

**IN THE COURT OF APPEAL OF TANZANIA  
AT DAR ES SALAAM**

**CIVIL APPLICATION NO. 564/17 OF 2019**

**(CORAM: NDIKA, J.A., KITUSI, J.A. And RUMANYIKA, J.A.)**

**THE BOARD OF TRUSTEES OF  
ST. ANITA'S GREENLAND  
SCHOOLS TANZANIA (SAGS) ..... APPLICANT  
VERSUS**

**1. DIANA JOY MBENA  
2. ANDREW MUNAZI } .....RESPONDENTS**

**(An application for leave to appeal against the judgment of the High  
Court of Tanzania (Land Division)  
at Dar es Salaam)  
(Makani, J.)**

**Dated 8<sup>th</sup> day of November, 2019  
in  
Misc. Land Case No. 831 of 2018**

.....

**RULING OF THE COURT**

21<sup>st</sup> February, & 25<sup>th</sup> April, 2022

**RUMANYIKA, J.A.:**

Central to this matter is a dispute over a three-acre parcel of land situated at Misufini Village, Soga- Kibaha district, Coast Region. At the instance of the aggrieved The Board of Trustees of St Anita's Greenland Schools Tanzania (SAGS), (the applicant), by way of a second bite, the application is for leave, under s. 47 (2) of the Land Disputes Courts Act, Cap. 216 R.E. 2002 (the Act) and rules 45 (b),

47, 48 (1) and (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The applicant intends to lodge an appeal against the judgment and decree, dated 02/11/2018 of the High Court (Mgonya, J.). The application is supported by affidavit of Levina Kiiza Kagashe, whose contents also, the applicant adopted at the hearing. Previously, the applicant had a similar application dismissed on 08/11/2019 by the High Court (Makani, J.).

We wish to observe at the outset that the application is pegged on six issues discursively and repetitively presented. Which we think may conveniently boil down to two points only: (i) whether the visitation to the locus in quo was intended for the trial District Land and Housing Tribunal (the DLHT) only to ascertain physical boundaries of the disputed land and (ii) whether the High Court failed to analyze the evidence on record properly and sufficiently. We are therefore invited to pronounce whether points raise arguable grounds in the intended appeal.

When the application was called on 21/02/2022 for hearing, Messrs Audax Kahendaguza Vedasto and Isaac Tasinga, learned counsel appeared for the applicant and the 1<sup>st</sup> respondent

respectively. Mr. Andrew Munazi (the 2<sup>nd</sup> respondent) appeared in person.

Arguing in support of the application, Mr. Kahendaguza submitted that leave is grantable where the proposed appeal stands reasonable chances of success or where the proceedings as a whole reveal such disturbing features as to require the intervention of this court. In this regard, he cited the case of **Harban Haji Mosi & Another v. Omary Hilal Seif & Another** [2001] TLR 409.

Mr. Kahendaguza then urged us to grant the application on the following grounds. First, that the applicant had unsuccessfully applied for leave from the High Court in compliance with the law and therefore it is now entitled to seek leave as a second bite, so to speak. Secondly, the present matter was duly lodged within ten days of the refusal by the High Court. Thirdly, that the record discloses an arguable appeal in that the High Court failed to comprehend and decide the real issue in the dispute resulting in denying the applicant the disputed land. In particular he elaborated that the visit of the locus in quo by the trial tribunal was a flawed process but the High Court downplayed the irregularity in its judgment.

That, it was not disputed that PW1 (a witness to the sale agreement- Exh. D1), secretary to the applicant was the 2<sup>nd</sup> respondent's wife and the 2<sup>nd</sup> respondent sold another piece of land other than the disputed one to the 1<sup>st</sup> respondent on 26/11/2012, but the DLHT and the High Court wrongly tackled, interpreted and misapprehended the pleadings and evidence therefore arrived at a wrong decision. Counsel also submitted that not only the DLHT visited the locus in quo wrongly, but also it abrogated the laid down principles thereby vitiating the proceedings. He cited the case of **Nizar M. H. Ladak v. Gulamali Fazal Janmohamed** [1980] TLR 29. That the courts should visit the locus in quo only where found it necessary to do it, but sparingly in order to avoid possibility of reducing themselves into witnesses.

