

**IN THE COURT OF APPEAL OF TANZANIA**  
**AT TABORA**

**(CORAM: JUMA, C.J., MUGASHA, J.A., And LILA, J.A.)**

**CIVIL APPLICATION NO. 176/11/2017**

**YUSUFU JUMA RISASI.....APPLICANT**

**VERSUS**

**ANDERSON JULIUS BICHA.....RESPONDENT**

**(Application for leave to appeal to the Court of Appeal  
of Tanzania from the decision of the High Court of  
Tanzania at Tabora)**

**(Songoro, J.)**

**dated the 3<sup>rd</sup> day of June, 2015  
in  
Land Appeal No. 20 of 2013**

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**RULING OF THE COURT**

**15<sup>th</sup> & 19<sup>th</sup> February, 2018**

**MUGASHA, J.A.:**

In this application, the applicant is seeking leave to file an appeal to the Court against the Judgment of the High Court dated 3/6/2015 in Land Appeal No. 20 of 2013. Initially, before the High Court, the applicant unsuccessfully applied for leave to appeal to this Court vide Misc. Land Application No. 51 of 2015 which was dismissed on 6/12/2016. The application is by way of Notice of

Motion made under section 5(1) (c) of the Appellate Jurisdiction Act (Cap. 141 R.E. 2002) and Rules 45(b) and 49(3) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The application is accompanied by the affidavit of **MUSA KASSIM**, the advocate of the applicant.

The respondent opposed the application through the affidavit in reply sworn by **REVOCATUS MUGAYA KAITILA**, learned counsel for the respondent.

At the hearing of the application, the applicant was represented by Mr. Musa Kassim, learned counsel whereas the respondent had the services of Mr. Mugaya Mtaki, learned counsel.

Before the hearing of the application, the Court wanted to satisfy itself on the competence or otherwise of the application seeking leave of the Court to appeal against the decision of the High Court (Land Division).

Mr. Mussa Kassim submitted that, this application to the Court for leave to appeal against the decision of the High Court is sought under section 5(1) (c) of the **APPELLATE JURISDICTION ACT [CAP 141 RE.2002]** (AJA), following refusal of the initial leave sought

before the High Court under section 47(1) of the **LAND DISPUTES COURTS ACT [CAP 216 RE.2002] (LDCA)**. In clarifying the reasons for seeking the present application, the learned counsel argued that under section 47(1) of the Act, the High Court has exclusive jurisdiction on the matter regarding leave to appeal and this Court is excluded. As such, he argued, after leave is refused by the High Court under section 47(1) of the LDCA, the law is silent on the subsequent remedy.

He added that, the other reason for bringing this application under section 5(1) (c) of AJA is that, since Land Appeals before the Court are dealt with like any other Civil Appeals, if leave by the High Court is refused then one should come to the Court to seek leave by way of second bite.

He submitted that, since section 47(1) LDCA, vests exclusive jurisdiction in the High Court to determine applications for leave in land matters, refusal of the High Court to grant leave should not close the doors. Instead, applicants who are refused leave should have recourse to section 5(1) (c) of AJA. He argued, to deny an applicant a second bite because section 47(1) of the LDCA confers exclusive jurisdiction to the High Court, while in other civil

proceedings allow applicants whose applications for leave are refused by the High Court to have a second chance, is, setting a double standard in civil appeals. And, for the instant applicant, it curtails his right of appeal as guaranteed by Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977 (the Constitution). To support his propositions, he referred us to the cases of **REPUBLIC VS. MWESIGE GEOFFREY & ANOTHER**, Criminal Appeal No. 355 of 2014 (unreported) **and NEMES MUYOMBE NTALANDA VS. REPUBLIC**, Criminal Appeal No. 403 of 2013 (unreported) where at page 10 the Court states:

*"Being mindful of the stipulation under article 13(6) (a) of the Constitution of United Republic of Tanzania, there is no way in which a provision of law would consciously be couched in a way that tends to impede such basic rights."*

Mr. Mussa also urged us to take inspiration in the case of **EUSTACE KUBALUENDA VS. VENANCIA DAUDI**, Civil Appeal No. 70 of 2011 (unreported), where the Court said, no appeal lies to the Court if a certificate on point of law is refused by the High Court.

