IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: MUGASHA, J.A., LILA, J.A., And NDIKA, J.A.)

CIVIL APPEAL NO. 232 OF 2018

HAMISI MDIDA
SAID MBOGO ..... **APPELLANTS**

VERSUS

THE REGISTERED TRUSTEES
OF ISLAMIC FOUNDATION ..... **RESPONDENT**

(Appeal from the Judgment of the High Court of Tanzania at Tabora)
(Rumanyika, J.)

dated the 16th day of September, 2016
in
Miscellaneous Land Application No. 75 of 2016

.....

JUDGMENT OF THE COURT

29th October & 4th November, 2019

NDIKA, J.A.:

In this appeal, Hamisi Mdida and Said Mbogo, the first and second appellants herein, seek the reversal of the ruling of the High Court of Tanzania at Tabora (Rumanyika, J.) in Miscellaneous Land Application No. 75 of 2016 dated 16th September, 2016 refusing them leave to appeal to this Court from the judgment of that Court (Mallaba, J.) in Land Appeal No. 41 of 2015 dated 26th July, 2016.

The underlying dispute between the parties herein is over the use, control and ownership of a mosque known as Masjid Dubai situated at Gungu along Kasulu Road within the Kigoma-Ujiji Municipality. The respondent in this matter, the Registered Trustees of Islamic Foundation, unsuccessfully sued the appellants before the District Land and Housing Tribunal of Kigoma at Kigoma for possession and ownership of the aforesaid mosque. On appeal by the respondent herein, the High Court at Tabora (Mallaba, J.) reversed the trial tribunal's judgment and decree. The respondent was thus adjudged the rightful owner of the mosque (the rightful title holder).

Being aggrieved by the aforesaid outcome of the appeal, the appellants duly lodged a notice of appeal and applied to the High Court vide Miscellaneous Land Application No. 75 of 2016 for leave to appeal in terms of section 47 (1) of the Land Disputes Courts Act, Cap. 216 RE 2002. As intimated earlier, that application came to naught as leave was refused by Rumanyika, J. on 16th September, 2016. The appellants, then, approached this Court by lodging an application for leave to appeal (Civil Application No. 183/11/2017) by way of a second bite, as it were. That quest was noticeably misconceived as, at the material time, section 47 (1) of Cap. 216 (supra) vested in the High Court sitting as a land court exclusive jurisdiction to grant leave to appeal to this Court over any decision of that court rendered in its

exercise of original, appellate or revisional jurisdiction. Put differently, this Court had no concurrent jurisdiction to grant leave to appeal although we should hasten to remark that the said position changed recently following the amendment of the said provisions by section 9 (a) and (b) of the Written Laws (Miscellaneous Amendments) (No.3) Act, 2018, Act No. 8 of 2018. In line with the decision of the Court in **Yusufu Juma Risasi v. Anderson Julius Bacha**, Civil Application No. 176/11/2017 which had then set out the legal position on such applications indicating that the only recourse upon refusal of leave by the High Court is appealing to the Court, the appellants, with leave of the Court, withdrew their "second bite" application on 19th February, 2018. Thereafter, they took necessary steps that culminated in the institution of the present appeal.

The appeal is grounded on a single point of complaint which we paraphrase as follows:

1. *That the learned Judge of the High Court erred in law and in fact in refusing leave to the appellants to appeal to the Court of Appeal against the decision of the High Court in Land Appeal No. 41 of 2015, the intended appeal predicated on the following proposed grounds of appeal:*

(i) That, while the assessors during the hearing before the trial tribunal adopted the role of cross-examining the witnesses then the learned Judge erred in law and in fact to declare the respondent to be the lawful owner of the suit property instead of nullifying the trial proceedings and ordering a retrial.

(ii) That, the learned Judge erred in law and in fact in deciding in favour of the respondent by declaring her the lawful owner of the suit property against the weight of evidence on record.

At the hearing before us, Mr. Mussa Kassim, learned counsel, appeared for the appellants while the respondent had the services of Mr. Method R.G. Kabuguzi, also learned counsel.