For the 1<sup>st</sup> respondent, Mr. Tasinga submitted; (1) that the grounds for the leave being sought reflected only the advocate's sentiments from the bar thus were an afterthought, because, on that one, the supporting affidavit was silent (2) that in fact the dispute was not on boundaries but rather whether, out of it the 1<sup>st</sup> respondent had purchased the ten acres and (3) that the issue of the

DLHT visiting the locus in quo neither surfaced nor was it addressed by the parties before. That if anything, contrary to the rule by this Court in the case of **Bulyanhulu Gold Mine Ltd and 2 Others v. Petrolube (T) Ltd and Another**, Civil Application No.364/16 of 20179 (unreported), the intended appeal was frivolous and vexatious therefore liable to be dismissed.

Rejoining, Mr. Kahendaguza agreed with his learned friend that indeed the grounds for leave were not in the supporting affidavit but rather vivid on the notice of motion at page 2.

The 2<sup>nd</sup> respondent, seemingly a layman only subscribed to the submission of the 1<sup>st</sup> respondent's counsel in that regard.

Having carefully examined the notice of motion, the parties' contending submissions made for and against the application, all bring to our attention s.47 (2) of the Land Disputes Courts Act Cap. 216 R.E. 2019 as amended. It reads as follows:

*"S. 47 (2)- A person who is aggrieved by the decision of the High Court in exercise of its revisional or appellate jurisdiction **may, with leave of the High Court or Court of Appeal**, appeal to the Court of Appeal."* (Emphasis added).

As, for the yardstick for granting or refusing leave, a number of times we applied s.47 (2) of the Act. See the case of **Rutagatina C.L. v. The Advocates Committee and Another**, Civil Application No. 98 of 2010. From where we quoted as follows;

*"...It is within the discretion of the court to grant or refuse leave. The discretion must, however judiciously be 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 a prima facie or arguable appeal...**See: **buckle v. Holmes** (1926) ALL E.R. 90) at page 91. However, where the grounds of appeal are frivolous, vexatious or useless or hypothetical, no leave will be granted."*(Emphasis added).

See also the case of **British Broadcasting Corporation v. Eric Sikujua Ng'maryo**, Civil Application No.138 of 2004.

It is the applicant's contention that the visit of the locus in quo was a completely flawed process but that the DLHT relied on the evidence gathered from the visit to decide the matter. We note from the impugned judgment of the High Court that it seems arguable that the learned Judge simply downplayed the matter and did not

examine if the procedure for conducting such a visit as we elaborated in **Nizar Ladak** (supra) was complied with. Given the circumstances we hold that the intended appeal raises a point worthy the consideration of this Court.

In the upshot we find the application merited and grant leave to appeal as prayed. Costs shall be in the cause.

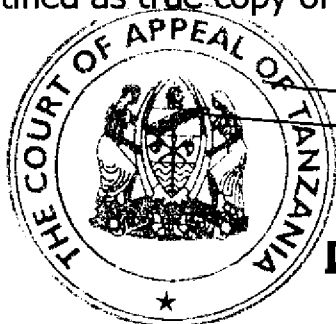
**DATED at DAR ES SALAAM this 20<sup>th</sup> day of April, 2022.**

G. A. M. NDIKA  
**JUSTICE OF APPEAL**

I. P. KITUSI  
**JUSTICE OF APPEAL**

S. M. RUMANYIKA  
**JUSTICE OF APPEAL**

The Ruling delivered this 25<sup>th</sup> day of April, 2022 in the presence of Mr. Paschal Mshanga, who also holding brief for Mr. Izak Tasinga for first respondent and in absence of second respondent is hereby certified as true copy of the original.



  
E. G. MRANGU  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**