Therefore, Mr. Mussa urged us to depart from what we decided in the case **TUMSIFU ANASI MARESI VS. LUHENDE JUMANNE SELEMANI AND NATIONAL MICROFINANCE BANK**, Civil Application No. 184/11 of 2017, whereby we said that if leave sought under section 47(1) of the Act is refused, the remedy is to appeal instead of bringing an application to the Court seeking leave under section 5(1) (c) of AJA which provides:

*“(1) In civil proceedings, except where any other written law for the time being in force provides otherwise, an appeal shall lie to the Court of Appeal–*

*(c) with the leave of the High Court or of the Court of Appeal, against every other decree, order, judgment, decision or finding of the High Court.”*

Mr. Kassim urged us to find that the application is properly before the Court having been brought under the cited provision.

On the other hand, Mr. Mtaki submitted that section 5(1) of AJA regulates the mode of appealing to the Court, save as otherwise so provided in any other written law. He pointed out that the expression *“save as otherwise provided in any other written*

*law*” brings into picture the Land Disputes Courts Act. Thus, since the applicant’s leave to appeal sought under section 47(1) the LDCA was refused by the High Court, he ought to have appealed to the Court because there is no remedy for a second bite under section 47(1) of LDCA.

The learned counsel urged us to find the application incompetent and proceed to strike it out. He supported his propositions by relying on the case of **TUMSIFU ANASI MARESI VS LUHENDE JUMANNE SELEMANI AND ANOTHER**, Civil Appeal No. 184/11 of 2017.

In rejoinder, Mr. Kassim repeated what he had earlier on submitted; reiterating that section 47(1) of LDCA curtails the right of appeal to the Court against the decisions of the High Court Land Division.

We have carefully considered the submissions by the counsel. Before determining the propriety or otherwise of this application we shall determine whether the existing legislation curtails the right of appeal and if there is a double standard in treating appeals to the Court from the Land Decision as opposed to ordinary civil appeals. We shall give our answers to the following issues:

1. *Whether section 47(1) of Cap 216 curtails the right of Appeal on Land Matters to the Court.*
2. *Whether, leave refused by the High Court under section 47(1) of Cap 216 can be remedied by seeking second bite to the Court under section 5(1) (c) of AJA.*
3. *Whether this application is competent.*

At the outset, we wish to make it clear that; there is no appeal before us but rather an application for leave to appeal against the decision of the High Court, Land Division. Moreover, we wish to clearly state that; the jurisdiction of courts is a creature of statute and not what the litigants like or dislike. Through sub-articles (1) and (4) of Article 117 which we reproduce below, the Constitution establishes the Court of Appeal, and also empowers Parliament to enact laws that stipulate the mandate and the procedure of lodging of lodging appeals in the Court of Appeal.

*"117.-(1) There shall be a Court of Appeal of the United Republic of the (to be referred to in short as "the Court of Appeal") which shall have the jurisdiction of the*

*Court of Appeal as provided in this Constitution or any other law.*

*(4) A law enacted in accordance with the provisions of this Constitution by Parliament or by the House of Representatives of Zanzibar may make provisions stipulating procedure for lodging appeals in the Court of Appeal, the time and grounds for lodging the appeals, and the manner in which such appeals shall be dealt with."*

The Appellate Jurisdiction Act is one of such law. In that regard and with particular reference to the matter under scrutiny, section 5(1) of AJA provides:

*"In civil proceedings, **except where any other written law** for the time being in force provides otherwise, an appeal shall be to the Court...."*

With the underlined expression, this brings into play other legislation which improvise for the right of appeal to the Court and mandates the Court to entertain and hear such appeals. There are a number of such legislation including the Land Disputes Courts Act which introduced a mechanism of adjudicating Land disputes and



the respective courts articulated under section 3 of that Act. The Court of Appeal of Tanzania is among the said courts vested with the appellate jurisdiction in terms of section 48 of LDCA which categorically states:-

*“(1) Subject to the provisions of the Land Act and Village Land Act the Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court (Land Division).*

*(2) The Appellate Jurisdiction Act shall apply to proceedings in the Court of Appeal under this section.”*

It is not in dispute that, before knocking the doors of the Court, to appeal against the decision of the High Court Land Division, leave of the High Court Land Division must be sought under section 47(1) of the LDCA. Under section 47 (3) of the LDCA it is categorically stated that:

*“The procedure for appeal to the Court of Appeal under this section shall be governed by the Court of Appeal Rules”.*

We have no problem with Mr. Mussa Kassim’s argument that, in terms of section 5(1) of AJA, an appeal to the Court on a land

related matter is similar to any other civil appeal. However, the distinction is that, the right to appeal to the Court against the decisions of the Land Division is a creature of section 48 of LDCA, while the modality of appealing to the Court in land matters is regulated by Court of Appeal Rules as is specified by section 47(3) of LDCA. This position bars recourse to section 5(1) (c) of AJA.

