

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[IN THE DISTRICT REGISTRY OF ARUSHA]

AT ARUSHA

MISC. LAND APPLICATION NO.162 OF 2017

[C/F LAND CASE NO. 10 OF 2015]

ESAU ERASTO (As Personal Legal Representative
of the late ERASTO LOSIOKI) **APPLICANT**

VERSUS

RICHARD LOSIYOKI **1ST RESPONDENT**

EVALINE SOOMBE **2ND RESPONDENT**

JACKSON DANIEL VAROYA **3RD RESPONDENT**

RULING

Date of last order: 14/03/2018

Date of Ruling: 06/04/2018

BEFORE: HON. S.C. MOSHI, J.

Through Chamber Summons the applicant filed the present application; the same is sought under the provisions of Section 47(1) of the Land Disputes Courts Act, Cap 216. R.E 2002. The applicant is seeking for the following orders;

- (a) The Honorable Court may be pleased to grant leave to the applicant to appeal to the Court of Appeal of Tanzania against the whole of the decision (Judgment and decree) of the High Court (Hon. Dr.M. Opiyo) in High Court of the United Republic of

Tanzania (at Arusha) Land Case No 10 of 2015 delivered on 26th September, 2017.

- (b) Costs to follow the event.
- (c) Any other relief as the honorable court may deem fit.

Before me the applicant was represented by Ms. Mtayangulwa learned advocate while the respondents appeared in person unrepresented. The application was disposed of by the way of written submissions.

Submitting on the application the Applicant counsel submitted that, the applicant's application for leave to appeal to the Court of Appeal of Tanzania is brought under the provisions of Section 47(1) of the Land Disputes' Courts Act, Cap.216 R.E. 2002.

It was her submission that, while the applicant has statutory rights of appeal to the Court of Appeal of Tanzania as he is aggrieved by the decision of the High Court in exercise of original jurisdiction in Land Case No.10 of 2015 the only condition placed by law is to obtain leave of the High Court. In a nutshell, much as the right of appeal is statutory so is the requirement for leave prior to appeal.

It was her submission further that, it is clear that the provisions of Section 47(1) of the Land Disputes' Courts Act, Cap.216 R.E. 2002 does not put any other pre-conditions for obtaining leave, the gist being the applicant's right of appeal should not be unreasonably withheld. As deponed in affidavit of the applicant in support of the application the applicant has already written a letter to the Deputy Registrar of the High

Court (Arusha Registry) requesting to be supplied with copies of certified proceedings, Judgment and decree but has also lodged a Notice of Appeal indicating his intention to appeal against the whole of the decision of Hon. Madam Dr. M. Opiyo, Judge in Land Case No.10 of 2015 in which he was the plaintiff.

The learned counsel submitted that, facts of the Land Case No. 10 of 2015 is that the applicant/plaintiff sued the respondents jointly and severally over a piece of land measuring 3 acres situated at Siwandeti Village Kiranyi Ward within Arumeru District in Arusha Region. The applicant being the duly appointed administrator of the estate of the late ERASTO LOSIOKI was on 30th January, 2015 handed over the possession of the disputed piece of land after the decision of the High Court of the United Republic of Tanzania at Arusha in (PC) CIVIL APPEAL NO.24 OF 2010 before Hon. Madam Judge A.C. Nyerere who declared the suit land the property of ERASTO LOSIOKI.

She went on submitting that, the applicant's claims against the respondents in Land Case NO.10 of 2015 is that the 1st and 2nd respondents unlawful and unjustifiably sold the suit land to the 3rd respondent. During trial the applicant/plaintiff tendered all the necessary documents from the letters of appointment, the warrant of possession issued by Arusha Urban Primary Court, *Barua ya Kukabidhi eneo* from Kiranyo Ward executive officer and the decision of Hon. Madam A.C. Nyerere, Judge in (PC) CIVIL CASE NO.24/2010. On their part the respondents tendered no documentary evidence to contravene the

evidence of the applicant despite all that, Hon. Madam Dr. M. Opiyo, Judge entered a judgment in favour of the respondents.

It was her submission that, it is in the circumstances the applicant was aggrieved by the judgment and decree of the High Court in Land Case No.10 of 2015 and is now seeking leave to appeal to the Court of Appeal of Tanzania to have the evidence re-evaluated and re-assessed critically. Hence the applicant in this application has attached a draft memorandum of appeal to enlighten this court or rather give a glimpse of the nature of his appeal before the Court of Appeal of Tanzania that there are material explanation to deserve a leave.

