IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

MISC. CIVIL APPLICATION NO.156 OF 2021

(Arising from Judgment and decree of the High Court of Tanzania at Mwanza in Civil Appeal No. 26 of 2021 dated 29/11/2020 Delivered by, Ismail J, Judge, Originating from the decision of the Resident Magistrate Court in civil case No. 48 of 2010.)

RICHARD PAUL CHAMA..... APPLICANT

VERSUS

ALLIANCE FINANCE CORPORATION LTD ..... RESPONDENT

RULING

4th April & 21st July, 2022

ITEMBA, J.

Before me is an application for grant of leave which will allow the applicant to file an appeal to the Court of Appeal of Tanzania, to challenge the decision of the High Court in Civil Appeal No. 26 of 2021, which was delivered on 29th November, 2021 by Hon. Ismail J.

The brief facts of this matter reveals that, the applicant and respondent entered into a personal loan agreement whereas the applicant was issued by the respondent an amount of TZS 92,386,512/= as he intended to purchase a motor vehicle make TATA. The motor vehicle was pledged as a security for the said loan. It was agreed that the said vehicle

will be repossessed and sold by the respondent if the applicant will fail to pay the loan. The applicant could not pay the loan as agreed, as a result the respondent sold the vehicle. In 2020, the applicant instituted a Civil Case No. 48 of 2020 before the Resident Magistrate Court of Mwanza and the decision was issued in his favor. The judgment was delivered on 21st May, 2021. The respondent herein was aggrieved with the said decision and successfully appealed to the High Court whereby the court quashed the holding of the trial court and allowed the appeal. The applicant is aggrieved by the High Court decision and he intends to appeal to the Court of Appeal hence this application.

The application has been preferred under **Section 5 (1)** of The Appellate Jurisdiction Act [Cap. 141 R.E. 2019]. It is supported by an affidavit sworn by Richard Paul Chama, the applicant herein, and it sets out grounds upon which the application is based.

On 08th December, 2021, the applicant has lodged notice of appeal, to that effect, and he has laid down complaints against the findings in the decision of the High Court.

The applicant contends that, the 1st Appellate Court has erred in law and in fact in holding that, the type of contract between the parties was a hire purchase arrangement. He complains further that, the 1st Appellate

Court erred in law and in fact in holding that the term hypothecation applies to number of goods and not to a single motor vehicle. He also faults the finding of the High Court Judge that, he erred in law and fact in not holding that the term hypothecation applies to a number of goods and not in a single entity. Again, he criticises the first appellate court to have erred in law and fact for not considering that the mode of payment by the applicant was affected by instalments. Lastly, the applicant states that the first Appellate Court erred in holding that the notice which was issued by the respondent was insufficient.

Hearing of the application took the form of written submissions. In her submission, Ms. Mary Melkiori, counsel for the applicant, dropped paragraphs 8, 9 and 10 and adopted paragraph 6, 7, 11 and 12 of the supporting affidavit.

On paragraph 6 of the affidavit, she avers that the 1st Appelate Court erred in law and in fact for failure to re-evaluate the evidence adduced before the trial Court that the nature of transaction between the parties was of hire purchase agreement. She supported her averments with the decision in the case of ***David Emil Kisinini vs Abdalah Kijanga***, Civil Appeal No. 38 of 2021 (Unreported) and Rule 2 of the Hire Purchase Rules GNs. No. 310 and 327 of 1996.

In respect of paragraph 7 which criticises on manner the hire purchase arrangement is governed, she submitted that, the first Appellate Court ignored the mode of payment and concluded that the contract was a loan agreement. She cited Rule 2 (2) of the GNs. No. 310 and 327 of 1996 and insisted that it indicates the price hence in this case the applicant ought to pay a monthly payment to the tune of three million eight hundred, forty-nine thousand, four hundred and thirty-eight (3,849,438/=) which will be paid in twenty-four month.

On 11th paragraph in which the applicant complains that, the Appellate Court erred in law and in fact in not taking into account the question of notice otherwise it denied the cardinal principle of a right to be heard. The counsel for applicant submitted that, repossession of motor vehicle was by surprise without any prior notification hence ignored right to be heard and the Appellate Court ignored the same. She cited decision in the case of ***Mbeya-Rukwa Auto parts and Transport Limited vs Jestina George Mwakyoma,*** Civil Appeal No. 45 of 2000 (Unreported) to support her arguments.

In regard to paragraph 12 of the affidavit the counsels' contention is to the effect that the 1st Appellate Court erred in holding that the prior contract concluded by the parties was purely loan agreement. She argues further that the Court has failed to interpret laws governing the

relationship to that effect. She cited ***Section 124, 125 and 128 of the Law of Contract Act*** Cap. 345 R.E 2002 and ***Article 13 (6) (a) of the United Republic of Tanzania Constitution.*** Based on these contentions she urged the court to grant an application and to allow the applicant to appeal to the Court of Appeal.