In the light of the above stated position of the law, we have seriously considered the line of submission whether; there is a *lacuna* or a double standard which curtails the right of appeal to the Court in land related disputes. We shall be guided by the case of **REPUBLIC VS. MWESIGE GEOFFREY AND ANOTHER**, (supra), whereby the Court extensively discussed on the familiar canon of statutory construction of plain language. The court borrowed a leaf from the US Supreme Court decisions. In the case of **CONSUMER PRODUCTS SAFETY COMMISSION et al V. CITE SYLVANIA**, Inc. et al 227 U.S. 102 (1980) the Court held that, if a statute's language is plain and clear:

*"the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion".*

In **CAMINETTI V UNITED STATES, 242 U.S 470 (1917)** the Court ruled that:

*"It is elementary that the meaning of a statute must in the first instance, be sought in the language in which the act is framed, and if it is plain... the sole function of courts is to enforce it according to its terms..."*

Thus, in **Mwesiga's** case the Court held:

*"Indeed it is axiomatic that when the words of a statute are unambiguous, "judicial inquiry is complete". There is no need for interpolations, lest we stray into the exclusive preserve of the legislature under cloak of overzealous interpretation. This is because "courts must presume that a legislature says in a statute what it means and means in a statute what it says there!"*

***CONNECTICUT NATL' BANK V. GERMAN, 112 S ct  
1146, 1149 (1992)***

We fully subscribe to the said decision in **Mwesiga's** case. In this regard, we are of the settled mind that, the language used in section 5(1) of AJA, and sections 47 and 48 LDCA is unambiguous and the respective legislation means what is stated therein. We do not agree with the suggestion that section 47 curtails any right of appeal; neither does it create any double standard in land matters. Besides, the mode of bringing the appeals to the Court is regulated under section 47(3) of LDCA. We say so because as earlier stated, jurisdiction is a creature of statute and there is no need for interpolations as suggested by Mr. Kassim. We decline Mr. Kassim's submission to take inspiration from the case of **EUSTACE KUBALYENDA VS VENANCIA DAUDI** (supra) for a major reason that, the Court dealt with a matter originating from the primary court and its essence was the certificate on point of law which is not the case in the matter under scrutiny.

We now turn to address the question whether the Court can grant the applicant leave to appeal to the Court against the decision

of Land Division which he seeks under section 5(1) (c) of AJA following its refusal at the High Court (Land Division). Our answer is in the negative because: **One**, under section 47(1) of LDCA, the High Court is vested with exclusive jurisdiction on matters of leave to appeal to the Court. **Two**, the Court does not have jurisdiction to entertain an application for leave to appeal against the decision of the High Court under section 47(1) of LDCA and there is no remedy under section 5(1) (c) of AJA. (See **FELISTA JOHN MWENDA VS. ELIZABETH LYIMO**, Civil Application No. 9 of 2016 and **ELIZABETH LOSUJAKI VS AGNESS LOSUJAKI AND ANOTHER**, Civil Appeal No.99 of 2016 (both unreported). **Lastly**, in the case of **TUMSIFU ANASI MARESI VS. LUHENDE JUMANNE**, Civil Application No. 184/11/2017, we clearly stated that the remedy of refusal by the High Court for leave to appeal is to appeal to the Court. This is fortified by what we have endeavoured to explain on the requirements of section 47(3) which categorically states that, the procedure or rather mode to appeal under section 47 shall be governed by the Court of Appeal Rules.

In view of what we have stated herein above, we do not find any sound reasons to depart from our earlier decisions wherein we

have emphasised the remedy for refusal of leave under section 47(1) of LDCA, is to appeal to the Court. Therefore, the present application is not properly before us and we accordingly strike it out.

**DATED** at **TABORA** this 17<sup>th</sup> day of February, 2018.

I.H. JUMA  
**CHIEF JUSTICE**

S. E. A. MUGASHA  
**JUSTICE OF APPEAL**

S. A. LILA  
**JUSTICE OF APPEAL**

I certify that this is a true copy of the original.



A.H. MSUMI  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**