the Court of Appeal before rights of the contending parties are conclusively determined. It is the legal position ascertainment whether the legal threshold for granting an application for leave has been met, which entails carrying out a thorough evaluation of the averments made in the supporting affidavit. Leave to appeal to the Court of Appeal must be on the satisfaction that the intended appeal raises novel points of law or where there is *prima facie*, or arguable grounds as it was held in the case of **Sango Bay v Dresdner Bank A.G** [1971] EA 17, 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 **Rutagatina C. L. (supra)** the Court of Appeal of Tanzania held that: -

*"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: **Buckie v Holmes** (1926) ALL £ R. 90 at page 91). However, where the ground') of appeal are frivolous, vexatious or useless or hypothetical, no leave will be granted."*

Applying the above holding, the Court of Appeal emphasized that the disturbing features must be in the form of serious points of law that warrant the attention of the Court of Appeal.

In the instant application, the respondent in his counter affidavit specifically paragraphs 4, 5, and 6 opposed the application, arguing that such grounds are not sound, pertinent, and an aggregate of an arguable case.


As stated earlier on, the applicant's argument is based on the grounds deponded in paragraph 7 of the affidavit. These are the grounds that the applicant thinks are good points of law that attract the attention of the Court of Appeal of Tanzania. The respondent opposed this contention, arguing that such grounds are not sound and a summative of an arguable case. In my considered view, I take the view that there are pertinent issues

that constitute a *prima facie* case, serious enough to attract the attention of the Court of Appeal. Issues such as determination of new issues which were not framed by the Court of Appeal, whether there was proof if the 1st respondent was the guarantor of the 2nd respondent. These issues are among other issues which are worth consideration by the Court of Appeal of Tanzania.

In the upshot, this application succeeds. The applicant is granted leave to appeal to the Court of Appeal. Costs to be in the cause.

Order accordingly.

Dated at Dar es Salaam this date 17th March, 2023.


A. Z. MGEYEKWA
JUDGE
17.03.2023

Judgment delivered on 17th March, 2023 in the presence of the applicant.


A. Z. MGEYEKWA
JUDGE
17.03.2023