

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

MISC. LAND CASE APPLICATION NO. 116 OF 2017

ALAKARA NAKUDANA.....APPLICANT

VERSUS

ONING'OI ORGUMI.....RESPONDENT

RULING

Date of Last Order: 26/06/2018

Date of Judgment: 10/08/2018

BEFORE: S. C. MOSHI, J

The applicant named above filed an application before this court under the provisions of section 47 (1) of the Land Disputes Courts Act, 2002 applying for the following orders:

- (a) That the Honourable Court may be pleased to grant to the Applicant leave to appeal to Court of Appeal of Tanzania against the judgment and decree of the High Court of Tanzania at Arusha in Land Appeal No. 25 of 2015 dated 11th July, 2015.
- (b) The costs of this application be provided for, and
- (c) Any other relief that this Honourable Court may deem just and fit to grant.

This application is supported by the affidavit of the applicant's counsel DAUDI HAKA.

Before this court, Mndeme learned Advocate from Haka Law Associates & Co. Ltd appeared for the applicant while the respondent was represented by Maganga learned Advocate. This court granted the applicant's counsel prayer that this application be disposed of by way of written submission and both sides filed their submission in accordance to the scheduled order.

The applicant's counsel in his submission in support of the application prayed do adopt the affidavit of DAUDI HAKA to form part of these submissions. Submitting on the application, the applicant's counsel stated that the intended memorandum of appeal which is annexed to the application show serious irregularities and serious issues which the Court of Appeal is called upon to address. She added that, appeal is right of litigants and hence it is just for the applicant to be granted leave to appeal. She further submitted that the respondent's counsel in paragraph 3 of the counter affidavit challenged the second and the third grounds of the intended appeal that raises and presents distinct issues of deliberation rather than specifying the points which are contested; responding to that, she submitted that the issue that there is no point of law in the intended grounds of appeal is immaterial because the appeal originates from the District Land and Housing Tribunal and not in the Ward Tribunal. She stated that, the issue whether the grounds of appeal holds water or not need to be determined by the Court of Appeal not this court. Hence at this juncture, parties do not need to submit on the intended grounds of appeal

because by doing so, they will be going to the merits of the intended appeal.

Opposing the application, the respondent's counsel submitted that the affidavit of DAUDI HAKA together with the intended Memorandum of Appeal lack any issue of general importance or a novel point of law which requires the guidance of the Court of Appeal for its determination. He further submitted that paragraph 5 of the Affidavit is the only paragraph in the affidavit which the applicant's counsel attempts to put forward reasons why the judicial discretion should be used to grant leave; nevertheless, the said paragraph only raises a blank statement that "there is an error in the proceedings and judgment in the intended appeal". He further submitted that, on the other grounds of appeal, ground No. 1, 2 and 3 in the intended Memorandum of Appeal are useless and hypothetical. He invited this court to the decision in the case of **British Broadcasting Corporation vs. Eric Sikujua Ng'maryo**, Civil Application No. 138 of 2004, CAT at Dar es Salaam (unreported) where it was held that;

"The affidavit in support of the application was before the Court and the learned judge should have subjected the issues to analysis to see if they merited re-consideration by this Court on Appeal. Needless to say, leave to Appeal is not Automatic. It is within the discretion of the Court to grant or refuse leave. The discretion must, however judiciously exercised and on the material before the court."

He further stated that the Court of Appeal in the case of **British Broadcasting** (supra) at page 3 last line stated that;

"As a matter of general principle, leave will be granted where the grounds raise issues of general importance or a novel point of law or where the grounds show a prima facie or arguable appeal. However, where the grounds of appeal are frivolous, vexatious or useless or hypothetical, no leave will be granted."

He went further submitting that, the application or the requirements for leave is not a mere procedural matter, the applicant's counsel ought to have deposed in his affidavit exactly what issues were wrongly decided by the High Court Judge or what novel points of law ought to be determined by the Court of Appeal so as to give this Court the material or facts to work upon in determining whether leave should be granted or refused. Otherwise there should be an end to litigation, that not each trivial, useless or hypothetical matter should always find its way to the Court of Appeal. In support, he cited the case of **Kenya Shell Limited vs. Kobil Petroleum Limited** [2006] 2 EA 132 where it was stated that;

"Public policy considerations may endure in favour of granting leave to appeal as they discourage it. As a matter of public policy, it is in the public interest that there should be an end to litigation....."

Based on his submission, he prayed this court to dismiss this application with costs.

I have considered the submissions of both parties and gone through the applicant's counsel affidavit and the submission in support of the application, together with the respondents' counsel counter affidavit and reply submission opposing the application. It is a settled position of the law

that, in order for this court to grant an application for leave to appeal to the Court of Appeal, the applicant must demonstrate that there is prima facie merits on grounds of appeal intended to be challenged to the Court of Appeal. That position of the law was stated in the case of **Sango Bay Estates Ltd and others vs. Dresdner Bank A. G** [1971] 1 EA 17 that;

"leave to appeal from an order in civil proceedings will normally be granted where prima facie it appears that there are grounds of appeal which merit serious judicial consideration....."

It was also stated in the case of **Gaudensia Mzungu vs. The I.D.M Mzumbe**, Civil Application no. 94 of 1999, CAT (unreported) that;

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

In order for this court to find out whether there is prima facie meriting an appeal to the Court of Appeal or not; has to go through the affidavit together with the intended grounds of appeal which is normally annexed to the application where in those grounds the applicant or his counsel will point out those errors which need to be considered or dealt by the Court of Appeal. In this application the applicant's counsel did not specify either in the affidavit or in the submission in support of the application the errors that need an attention by the Court of Appeal. The errors have just been pointed in the intended memorandum of appeal attached in the application. It was stated in the case of **British Broadcasting**

Corporation vs. Eric Sikujua Ng'maryo as cited by the respondent's counsel that;

"It is evident from the Ruling of the learned judge that he did not dismiss the application after due consideration of the issues raised by the applicant. The affidavit in support of the application was before the court and the learned trial judge should have subjected the issues to analysis to see if they merited re-consideration by this Court on appeal. Needless to say, leave to appeal is not automatic. It is within the discretion of the court to grant or refuse leave. The discretion must, however judiciously exercised and on the materials before the court."

Being guided with the authority cited above, although the affidavit in support of the application did not analyze the issues intended to be considered to the Court of Appeal (something which was supposed to be done); as a matter of general principle, leave to appeal will be granted where the grounds of appeal raises issues of general principle importance or novel point of law or where the grounds show a prima facie appeal as stated in the above case. Considering that, I have to go through the issues raised in the intended memorandum of appeal that;

1. *That the 1st appellate Court erred in law and in fact by letting the respondent benefit from his own wrong against the law.*
2. *Whether admission of the exhibits P1 and P2 had effect on the proceedings of the Tribunal.*
3. *Whether the sale of the land in dispute was void ab initial.*

Having gone through the points which have been stated above, I find from the face of it, the intended grounds raises factual and legal issues which need to be considered by the Court of Appeal.

That said, I hereby grant leave to the applicant to appeal to the Court of Appeal.

Order accordingly.


S. C. MOSHI

JUDGE

10/08/2018