Respondents in their joint written submission opposed the application and submitted that, it is very clear from the very outset that the applicant's application had no merit whatsoever in the eyes of law as such it is intended to waste precious time of the Court of Appeal, basing on the fact that the judgment which is challenged by intended appeal is very clear to leave no doubt as regard to the lawful owner of the disputed land since the trial Judge reasoned very well in the said judgment. That being the case therefore, they ask themselves as to what miracle the applicant expect to happen that will overturn the overwhelming evidence that was adduced by the respondents during the trial before this court to the extent of leaving the trial Judge with no any other option than deciding a case in favour of the respondents.

They submitted further that, they do agree squarely with the fact that appeal is a constitutional right of a person but yet it is pertinent to be

noted that the intended appeal must have something serious that is visibly seen on the fact of record especially appeals to the court of appeal which is not that much free as the Applicant's Counsel thinks. They are of that view because they are aware that all appeals to the Court of Appeal are regulated by the appellate Jurisdiction Act (CAP.141 R.E. 2002) and according to that legislation, the primary role of Applicant who seeks leave to appeal to the Court of Appeal is to satisfy the High Court that the intended appeal has a merit meaning that there must be a serious legal issue (s) that need intervention of the Court of Appeal short of which the High Court should be reluctant to grant leave as doing so will certainly waste the precious time of the Court of Appeal which has a very tight schedule.

It was their submission further that, Principally the applicant's counsel simply submitted that the applicant has a statutory right to appeal and that according to Section 47(1) of the Land Dispute's Courts Act, CAP 216 R.E. 2002 there is no any requirement of the satisfaction by the High Court that there is a point of law that is involved in the intended appeal that need to be proved by the applicant. As much as they agree with the fact that the cited provision of the law indeed does not impose that duty to the Applicant but as they said from the very outset that all appeals to the Court of Appeal are regulated by the Appellate Jurisdiction Act (CAP 141 R.E. 2002) and Regulations made thereunder the same law and regulation impose that requirement. The rationale behind that requirement in their view is to limit some of unfounded appeals which will unnecessarily waste precious time of the Court of Appeal. It follows therefore that, the

applicant who seeks leave to appeal must at least satisfy the High Court that the intended appeal has merit or serious point of law that invites the intervention of the Court of Appeal. Hence allowing every appeal that has no substance on the face of it will certainly open a floodgate to people to appeal to the court of Appeal with predetermined outcome something which will increase workload of the court unnecessarily. It was their submission that, the intended appeal has no merit whatsoever hence worth nothing but dismissal with costs.

I have considered the submissions of the Applicant and gone through his Affidavit. It is common ground that an application for leave to appeal to the Court of Appeal, will only be granted if there is some merits in the intended appeal. See the case of **British Broadcasting Cooperative Vs Sikujua Ng'maryo**, (civil application No.138 of 2004) the Court of Appeal at page 6 of its ruling held that

"It is within the discretion of the court to grant or refuse leave. The discretion must, however judiciously exercised and on 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 a novel point of law or where the grounds show prima facie or arguable appeal....However, where the grounds of appeal are frivolous, vexatious or useless or hypothetical, no leave will be granted"

Further it was stated by the Court of Appeal in the case of **Gaudensia Mzungu vs. The I.D.M Mzumbe, Civil Application No. 94 of 1999** that;

".....leave is not granted because there is an arguable appeal. There is always an arguable appeal. What is crucially important is whether there are prima facie grounds meriting an appeal to this court".

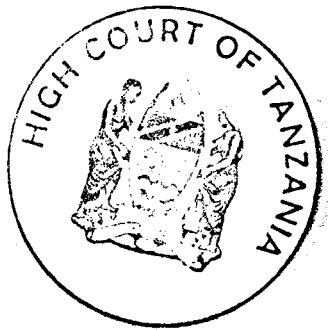
Having referred to the cases above, it is evident that the issue for consideration before this court is whether the intended appeal has some merits to be considered by the Court of Appeal. Having gone through the Applicant's draft memorandum of appeal the grounds are;-

1. The honourable trial judge grossly erred both in law and fact for failure to appreciate the decision of the High Court of Tanzania at Arusha in (pc) Civil Appeal No 24/2010 (exhibit) which declared the late ERASTO LOSIOKI the owner of the suit land.
2. The honourable trial judge grossly erred in law and fact for failure to appreciate the fact that the appellant was dully appointed by Emao primary court as administrator of the estate of the late ERASTO LOSIOKI.
3. The honourable trial judge failed to critically analyze exhibit P1,P2 and P3 and their impact on the case.
4. The honourable trial judge grossly erred in deciding the case on documents which were never tendered in court as exhibits.

5. The honourable trial judge grossly erred both in law and fact in failing to properly assess and analyze the evidence and hence arriving at erroneous decision.

From the applicant's draft memorandum of appeal, I find there are arguable issues which need attention of the Court of Appeal. I therefore find that the applicant has managed to show prima facie grounds meriting an appeal to the Court of appeal and I hereby allow this application.

No orders as to costs.




S.C. MOSHI

JUDGE

06/04/2018