Mr. Kassim began his quest by adopting the written submissions in support of the appeal. Specifically referring to pages 145 and 146 of the record of appeal, Mr. Kassim criticized the learned High Court Judge for holding that the application disclosed no points worth of the consideration of this Court. Addressing the first proposed ground of appeal that the trial proceedings and the decision thereon were a nullity on account of irregular cross-examination of witnesses conducted by assessors at the trial, the learned counsel made a three-fold argument: first, that it was evident from pages 25-26, 29-31, 34-35, 38-40, 44-46 and 49-50 of the record of appeal

that the assessors at the trial wrongly cross-examined witnesses instead of putting questions to them for clarification. Secondly, that against the clear evidence on the record the learned High Court Judge held that such cross-examination did not exist and that even if it did it caused no injustice or prejudice to the parties particularly the appellants who won at the trial. He faulted the learned Judge for scrutinizing the proposed point as if he was rehearing the appeal after Mallaba, J., a judge of the same court, had decided the matter instead of determining whether the said point had, on the face of it, was worthy of the consideration of the Court. Thirdly, relying on the decision of the Court in **Timoth s/o Sanga and Another v. The Republic**, Criminal Appeal No. 80 of 2015 (unreported) for its holding that assessors' cross-examination of witnesses was a fatal procedural infraction, the learned counsel urged us to find the violation at hand a grave irregularity deserving this Court's consideration even though it was not raised before the High Court on appeal.

Mr. Kassim then went on to express his displeasure on how the High Court handled the second proposed ground of appeal that the respondent was erroneously declared the lawful owner of the suit property against the weight of evidence on record. He charged that the learned High Court Judge

made no specific finding on that aspect other than concluding, rather feebly and without any consideration, at page 146 of the record that:

> *"As the point is in essence [the] axis of the application,* ***I will lay the other limb to rest.***"
> [Emphasis added]

The learned counsel, then, made reference to the appellants' defence evidence at pages 32 through 50 and the respondent's case from page 22 through 31, urging us to find it arguable that the appellants' case was weightier and more plausible than the respondent's case and that the said point merited the consideration of this Court by way of appeal. In conclusion, Mr. Kassim implored us to allow the appeal with costs.

Mr. Kabuguzi, on his part, disagreed with his learned friend. Highlighting the written submissions in opposition to the appeal that he duly lodged in advance, Mr. Kabuguzi contended that a grant of leave to appeal is an exercise of judicial discretion to be interfered with if the discretion was abused or misused. He submitted that in the instant case the learned High Court Judge rightly exercised his discretion refusing leave on the ground that the appellants miserably failed to demonstrate that their intended appeal contained arguable points. It was his submission that both proposed points of complaint were not deserving of this Court's consideration. In particular,

he characterized the first proposed ground of appeal as an afterthought; that it was raised after the High Court reversed the trial tribunal's decision in the appellants' favour. Relying on the curative provisions of section 45 of Cap. 216 (supra) and the recent decision of the Court **in Yakobo Magoiga Gichere v. Peninah Yusuph**, Civil Appeal No. 55 of 2017 (unreported) on the application of the Overriding Principle to attain substantive justice so as to cut back on overreliance on procedural technicalities, Mr. Kabuguzi submitted that the alleged assessors' cross-examination caused no injustice and that it was rightly ignored by the High Court.

However, when probed by the Court on how the learned High Court Judge dealt with the first proposed ground of appeal, Mr. Kabuguzi conceded that the learned Judge appeared to have gone overboard by analyzing the ground of appeal and adjudicating on its merits instead of deliberating on it whether it was arguable or not. Yet, he maintained his position that the learned Judge's finding that there was no arguable case in the intended appeal was unassailable. As a result, he urged us to dismiss the appeal with costs.

Rejoining, Mr. Kassim sought to poke holes into his learned friend's standpoint, contending that his submissions were anchored on a

misconception that in determining the prospects of the intended appeal the High Court had to consider the proposed grounds of appeal as if the original appeal was being reheard.

We have carefully examined the record of appeal, the supporting and opposing written submissions as well as the authorities relied upon in the light of the contending submissions of the learned counsel. The principal issue for our determination is whether the learned High Court Judge properly considered and determined the application before him for leave to appeal.

