

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

MISC. LAND APPLICATION NO.747 OF 2022

*(Arising from the Judgment of the High Court- Land Division in Land
Appeal No. 224 of 2021)*

JANETH JULIUS KIBONA APPLICANT

VERSUS

MENGI OBENI MWAKISOLE1ST RESPONDENT

TANZANIA COMMERCIAL BANK PLC 2ND RESPONDENT

RULING

Last order: 15.01.2023

Ruling date: 25.01.2023

A.Z.MGEYEKWA, J

This is application is brought under Sections 47 (2) of the Land Disputes Courts Act, Cap. 216 [R.E 2019] and section 5 (1) (c) of the Appellate Jurisdiction Act, Cap. 141 [R.E 2019]. The applicant seeks to leave to appeal to the Court of Appeal of Tanzania to impugn the decision of this Court in Land Appeal No. 224 of 2021 delivered on 26th October, 2022. The application is supported by an affidavit deponed by Joseph Yahaya

Mbogela, learned Advocate for the applicant. The second respondent is feverishly opposed to the application by filing a counter-affidavit sworn by Mr. Tito Kisanga, learned Advocate for the second respondent. The matter proceeded *ex parte* against the first respondent.

When the matter was called for hearing before this court on 15th December, 2022, the applicant had the legal service of Mr. Jospeh Mbogela, learned counsel whereas the 2nd respondent was represented by Mr. Meiseyeki Msangi, learned counsel.

In his oral submission, Mr. Mbogela urged this court to adopt the applicant's affidavit and form part of his submission. The learned counsel for the applicant stated that the applicant prays for this court to grant leave to appeal to the Court of Appeal of Tanzania against the decision of Hon. Mwenegoha, J in Land Appeal No. 224 of 2021. Mr. Mbogela submitted that the applicant under paragraph 7 of his affidavit has listed points of law that attracts the attention of the Court of Appeal of Tanzania as follows; this Court has failed to evaluate the evidence adduced by the applicant at the District Land Housing Tribunal and this Court did not consider and discuss the first and second grounds of appeal which were in favour of the applicant. To fortify his submission, he referred this Court to pages 4 to 6 of this Court Judgment. The learned counsel for the applicant faulted this Court for failure to determine whether a spouse who is living in a

matrimonial home can consent to the mortgage. The learned counsel for the applicant beckoned upon this Court to find that the applicant has adduced arguable grounds worth being considered by the Court of Appeal of Tanzania.

In conclusion, Mr. Mbogela urged this Court to grant the applicant's application with costs.

Responding, Mr. Msangi, learned State Attorney urged this court to adopt the respondent's counter-affidavit sworn by Mr. Tito Kisanga to form part of his submission. Mr. Msangi submitted that an application for leave is granted if the applicant raises serious issues which attract the attention of the Court of Appeal of Tanzania. It was his opinion that the applicant has failed to raise serious issues. To support his submission he referred this Court to paragraph 7 of the counter affidavit.

Mr. Msangi went on to argue that the Hon. Judge considered all grounds of appeal and on page 3 of her Judgment, she determined the issue of spouse consent and found that the applicant is not a legal wife of the first respondent and she did not submit any evidence proving her allegations. Mr. Msangi stressed that there is no any issue for consideration before the Court of Appeal of Tanzania.

In his brief rejoinder, the learned counsel for the applicant reiterated his submission in chief. He submitted further that this Court on page 3 of its Judgment narrated the submissions of the counsels, thus, it was not the position of this Court. He insisted that the applicant proved that she was living in the matrimonial house.

In conclusion, the learned counsel for the applicant insisted that the applicant has raised arguable grounds which attract 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, I will determine *whether the application is meritorious*. The issue for determination takes into account the settled position of the law to the effect that the grant of leave to appeal to the Court of Appeal is not a matter of mere formality. The applicant is required to demonstrate with material sufficiency that the intended appeal carries an arguable case that merits the attention of the Court of Appeal. In other words, there must be based on 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 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.”*

This decision is in consonance with the decision of the Court of Appeal of Tanzania in the case of **Bulyanhulu Gold Mine Ltd v Petroiube (T) Ltd & Another**, Civil Application No. 364/16 of 2017 CAT (unreported), it was held 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, be 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 novel point of law or where the grounds show prima facie or arguable appeal (see: *Buckle v Holmes* (1926) All E.R. 90 page 91). However, where the grounds of appeal are frivolous, vexatious or useless or hypothetical, no leave will be granted."*

The same was decided by the Court of Appeal of Tanzania in the cases of **British Broadcasting Corporation v. Eric Sikujua Ng'maryo**, Civil Application No. 138 of 2004 (unreported), and **National Bank of Commerce v Maisha Musa Uiedi (Life Business Centre)**, CAT-Civil Application No. 410/07 of 2019.

After taking into consideration what has been stated in the affidavit and the applicant's Advocate submission, I would like to observe that applicant's counsel in his affidavit particularly paragraph 6 stated that there are points of law left unaddressed and hence worth being considered by the Court of Appeal of Tanzania. In paragraph 7 of his affidavit, Mr. Mbogela stated that this Court has failed to evaluate the evidence adduced by the applicant on spouse consent to the mortgage of the suit property.

On his side, Mr. Msangi opposed the application. He contended that there is no any arguable ground worthy of consideration by the Court of Appeal of Tanzania. I take the view that the ground that this Court did not determine the first and second grounds is unfounded as the same was considered and determined by this Court. See pages 3 and 4 of the impugned Judgment, therefore, this is not a fit ground of consideration by the Court of Appeal of Tanzania.

Regarding the second issue, whether the applicant who lives in the matrimonial property can consent to a mortgage, I find that the same does not attract the attention of the Court of Appeal of Tanzania, I am saying so because the tribunal proceedings show clearly that the applicant testified to the effect that she has not contracted marriage with the 1st respondent and has no any marriage certificate with the first respondent.

That means the applicant was certain that there was no existing marriage between her and the 1st respondent. Therefore, in my view, the above grounds are not worthy of consideration by the Court of Appeal of Tanzania since the same does not raise a *prima facie* case.

In the upshot, I proceed to dismiss the instant application with costs.

Order accordingly.

DATED at Dar es Salaam this 25th January, 2023.



A.Z MGEYEKWA
JUDGE
25.01.2023

Ruling delivered on 25th January, 2023 in the presence of Loveneer Pilimbe, counsel for the 2nd respondent.



A.Z MGEYEKWA
JUDGE
25.01.2023