In rebuttal submission Ms. Ruqaiya Alhadhi, submitted on behalf of the respondent. She started by pointing out that, the applicants' submissions have failed to show a novel point of law worth to be heard by the Court of Appeal. In that respect she cited decision in the case of ***British Corporation vs. Eric Sikujua Ng'amaryo,*** Civil Application No. 138 of 2004.

On paragraph 6 of the affidavit, she contends that it does not qualify to be a ground for leave to appeal. She insists that the said ground invites the court of appeal to analyse the evidence which is improper in accidence with the law. She cited provisions under Section 17 (1) of Hire Purchase Act (Supra) to support her contentions.

In respect of paragraph 7 through which the applicant decries that the 1st Appellate Court erred in law and in fact in not holding that the contract under hire purchase agreement is governed by the manner the payment is affected, she is of the view that this ground is baseless as the

1st Appellate Court made a clear distinction between hire purchase agreement and loan agreement at page 15 through 17 of the judgment.

Responding to paragraph 11 of the affidavit she avers that, the notice to the applicant was duly served as they were sent to the applicant's address. And the same was not disputed during the trial hence it remains an afterthought. She submitted further that the respondent has exercised her rights a provided in the contract between the parties, she also distinguished the cited decision in the case of ***Mbeya-Rukwa Auto parts***.

In regard to paragraph 12 that the verdict of the Appellate Court is otherwise faulty and bad in law she contends that, ***sections 124, 125 and 128 of the Law of Contract*** cited by the counsel for the applicant are irrelevant as they talk about bailment and not loan agreement. She added that the applicant is attempting to create his own judgment which has never existed neither in the trial court nor in the Appellate Court. She concluded by arguing that the applicant has failed to establish points of law for the Court of Appeal to intervene.

On her brief rejoinder the learned counsel for the applicant literary retaliated what was submitted in submission in chief, I don't find it worthy reproducing the same.

Having heard the rival submissions made by both counsels, the Court's duty, at this stage of the proceedings, is to determine whether the application has raised any sufficient ground capable of engaging the Court of Appeal in the intended appeal. This question arises from a realization of the fact that the Court has a duty, in an application for leave, to avoid a wasteful use of judicial time. Prof. Shivji, in **Developments in Judicial Review in Mainland Tanzania;** (https:// www. Scribd.co). Had this to say:

> *"Weeding out frivolous or vexatious and perhaps those, on the face of it, that do not exhibit good faith or ex facie are an abuse of the legal process"*

It is an established position of law that a party that is craving for leave to appeal must demonstrate, with material sufficiency, that the intended appeal carries an arguable case which necessitates the attention of the Court of Appeal. This means that leave to appeal to the Court of Appeal must be based on solid grounds that are weighty enough to engage the Court of Appeal. Such grounds must be premised on serious points of law or law and fact. This position has been underlined in several court decisions. These include: ***Abubakari Ally Himid v. Edward Nyalusye***, CAT-Civil Application No. 51 of 2007; ***British Broadcasting Corporation (BBC) v. Eric Sikujua Ng'maryo***, CAT-Civil Application No. 138 of 2004; and ***Rutagatina C.L. v. The Advocates Committee & Another***, CAT-Civil

Application No. 98 of 2010. In all these decisions the emphasis given is to the effect that grant of leave to appeal must be on satisfaction that the intended appeal raises a novel point of law or there is a prima facie or arguable appeal which warrant the attention of the Court of Appeal.

However, the court enjoys the discretionary powers to refuse to grant leave where it is of the view that the application for leave falls short of meeting the obligatory verge for its grant. See: ***Nurbhain Rattansi v. Ministry of Water Construction Energy Land and Environment and Another*** Civil Application No. 3 of 2004 TLR [2005] 220.

I am forced to point out that the contents of the applicant's affidavit in support of the application are rather confusing. However, reading through paragraph 6, 7, 11 and 12 of the said affidavit, trial court judgement and 1st Appellate Court judgment, I find that paragraph 6 and 12 do not amount to arguable grounds of appeal as they relate to analysis of evidence and there is no serious point of law raised therein. However, I gather that there are arguable grounds worthy of being considered by Court of Appeal as follows:

In respect of paragraphs 7 of the applicant's affidavit:

(i) '*Whether the contract between the parties was hypothecation or hire purchase'.*

In respect of paragraph 11

(ii) Whether it was necessary for the respondent to issue the appellant a notice of the sale in accordance with section 128 (1) of the *Law of Contract, Cap 345.*

(iii) And; whether a demand notice can sufficiently serve as a notice of the sale.

Therefore, the application is allowed to the extent explained.

Costs to be in the cause.

It is so ordered.

DATED at **MWANZA** this 21st day of July, 2022.

THE HIGH COURT OF TANZANIA
MWANZA

L. J. ITEMBA

JUDGE