Prior to its amendment by section 9 (a) and (b) of Act No. 8 of 2018, section 47 (1) of Cap. 216 (supra), which is relevant to the instant matter, provided the right of appeal to this Court from the decisions of the High Court sitting as a land court subject to obtaining leave to appeal thus:

> *"(1) Any person who is aggrieved by the decision of the High Court in the exercise of its original, revisional or appellate jurisdiction,* ***may with the leave from the High Court*** *appeal to the Court of Appeal in accordance with the Appellate Jurisdiction Act."*
> [Emphasis added]

The above provisions explicitly vested in the High Court exclusive jurisdiction to grant leave to appeal to this Court from its decisions in the exercise of its original, revisional or appellate jurisdiction.

In **British Broadcasting Corporation v. Eric Sikujua Ng'maryo,** Civil Application No. 138 of 2004 (unreported), a single Justice of the Court, dealing with an application for leave under section 5 (1) (c) of the Appellate Jurisdiction Act, Cap. 141 RE 2002, pointed out that leave to appeal was not automatic; that it was within the discretion of the court to grant or refuse; and that the said discretion must be exercised judiciously and not capriciously, based on the materials before the court. The single Justice, then, proffered some guideline for deciding whether or not to grant leave thus:

> *"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 case or arguable appeal.****"*[Emphasis added]

Earlier in **Harban Haji Mosi and Another v. Omari Hilal Seif and Another**, [2001] TLR 409, the full Court held, at p. 414-415, 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****. The purpose of the provision is, therefore, to spare the Court the spectre of unmeriting matters and to enable it to give adequate attention to cases of true public importance."* [Emphasis added]

While in **Wambele Mtumwa Shamte v. Asha Juma**, Civil Application No. 45 of 1999 (unreported), it was acknowledged that the law provided no explicit factors to be taken into account in deciding whether to grant leave, the Court reiterated generally that leave would be granted if the intended appeal has some merits whether factual or legal. In **Gaudensia Mzungu v. I.D.M. Mzumbe**, Civil Application No. 94 of 1999 (unreported) it was underlined that:

> *"Again, leave is not granted because there is an arguable appeal.... What is crucially important is whether there are* ***prima facie, grounds meriting an appeal to this Court.***" [Emphasis added]

See also the decision of the Court in **Nurbhai N. Rattansi v. Ministry of Water, Construction, Energy, Land and Environment and Hussein**

Rajabali Hirji [2005] TLR 220 for the holding that leave is grantable where the matter raises a legal point worth the consideration of the Court.

We have purposefully revisited the above decisions of the Court to underline two points: first, that the Court has enunciated the principles on the grant of leave to appeal in different ways but we think they essentially arrive at the same ultimate result. Secondly, that an application for leave does not involve a rehearing of the matter for which leave to appeal is being sought. While the application for leave must state succinctly the factual or legal issues arising from the matter and demonstrate to the court that the proposed grounds of appeal merit an appeal, the court concerned should decide whether the said proposed grounds are ***prima facie*** worthy of the consideration of the Court of Appeal. The court would generally look at the judgment or ruling sought to be appealed against to assess whether there are arguable grounds meriting an appeal. Certainly, such a determination will be made at the end of the day after some deliberation but not an adjudication on the merits of the proposed grounds.

Since any decision refusing leave is an exercise of judicial discretion by a judge of the court below, this Court will normally not interfere with it except in rare circumstances. The general principles upon which an appellate

court can interfere with the exercise of discretion by an inferior court or tribunal were stated by the erstwhile East Africa Court of Appeal, as per Sir Charles Newbold, President, in **Mbogo and Another v. Shah** [1968] 93 at page 96 thus:

> *"a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has* ***misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice.*** *"*[Emphasis added]

Applying the above exposition of the law to the instant case, the gravamen of the matter, then, becomes whether the learned High Court Judge properly exercised his discretion in refusing leave to appeal.

