

**IN THE HIGH COURT OF TANZANIA
(IN THE DISTRICT REGISTRY)
AT MWANZA
MISC. CIVIL APPLICATION NO.09 OF 2021
(Arising from Land Case No.41 of 2017)**

**THE REGISTERED BOARD OF TRUSTEES OF
ALLIANCE SCHOOLS SPORTS ACADEMY APPLICANT**

VERSUS

MWANZA CITY COUNCIL RESPONDENT

RULING

Date of Last order: 09.03.2021

Daye of Ruling: 10.03.2021

A.Z.MGEYEKWA, J

This application is brought under section 5 (1) (c) of the Appellate Jurisdiction Act, Cap. 141 [R.E 2019]. The applicant seeks leave to appeal to the Court of Appeal of Tanzania to impugn the decision of this Court in Civil Case No.04 of 2020 delivered on 7th October, 2020. The application is supported by an affidavit deponed by Felician Patrick Burakali. On the

other hand, the respondent opposed the application by filing a counter affidavit deposed by, Malick Abasi Mweneyuni, Solicitor.

Following the global outbreak of the Worldwide COVID - 19 pandemic (Corona virus), the hearing was conducted via audio teleconference, the applicant enjoyed the legal service of Mr. Kabonde, learned counsel and the respondent was represented by Mr. Vungwa, Solicitor.

It was Mr. Kabonde who started to kick the ball rolling. He urged this court to adopt the applicant's affidavit and form part of his submission. Mr. Kabonde stated that they have filed an application for leave to appeal before the Court of Appeal of Tanzania. The learned counsel for the applicant went on to submit that they have raised a point of law that they want to bring it to the attention of the Court of Appeal of Tanzania. He referred this court to paragraph 4 of the applicant's affidavit. Mr. Kabonde further urged for this court to maintain status quo in regard to the disputed property while the applicant is in the process to file a temporary injunction.

On the strength of the above submission, Mr. Kabonde beckoned upon this court to grant their application to file an appeal to the Court of Appeal of Tanzania.

The learned counsel for the respondent strenuously resists the application through the counter affidavit as well as in the oral arguments at the hearing before me. Mr. Vungwa contended that in granting leave to appeal to the Court of Appeal of Tanzania the court must ask itself whether there is an arguable ground and whether there is a *prima facie* case to merit the attention of the Court of Appeal. Mr. Vungwa objected the application for failure for the applicant to list the grounds for consideration by the Court of Appeal. He went on to argue that the grounds stated under paragraph 4 of the applicant was addressed by this court in its Judgment therefore the same are not fit grounds to merit the attention of the Court of Appeal since the applicant was a trespasser.

It was Mr. Vungwa further submission that an application for leave is not automatic, the same is granted if the grounds are serious for consideration. He went on to submit that a leave is granted where there is a point of law and *prima facie* case. To support his submission he cited the case of **British Broadcasting Corporation v Erick Sikujua Ng'amaryo**, Civil Application No. 138 of 2004. He lamented that as long as the ground contains a point of law and facts the same does not qualify to go to the Court of Appeal of Tanzania.

Relating to the prayer to maintain status quo, Mr. Vungwa argued that this order is brought XXXVII Rule 2 of the Civil Procedure Code Cap.33

[R.E 2019], whereby the law requires that there must be a pending case at the same court. He valiantly argued that there is no any pending case thus the same is an abuse of the court process. He added that the application will be fit after the decision of this court.

In conclusion, Mr. Vungwa urged this court to disregard the applicant's application with costs.

Rejoining, Mr. Kabonde reiterated his submission in chief and added that Order XXXVII Rule 2 of the Civil Procedure Code Cap. 33 is irrelevant. Insisting, Mr. Kabonde urged this court to grant their application because in case the suit property will be executed then the applicant will suffer irreparable loss. Mr. Kabonde went on to argue that the learned Solicitor averments are not reflected in his counter affidavit thus his submission is an afterthought. Thus, he urged this court to disregard Mr. Vungwa averments. Insisting, Mr. Vungwa stated that there is a point of law that attract the attention of the Court of Appeal of Tanzania.

On the strength of the above submission, Mr. Kabonde once again, beckoned upon this court to grant leave to the applicant to file an appeal before the Court of Appeal of Tanzania.

Having stated the above, I should now be in a position to address the relevant issue in the application which is whether the applicant should be

granted leave to appeal to the Court of Appeal of Tanzania. However, before I do that, I find it appropriate to state at this juncture that before the hearing commenced, the respondent's counsel sought to withdraw the preliminary objection with a view to expediting the hearing of the application. As the applicant had no objection to the prayer for withdrawal, the Court granted the prayer and, accordingly, marked the preliminary objection withdrawn. Additionally, I want to make it clear that the applicant's Advocate prayer to maintained *status quo* in regard to disputed property pending the filing of a temporary injunction cannot be granted. For the main reason that the learned counsel for the applicant has raised a new prayer that is not among the prayers on Chamber Summons and not mentioned in the applicant's affidavit.

I now revert to the merits of the application. It is important to underline here that 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. It is when the grounds of appeal raise issue of general importance or a new point of law or where the grounds show a *prima facie* or arguable appeal. 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.”

Similarly, In the case of **British Broadcasting Corporation** (supra) the Court of Appeal of Tanzania at Dar es Salaam (unreported) 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... “

On the contrary, a court cannot grant leave where the grounds of appeal are frivolous, vexatious or useless, or hypothetical. As was lucidly stated by this Court of Appeal of Tanzania in Civil Reference No. 19 of 1997, **(i) Harban Haji Mosi (ii) Shauri Haji Mosi v. (i) Omar Hilal Seif (ii) Seif Omar** (unreported) that:-

“Leave is grantable where the proposed appeal stands reasonable chances of success or where, but not necessarily, the proceedings as a whole reveal such disturbing features as to require the guidance of the Court of Appeal of Tanzania . The purpose of the provision is therefore to spare the Court the specter of unmeriting matters and to enable it to give adequate attention to cases of true public importance.”

The purpose of the provision is to spare the Court the menace of unmeriting matters and to enable it to give adequate attention to cases of true public importance. In my respectful view, the issues raised by the

applicant cannot be labeled as frivolous, vexatious or useless. It was Mr. Vungwa concern that the applicant's ground is based on point of law and facts. In my view, it is not detrimental to cite grounds based on point of law and facts, the same suffice to attract the attention of the Court of Appeal of Tanzania. In the case of **Bulnyahulu Gold Mine Ltd & 2 others v Petrolube (T) Ltd and Another**, Civil Application No. 364/16 of 2017, the Court of Appeal held that:-

“ The above said, we are satisfied that the grounds raised by the applicants raise serious issues of law and facts worth consideration by the Court.”

Guided by the above provision of law, without expressing any opinion, I am satisfied that the ground raised is embraced in conditions set in the cases of **British Broadcasting** (supra) and **Bulnyahulu Gold Mine Ltd & 2 others v Petrolube (T) Ltd and Another**. The applicant has demonstrated sufficient ground to invoke the appellate jurisdiction of the Court of Appeal of Tanzania. In order to ensure that justice is done, there is need for the Court of Appeal of Tanzania to resolve the rival contentions raised by the learned counsel for the applicant on the point of law that the evidence on record reveals that the applicant is the lawful owner.

In the upshot, I will, in the circumstances, exercise my discretion under section 5 (1) (c) of the Appellate Jurisdiction Act, Cap. 141 [R.E 2019] and grant leave to appeal to the Court of Appeal of Tanzania.

Order accordingly.

DATED at Mwanza this 10th March, 2021.




A.Z MGEYEKWA

JUDGE

10.03.2021

Ruling delivered on 10th March, 2021 via audio teleconference whereas Mr. Kabonde, learned counsel for the applicant, and Mr. Vungwa, learned Solicitor were remotely present.


A.Z MGEYEKWA

JUDGE

10.03.2021