

IN THE COURT OF APPEAL OF TANZANIA

AT KIGOMA

(CORAM: MUGASHA, J.A., SEHEL, J.A and MWAMPASHI, J.A.)

CIVIL APPLICATION NO. 680 OF 2021

INNOCENT BISUSA..... APPLICANT

VERSUS

RAJABU RASHI MGOZI.....RESPONDENT

(Arising from the ruling of the High Court of Tanzania at Kigoma)

(Matuma, J.)

dated the 26th day of October, 2021

in

Misc. Land Application No. 31 of 2021

.....

RULING OF THE COURT

6th & 9th June, 2023

MUGASHA, J.A.:

The applicant was a losing party in Land Appeal No. 4 of 2021 which was delivered in favour of the respondent by the High Court. As the respective appeal originated from the District Land and Housing Tribunal, appealing to the Court is subject to obtaining leave in terms of section 5 (1) (c) of the Appellate Jurisdiction Act (Cap 141 R.E. 2019). Since the High Court and the Court enjoy concurrent jurisdiction in terms of Rule 45 (b) of Tanzania Court of Appeal Rules, 2009 (the Rules), such leave must be sought at first instance before the High Court and if it is refused it may be sought as a second bite before the Court.

Apparently, in the present case, the applicant's initial application for leave to appeal was refused by the High Court in its Ruling delivered on

26/10/2021. Being not satisfied with the refusal by the High Court, the applicant has approached the Court by way of a second bite seeking to be granted leave to appeal. The grounds upon which the motion is sought are as follows:

- 1. Considering the Respondent's own evidence on record of the trial District Land and Housing Tribunal that the Respondent and his parents had shifted to Kasulu from the suit land during the "Operesheni Vijiji" the Honourable High Court Judge grossly erred in law and fact when he held that the Respondent retained the claimed ownership over the shifted suit land contrary to the provisions of the Regulation of Land Tenure (Established Villages) Act, 1992.*
- 2. Considering the evidence on record of the trial District Land and Housing Tribunal for Kigoma in the said original Land Application No. 41/2016, the decision of the High Court in the said Land Appeal No. 4/2021 that the Respondent's evidence was more credible than the Applicant's evidence on record regarding the reallocation of the suit land to the same by Herujuu Village authority after the same had been shifted by the Respondent and his parents is legally erroneous.*
- 3. The leave to appeal to this Honourable Court against the said impugned decision of the High Court in the said Land Appeal No. 4/2021 was wrongly rejected by the High Court vide the said Misc. Land Application No. 31/2021 since the Honourable High Court judge pre-determined the Applicant's intended appeal without having jurisdiction to do so rather than determining the application for leave to appeal which was actually before him.*

The application is accompanied by the affidavit sworn by the applicant.

Apparently, before the High Court, the applicant has advanced similar grounds. At the hearing of the application, the applicant had the services of Mr. Method Kabuguzi, learned counsel whereas the respondent appeared in person unrepresented.

It was submitted by Mr. Kabuguzi that instead of considering as to whether leave sought demonstrated points worth consideration by the Court, the learned High Court dealt with the merits and demerits of an appeal. This was argued to be improper and, in that regard, Mr. Kabuguzi urged us to interfere with the ruling of the High Court, reverse it and proceed to grant leave to the applicant so that he can pursue an appeal. In a nutshell, he prayed for the grant of the application. On the other hand, the application was opposed by the respondent who viewed that the refusal by the High Court was justified and as such, the present application deserves to be dismissed.

Having considered the contending submissions, the grounds of motion and affidavit, the question to be answered is whether the refusal by the High Court was justified and if it is warranted to grant leave as a second bite.

We begin with the position of the law on what it takes to warrant the grant of leave to appeal. In the case of **MS. AIRPORT PROPERTIES LTD VS. THE REGISTRAR OF TITLES AND ANOTHER**, Civil Application No. 389/17 of 2020 (unreported) the Court stated:

*"It is trite law that in an application for leave the applicant must demonstrate that there are some arguable points of law or matters of general importance emanating from the impugned decision to convince the Court exercise its judicious discretion to grant it. Basically, as we stated in **Kadiri Zahoro and Another v. Mwanahawa Seleman** Civil Application No. 137 of 2018 in an application for leave to appeal: "questions such as the nature or significance of the intended point of law or fact to warrant the decision of the Court of Appeal should prima facie be stated in the applicant's application".*
[At pages 6 and 7]

See also: Corporation Civil Application No. 133 of 2004 **RUTAGATINA V.L.VS. THE ADVOCATES COMMITTEE & ANOTHER**, Civil Application No. 98 of 2010, **MS. AIRPORT PROPERTIES LTD VS. THE REGISTRAR OF TITLES & ANOTHER**, Civil Application No. 389/17 of 2020 and **WAMBELE MTUMWA SHAHAME VS. ASHA JUMA**, Civil Application No. 45 of 1999 (all unreported). In the latter case we said:

"Unfortunately, it is not provided what factors are to be taken into account when considering whether or not to grant leave whether or not to appeal to this court. However, it is obvious that leave will only be granted if the intended appeal has some merits whether factual or legal".