The learned High Court Judge's reasoning and disposition of the matter lies at pages 145 and 146 of the impugned four-page ruling. It is evident that although the learned Judge mistakenly indicated in his determination at page 145 that the matter before him was primarily anchored on section 5 (1) (c) of Cap. 141 (supra) instead of section 47 (1) of Cap. 216 (supra), he was well

alert that leave was grantable only if the application had disclosed grounds of appeal meriting the Court's consideration. Having directed himself quite properly that the application did not require him to rehear the merits of the appeal before the High Court whose decision was intended to be challenged, he assessed the first proposed ground of appeal and found it unmerited for the consideration of this Court. We think we should let the record speak for itself thus:

> *"As to whether the witnesses were cross-examined by assessors, not only witnesses were questioned (the law allows it), or examined ...* ***but also answers by witnesses did not suggest that [they] were subjected to cross-examination. Even if it was cross-examination, which I said it wasn't, it prejudiced no party****. Instead the applicants won the case and though Mr. Mussa Kassim who also had the conduct of the case just enjoyed both the judgment and decree until when this court reverse it.* ***Counsel cannot introduce the new point now.*** *It is settled law that issues, except of course for jurisdiction, not raised at the trial cannot be introduced at the stage of appeal – (case of* ***Samwel Sawe v. R.****, Criminal Appeal No. 135 of 2004, CAT (unreported)).*"[Emphasis added]

It is our firm view that the reasoning and conclusion above are evidently faulty. First and foremost, we agree with Mr. Kassim that the learned Judge appears to have gone too far to adjudicate the first proposed issue on its merits as if he was rehearing the appeal which Mallaba, J. had decided. He did not have to revisit the evidence on the trial record and express his impression on the matter. Since it is settled jurisprudence in our country that assessors' cross-examination bent on contradicting and impeaching witnesses is a fundamental error vitiating trial proceedings and the decision thereon, the learned Judge was only required to determine whether on the face of the record that ground was arguable. Based on the materials before us, which we have scrutinized, we are of the different view that the intended appeal is arguable on the complaint that the assessors illegally cross-examined the witnesses. Secondly, the learned Judge slipped into another error by holding that the said point having not been raised "at the trial court" (which we presume he meant "the first appeal") could not be basis of a second appeal to this Court. We have read our decision in **Samwel Sawe** (supra), which the learned Judge relied upon in his reasoning. Indeed, in that case we made a statement of principle of general application that a second appellate court cannot adjudicate on a matter that was not raised as a ground of appeal in the first appellate court. In our view,

that principle does not exclude the consideration of the point raised by the appellants as it is a pure point of law questioning the impartiality of the assessors and hence the fairness of the trial of the suit by the trial tribunal.

As regards the second proposed ground of appeal that the respondent was erroneously declared the lawful owner of the suit property against the weight of evidence on record, we hasten to say, with respect, that we are in accord with Mr. Kassim that the learned Judge erred by giving no consideration to this point. He simply ignored it, claiming that his determination on the first point also dealt with the thrust of the second point. That, in our view, was an improper exercise of his discretion as we do not see how his reasoning and findings on the first point on alleged illegal cross-examination addressed the second point alleging that the case was decided against the weight of evidence adduced at the trial.

It behooves this Court, therefore, to consider and determine whether that point, on the face of it, merits the consideration of this Court on appeal.

As hinted earlier, the appeal intended to be pursued by the appellants is a second appeal. It is settled that this Court, when sitting as a second appellate court, would be reluctant to upset concurrent findings of fact of the courts below. But in the case at hand, the two courts below markedly

differed on the factual findings. It is noticeable from Mallaba, J.'s judgment from page 258 to 262 of the record that he overturned the trial tribunal's judgment on his finding that the respondent's evidence was more credible than that of the appellants. But, the trial tribunal's presiding Chairman and his assessors who heard the witnesses and observed their demeanor had found the appellants' case more believable and reliable. This difference of opinion renders the assertion that the case was decided against the weight of evidence on record a contentious question meriting this Court's consideration.

In the upshot of the matter, we find merit in the appeal, which we allow. Accordingly, we set aside the High Court's refusal of leave to appeal and substitute for it leave to appeal to this Court. Costs shall follow the event in the intended appeal.

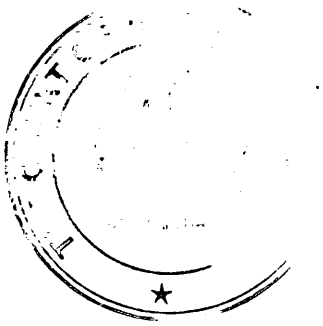
DATED at **TABORA** this 1st day of November, 2019

S. E. A. MUGASHA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

The Judgment delivered this 4th day of November, 2019 in the presence of Mr. Mussa Kassim, Counsel for the Appellant and Mr. Method R. G. Kabuguzi, Counsel for the Respondent is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL