

**IN THE HIGH COURT OF TANZANIA
(MWANZA DISTRICT REGISTRY)
AT MWANZA**

MISC. CIVIL APPLICATION NO. 02 OF 2020

MKAMA MAGESA APPLICANT

VERSUS

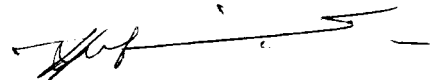
RICHARD MCHELE RESPONDENT

RULING

14th May, & 30th July, 2020

ISMAIL, J.

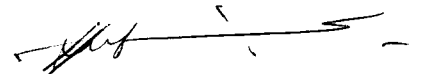
This is an application for grant of leave which will allow the applicant to appeal to the Court of Appeal against the decision of the Court (Hon. Sumaye, SRM –Ext. Juris.), delivered on 27th December, 2019, in Land Appeal No. 22 of 2019. The decision sought to be appealed against went in the respondent's favour, much to the applicant's dissatisfaction. The application has been preferred under the provisions of section 47 (2) of the Land Disputes Courts Act, Cap. 216 R.E. 2019 (as amended by Act. No. 3 of 2018), and Rule 45 (a) of the Tanzania Court of Appeal Rules, 2009, GN. NO. 368 of 2009. Supporting the application is an affidavit sworn by



JULIUS MUSHOBOZI, an advocate duly instructed to represent the applicant, and it sets out grounds upon which the application is based.

Facts constituting the basis for this application are scanty, and this is because the affidavit that supports the application has been economical with such facts. It is simply a matter which touches on the dispute of ownership of property on Plot No. 40 Block 'U' located at Bukala, Sengerema Urban Area in Sengerema. Unable to arrive at an amicable settlement, the parties escalated the matter to the District Land and Housing Tribunal for Geita at Geita where it was registered as Land Application No. 21 of 2016. The applicant lost the contest. At the instance of the aggrieved party, the matter came to this Court by way of appeal (Land Appeal No. 22 of 2019) which was disposed of on 27th December, 2019, in the respondent's favour. It is this decision which has aggrieved the applicant, hence his decision to embark on a journey to the Court of Appeal. He has lodged a notice of appeal and this application intends to secure leave which is a prerequisite for appeals which do not originate from this Court.

The respondent is feverishly opposed to the application. In a counter-affidavit sworn by ANDREW INNOCENT LUHIGO, the respondent's counsel,



has leapt to the defence of the decision of this Court, terming it unblemished, maintaining that the suit land lawfully belongs to the respondent.

The applicant's supporting affidavit has taken a serious exception to the Court's decision, terming it flawed, and necessitating need for having it appealed against, if leave of the Court is granted. He contends that the decision carries some illegalities and improprieties which are enumerated in paragraph 5 of the affidavit.

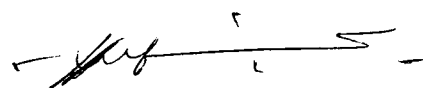
Hearing of the application pitted Mr. Julius Moshobozi, learned counsel for the applicant, against Mr. Andrew Luhigo, learned advocate for the respondent. Submitting on behalf of the applicant, Mr. Mushobozi highlighted five areas that he thinks the Court erred and constitute points of sufficient importance warranting attention of the Court of Appeal. **One**, he contended that the trial Tribunal did not have the jurisdiction to direct the Registrar of Titles to rectify the record. **Two**, that Court did not take note of the fact that the trial proceedings changed hands and the successor chairperson did not assign reasons for the takeover or invite the parties to say if they wished to carry on with the hearing from where the predecessor chairperson left. **Three**, that the Court indulged in a

misdirection when it held that the respondent was the first acquirer of the suit land while the record does not indicate that the said land had been acquired prior thereto. **Four**, that the Court grossly misdirected the evidence on record when it failed to hold that the admissibility of evidence of Edwin Allon was improper and irregular. **Five**, that the Court relied on extraneous matters instead of focusing on points that are on record in an attempt to show that the respondent had a good title.

He prayed that the Court should grant leave to appeal to the Court of Appeal. He prayed that costs should follow the event.

Mr. Luhigo's submission was quite laconic. While praying to adopt the contents of the counter-affidavit, he opposed the application on two grounds:

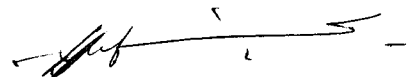
1. That issues raised are purely matters of fact and not law. They are the matters for the trial court; and
2. Legal issues covered are weak, minor legal issues, and they do not merit attention of the Court of Appeal. He contended that, in view of their triviality, the same would be overruled by the principle of overriding objective.



In rejoinder, Mr. Mushobozi submitted that the respondent's contention is misconceived since his arguments would be relevant if the application was for a certificate on a point of law. He argued that even points of facts are worth of attention by the Court of Appeal. With respect to the respondent's second argument, the learned counsel held the view that it is for the Court of Appeal to see which of the issues can be cured by the overriding objective.

From these contending submissions the pertinent question is whether the application has raised sufficient grounds or a disturbing feature capable of engaging the Court of Appeal in the intended appeal.

It is a trite position that ascertainment of whether the legal threshold for the grant of applications, including the present application, has been met, requires a review of depositions made in support of the application. In view thereof, my focus in respect of this application will mainly be on the parties' depositions. My view derives its legitimacy from the fact that affidavits are evidence, while submissions made by the parties, orally or in writing, are merely an elaboration of evidence that is already tendered through affidavits. (See ***The Registered Trustees of Archdiocese of***



Dar es Salaam v. Chairman Bunju Village Government and Others,

CAT- Civil Application No. 147 of 2006 [unreported]).

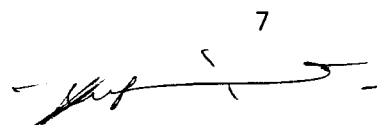
The party intending to be allowed to appeal must demonstrate, with material sufficiency, that the intended appeal carries an arguable case which merits the attention of the Court of Appeal. Thus, grant of leave must be based on solid grounds which are weighty enough to engage the minds of the Court of Appeal, and they (the grounds) must be premised on serious points of law or law and fact.

The position as it currently obtains is that an appeal constitutes an arguable case where the prospective appellant is able to demonstrate, in an application for leave, that he stands reasonable chances of success or, that disturbing features exist to require guidance of the Court of Appeal (see ***Rutagatina C.L. v. The Advocates Committee & Another***, CAT-Civil Application No. 98 of 2010; and ***Abubakari Ally Himid v. Edward Nyalusye***, CAT-Civil Application No. 51 of 2007; ***British Broadcasting Corporation (BBC) v. Eric Sikujua Ng'maryo***, CAT-Civil Application No. 138 of 2004; and ***Junaco (T) Ltd and Justin Lambert v. Harel Maliac Tanzania Limited***, CAT-Civil Application No. 473/16 of 2016 (all unreported). In all of the cited decisions, the position is that grant of leave

to appeal must be on satisfaction that the intended appeal raises issues of general importance or a novel point of law or where there is a prima facie or arguable appeal. Instructively, the decision in ***Himid's case*** quoted with approval the superior Court's own decision in CAT-Civil Reference No. 19 of 1999, between ***Harban Haji Mosi (2) Shauri Haji Mosi V. (1) Omar Hiial Seif (2) Seif Omar*** CAT-Civil Reference No. 19 of 1997 (unreported) in which it was underscored that the disturbing features must be in the form of serious points of law which warrant the attention of the Court of Appeal.

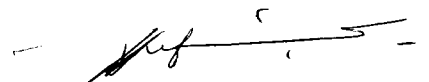
Deducing from these decisions, it is gathered that it is within this Court's discretion to refuse to grant leave where the Court is of the view that the application for leave falls short of meeting the requisite threshold for its grant (See: ***Saidi Ramadwani Mnyanga v. Abdallah Salehe*** [1996] TLR 74); and ***Nurbhain Rattansi v. Ministry of Water Construction Energy Land and Environment and Another*** Civil Application No. 3 of 2004 TLR [2005] 220.

In my unflustered view, the averments made in the supporting affidavit reveal facts and grounds which justify my conclusion that there is an arguable case sufficient to draw the attention of the Court of Appeal.

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The issues extracted from the averments and which constitute an arguable case are as follows:

1. *Whether the trial Tribunal had jurisdiction to direct the Registrar of Titles to rectify the record;*
2. *Whether the successor trial chairperson erred in law in not assigning reasons for the takeover of the matter from his predecessor and whether, subsequent to the takeover, the parties were invited to say if they wished to carry with the hearing from where the predecessor chairperson left;*
3. *Whether the Court indulged in a misdirection when it held that the respondent was the first acquirer of the suit land while the record did not indicate that the said land had been acquired prior thereto;*
4. *Whether the Court misdirected itself when it failed to hold that the admissibility of evidence of Edwin Allon was improper and irregular;*
5. *Whether the Court relied on extraneous matters instead of focusing on points that were on record to show that the respondent had a good title.*




The averments in paragraph 5 as supported by the arguments made by the counsel for the applicant are weighty, sound and pertinent enough to seriously engage the Court of Appeal's mind and make a finding thereon.

In the upshot, I am overly convinced that the application meets the legal threshold for its grant. Accordingly, I grant it as prayed. Costs to be in the cause.

It is ordered accordingly.

DATED at **MWANZA** this 30th day of July, 2020.




M.K. ISMAIL
JUDGE

Date: 30/07/2020

Coram: Hon. M. K. Ismail, J

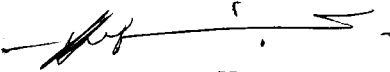
Applicant: Mr. Mwita Emmanuel, Advocate

Respondent: Mr. Mwita Emmanuel, Advocate for Mr. Andrew Luhigo,
Advocate.

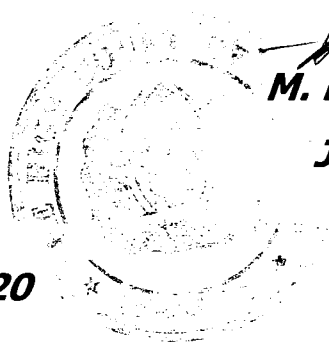
B/C: B. France

Court:

Ruling delivered in chamber, in the presence of Mr. Mwita Emmanuel, learned advocate for the Applicant and Mr. Emmanuel holding Mr. Luhigo's brief for the respondent, in the presence of Ms. Beatrice B/C, this 30th July, 2020.



M. K. Ismail
JUDGE



At Mwanza

30th July, 2020