Yet, the applicant seeking leave to appeal must demonstrate existence of an arguable case as emphasized in the case of **BRITISH BROADCASTING CORPORATION VS. ERIC SIKUJUA NG'MARYO**, Misc. Civil Application No. 138 of 2004 (unreported) citing its earlier decision in **HARBAN HAJI MOSI & ANOTHER VS. OMAR HILAL SEIF & ANOTHER**, Civil Reference No. 19 of 1997 (unreported) where it aptly stated:

"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".

In the cited decisions, what is to be considered in an application for leave is if there are some arguable points of law or matters of general importance emanating from the impugned decision to convince the Court exercise its judicious discretion to grant leave.

We shall be accordingly guided in determining this application and the question to be answered is if the applicant has managed to demonstrate that the intended appeal has some merit be it factual or legal or that there are grounds which merit serious consideration by the Court. In the light of the settled law, at this juncture, being not seized with the appeal, we are not supposed to deal with the merits of the intended appeal because it suffices if

the application shows that the intended appeal; prima facie, has raised arguable grounds or a point of law worth the attention of the Court. That said, looking at the grounds on motion and the accompanying affidavit, we are satisfied that the application has sufficiently demonstrated existence of serious points that deserve the attention of the Court on the question of misapprehension of the evidence by the courts below. However, in the initial application leave was denied on account of the grounds reflected at pages 7, 9, 10, 11 and 12 of the Ruling. The grounds upon which leave was refused are as hereunder:

***"one,** the applicant is not challenging the determination of the High Court on the evidence on record as to whether or not there was any reallocation of suit land during operation Vijiji, rather he is raising a legal issue which was not subject to determination by the High Court;*

***two,** allowing the application would be subjecting the Court of Appeal into an academic exercise for determination of a legal issue on the validity of reallocation of land during operation Vijiji which is in fact undisputed by either party, nor it was adjudged by the High Court contrary to the law; and*

***three,** in this matter the validity or otherwise of the reallocation of land during operation Vijiji did not affect the rights of either party because it was not a contentious matter in the impugned judgment".*

Looking at the grounds for refusal to grant leave to appeal, with respect, the learned High Court Judge strayed into re-evaluating the evidence which is the domain of the Court before which the appeal will be adjudicated which was not proper as correctly submitted by Mr. Kabuguzi. That said, we are aware that, the High Court enjoys discretion either to grant or not to grant an application for leave to appeal. However, the discretion must be judiciously exercised and if not, the superior court might interfere with such discretion. Can the Court now interfere with the discretion exercised by the High Court? We have seriously considered the principles upon which an appellate Court can interfere with the exercise of discretion of the inferior court or tribunal as set in the case of **MBOGO AND ANOTHER VS. SHAH** [1968] EA 93 as follows:

(i) If the inferior Court misdirected itself; or

(ii) it has acted on matters on which it should not have acted; or

*(iii) it has failed to take into consideration matters which it should have taken into consideration". Other jurisdictions have put it as "abuse of discretion" and that an abuse of discretion occurs when the decision in question was not based on fact, logic, and reason, but was arbitrary, unreasonable, or unconscionable. (See **PINKSTAFF VS. BLACK & DECKTZ (US) Inc**; 211S.W. 361 (Mo. COURT OF Appeal 2009)".*

Thus, with respect, the learned High Court Judge acted on matters on which it should not have acted and failed to take into consideration matters which it should have taken into consideration. This warrants interference with the decision of the High Court in refusing leave to appeal. In the circumstances, we reverse the application refusing leave and grant leave to the applicant to appeal against the decision of the High Court in Land Appeal Case No 4 of 2021.

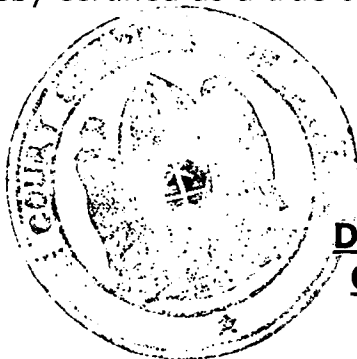
DATED at **KIGOMA** this 8th day of June, 2023.

S. E. A. MUGASHA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Ruling delivered this 9th day of June, 2023 in the presence of Mr. Sadiki Aliko holding brief for Mr. Raymond Kabuguzi, learned counsel for the Applicant and Mr. Rajabu Rashidi Mgozi, learned counsel for the Respondent, is hereby certified as a true copy of the original.




D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL