

**IN THE HIGH COURT OF TANZANIA**

**IN THE DISTRICT REGISTRY**

**AT MWANZA**

**MISC. CIVIL APPLICATION No. 191 OF 2019**

*(Arising from Land Appeal No. 37/2019 in the High Court of Tanzania at Mwanza)*

**SAID PETER KATAKULA.....APPELLANT**

**VERSUS**

**NOBERT MAHIGILA GWEBE .....RESPONDENT**

**RULING**

*12<sup>th</sup> February, 2020 & 17<sup>th</sup> February, 2020.*

**TIGANGA, J.**

In this Application, the Applicant Said Peter Katakula moved this court under section 47(1) of the Land Disputes Court Act 2002 and section 95 of the Civil Procedure Code [Cap 33 RE 2002] to grant the following orders namely;

- (i) That this court be pleased to grant leave from the High Court (Land Division) to appeal to the Court of Appeal of Tanzania.
- (ii) Cost of this application are in the cause. (sic)
- (iii) Any other order(s) order that the honourable Court deems fit to grant.

The application was preferred by chamber summons and supported by the affidavit affirmed by the Applicant which put forth the reasons and

grounds for the application. Together with the reasons for Application, the affidavit also gives the background information of the case at hand.

Briefly, the background of the case at hand is that, in the District Land and Housing Tribunal for Mwanza Nobert Mahigila Gwebe who is the respondent in this application filed Land Application No. 541 of 2018 against the two respondents namely, Abdallah Luholela and Said Peter Katakula, the later being the Applicant in this Application.

The relationship between the parties was that, the Applicant was the tenant while the Respondent was the Land lord. The Applicant is alleged to have tenanted in the business premises owned by the Respondent from July 2016 to June 2017 at the annual rent of 10,000,000/=. It is also the fact that, the first rent was paid through one Raia who introduced the Applicant to the Respondent and through whom this relationship was formed. It is also on record that, when the first year of contract expired, the applicant did not smoothly pay the rent for the second year which was commencing from July 2017 and ending in June 2018. However it is evident that he paid only Tshs.3,000,000/= and refused to pay the balance of Tshs. 7,000,000/= for simple reason that he did not recognise the Applicant as his Land Lord so he was not ready to pay to him.

That was the origin of the dispute between the parties. That dispute was referred to the District Land and Housing Tribunal for Mwanza where it was determined in the favour of the Applicant. In its judgment, the trial tribunal ordered both Respondents in that application to vacate from the disputed premises. It was also ordered that the first respondent pay Tshs. 6,000,000/= while the 2<sup>nd</sup> Respondent, (who is the present applicant) was also ordered to pay a total of Tshs 12,500,000/= to the current respondent, being rent areas for the year 2017/2018 and nine months of the year 2018/2019 to the date of the judgment of the tribunal.

That verdict aggrieved the 2<sup>nd</sup> Respondent who consequently appealed against it to the High Court via Land Appeal No.37 of 2019. That appeal was dismissed for being filed out of time. The dismissal once again

aggrieved the Appellant who commenced the appeal process to appeal to the Court of Appeal, this application being one of the processes.

As earlier on pointed out the Applicant in this Application seeks leave to appeal to the Court of Appeal of Tanzania. The grounds for the application are narrated in the affidavit filed in support of the Application. The said alleged grounds are in the 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 8<sup>th</sup> paragraphs of the Affidavit which are to the effect that, Land Appeal No. 37 of 2019 was filed within time and that looking at the nature of the facts of the case, the said land appeal had a big chance of success. Last is that, if this application will not be granted the applicant stands at a high loss as the sought appeal also will have automatically denied as opposite (sic) to the respondent if the application is allowed.

The application was countered by the respondent by filing the counter affidavit sworn by Mr. Mwita Emmanuel learned counsel for the Respondent. In such counter affidavit he insisted that the contents of paragraphs 4 and 5 of the Affidavit are untrue and averred that the appeal was hopelessly time barred and had no chance of success. He also disputed the contents of paragraphs 6, 7 and 8 of the Affidavit and aver that the Applicant is not entitled to the right of appeal and further aver that if the application is granted, the respondent will suffer loss as the applicant has been occupying the respondent's premises without paying rent, but rather opting to play delaying tactics by filing cases and applications in court every day.

Together with the counter Affidavit, the respondent filed the notice of preliminary objection. However on the hearing the counsel for the respondent abandoned the said notice and asked the court to proceed with the hearing of the application on merit.

By the leave of the court, the application was argued by way of written submissions which were filed as scheduled. In his submission in chief, the Applicant over and above narrating the historical background of the case at hand, he condemned the respondent that the counter

affidavit filed in opposition of the application, did not specifically deny the facts averred in the affidavit, instead it generally denied the contents of the Affidavit filed in support of the application. He submitted that to his understanding the content of the affidavit must be specifically denied, but in his opinion the respondent evasively denied it. He submitted that the general denial means that the counter affidavit is incurably defective, therefore it should be rejected by this court.

While still challenging the counter affidavit, he alternatively urged this court to treat the filing of defective counter affidavit as tantamount to failure to file the same, and after so treating the counter affidavit, the court be guided by the authority in the case of **Benedict Kimwag Vrs Principal Secretary Ministry of Finance**, Civil Application No. 30 of 2000 CAT at Dar Es Salaam in which according to him, it was held that, where there is no counter Affidavit, facts in the affidavit stands uncontroverted.

He also submitted further that, the counter affidavit is full of contradictions. In dealing with such contradictions he prayed the court to be guided by the authority in the case of **Nzige Juma Vrs Republic** (1964) EA No.107 and **Sahoba Benjuda Vrs Republic** Crim. App. No.96 of 1989 Arusha CAT (Unreported) which gave the principle that;

*"Contradiction in the evidence of witnesses affects the credibility of the witness and unless the contradiction can be ignored be only minor immaterial of a particular point unless it is supported by other evidence"(sic)*

He also referred to the authority of **Mohamed Said Matula Vs Republic** 1995 No.3 where it was held according to him that;

*".....where testimonies by witness contain inconsistencies and contradiction the court has a duty to address the inconsistencies"*

He also invited this court to be guided by the principle in the case of **Bandoma Fadhili Makoro Vs Republic** Crim. Appeal No.14 of 2005 CAT Mwanza Pg 11 (Unreported), which according to him gave the following principle;

*"Where their among with other things of the case CA Justice argued strongly on the matter of name variance of names to be equally" (sic)*

He also invited this court to find that filing the counter affidavit with general denial is similar to amending the applicant's affidavits without court order. He on that referred me to the authority in the case of **Republic Vrs Asafu Tumwine** Crim Revision No.1 of 2006 CAT Mwanza and the principle contained therein is that;

*"Where there is no committed order, proceedings are nullity" (sic)*

Further to that the applicant submitted that the filing of the counter affidavit which contains general denial is tantamount to disobedience of a lawful court order or statutory duties which may entitle the Applicant to claim for compensation. In support of his such argument he cited **Miller 1976 Cr.M.L.R.694** which according to him has the following principle;

*"There are exception cases where compensation order may be made, to remind the defendant of the evil has done". (sic)*

On the same argument, he cited 1978 CR.M.L.R.599 AND WASIK EMMINS ON SENTENCING 2<sup>ND</sup> ED. 1993 P.244 in which according to him, the following principle was given;

*"Conjunction with on other sentence the order here are restitution (ordering stolen goods to be returned to the person entitled to them)" (sic)*

He also cited WOOD (1974) 60 CR. APP. R.70 SEE WASIK in which according to him the following principle was allegedly established;

*"The place of compensation in the penal system and wasik  
Emmins on sentencing 2<sup>nd</sup> Ed.1993.P.244" (sic)*

Last but one, he cited article 107A(1)(2)(a)(b)(c)(d)(e) of the Constitution of The United Republic of Tanzania of 1977 as amended from time to time. While relying on this provision he urged the court not to be tied up by technicalities of procedure but to base on substantive justice.

He posed a prayer which for sure I have not grasped what he actually wanted. However looking at that prayer, he probably meant that, what the advocate did is a misconduct which should be subjected to disciplinary procedure, as the advocate for the respondent has not acted in a professional manner as directed by Rule 4(1)(a)(b)(c)(e) of Advocate (Disciplinary and other proceedings Act Cap 341 RE 2002) sic GN 120  
PUBLISHED ON 9/3/2018

Lastly he asked for the following reliefs;

- i) Leave to Appeal to the Court of Appeal*
- ii) An order for the respondent to pay Tsh.600,000,000/= as compensation for : " engaging the qualified Advocate who not able to practice the legal work before this court, for the respondent's own costs. (sic)*
- iii) That the advocate be sued for filing the incurably defective notice of preliminary objection and the counter affidavit, sic*
- iv) Any other order as the court may think fit and the costs of the written submissions as the court may think fit.*

The submission filed by Mr. Mwita Emmanuel learned counsel for the respondent in reply to the submission in chief filed by Applicant; started by attacking the submission filed by the applicant on the ground that he failed to understand what was specifically submitted by the Applicant in his submission in chief. He submitted further that there is no any triable issues therein which will require the attention of the Court of Appeal. Mr. Mwita submitted furthermore that Hon. Ismail, J in his ruling which is challenged

made himself very clear that the appeal was filed outside the prescribed time spelt out in section 41(2) of [Cap 216 RE 2002] and relied on the authority in the decision of the Court of Appeal i.e **Registered Trustees of the Marian Faith Healing Centre @ Mwanamaombi Vrs The Registered Trustees of Catholic Church Sumbawanga Diocese** CAT Civil Appeal No. 64/2006 which discussed the circumstances under which the provision of section 19(2) can be resorted to. He submitted that, being the only defence for the applicant, section 19(2) cannot come into play as the court rewards activeness not the sloppiness. According to him, it was the duty of the Applicant to show by evidence that he was actively making effort to secure the copy of the judgment from the tribunal which he actually failed to achieve. He cited the case of **Stephen Wasira Vrs Joseph Warioba** [1997] TLR 205 and **Yusuph Same and Another Vrs Hadija Yusuph** [1996] TLR 347 which among others held that;

*"...a party intending to impugn the decision must prove that he made effort and was vigilant enough to secure the same but only the court which failed to act promptly and delayed him."*

According to him, that was not proved by the applicant in this case before the High Court. He reminded this court that it is a principle of law that litigations must come to an end. He also reminded that the right to Appeal is not automatic, it is conditional to fulfilling some of the conditions the important one being to establish in the Application for leave that there are arguable issues which need the attention or intervention of the Court of Appeal.

In his rejoinder the applicant still complained that the respondent did not specifically counter his submission in chief paragraph to paragraph, but came up with new issues which were not stated by the applicant in his submission. He submitted that the respondent did not at all address the issue of filing the incompetent counter affidavit as narrated in the submission in chief. He finally reiterated his prayers of reliefs as submitted in the submission in chief and asked the same to be granted as prayed.

I have laboured much to try to consider and analyse each and every issue, point, and argument, presented by the applicant in the Affidavit and submissions. The aim was to try to figure out the points or issues worth for consideration of the Court of Appeal. I have also tried my best to accommodate the arguments by the respondent in opposing the Application. I can say from the outset of my consideration of this application that it has taken me a lot of time to try to understand from the Affidavit and submissions filed by the applicant, what he was trying to advance as the grounds for consideration by this court in granting the application for leave to Appeal to the Court of Appeal.

In such endeavour, the Applicant has presented a lot of materials allegedly supporting the Application at hand. I have reproduced them in extenso in this ruling for the obvious reasons of granting him the right to be heard. But with due respect, in my considered view these materials are distinguishable and irrelevant in this Application. Most of them are rooted from Criminal trials and give the principles of how the contradictions and inconsistencies in evidence should be treated. Before this court is an application for leave, it is not a trial and there is therefore no testimonies the contradictions and inconsistencies of which could be considered and examined. In pondering on what was actually meant by the applicant I speculated that he may be meaning that as the affidavit is also evidence, its credibility can be tested just like oral testimony. If that is what he meant, in a bid to satisfy myself, I have examined the content of the counter Affidavit filed by the respondent, passed thorough it one paragraph after another but I failed to grasp the alleged inconsistencies or contradictions. I find the authorities and arguments to be distinguishable and irrelevant.

Over and above the alleged inconsistencies, the applicant has come up with the claim for compensation and the demand that disciplinary measures or professional misconduct measures be taken against the counsel for the respondent for filing an incompetent counter affidavit. Assuming for the sake of argument, that the alleged inconsistencies really



existed in the counter affidavit, the questions remains whether the same entitles the applicant to compensation as claimed? And or that the advocate should be subjected to disciplinary proceeding for professional misconduct. On that, the Applicant has not cited any law which entitles him the compensation, neither did he cite any law directing for the disciplinary charges against the advocate who file the defective affidavit. Speaking of myself, I know no law which entitles him to such compensation, neither do I know one which makes it a professional misconduct to warrant for a disciplinary measures against an advocate who files a defective affidavit. All these said, I think these two prayers in this application are misplaced.

Back to the merit of the application, the same has one substantive prayer which is leave to Appeal to the Court of Appeal. As rightly submitted by Mr. Mwita Emmanuel, learned counsel, the right of Appeal in land disputes from the High Court (exercising Appellate and Revision Jurisdiction) to the Court of Appeal is not automatic. Section 47 (2) of the Land Disputes Courts Act [Cap 216 RE 2002] as amended by Written Laws (Miscellaneous Amendments) (N0.3) Act of 2018, which reads as follows;

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

Following that amendment the requirement of the leave to appeal is no longer provided under subsection (1) of section 47 of [Cap 216 RE 2002], therefore the application was supposed to be filed under section 47(2) as amended, not section 47(1). That alone would have collapsed the application for being preferred under the wrong provision of the law. However having in mind the fact that the applicant has been unrepresented, I think there is a need to look into the merit of the application.

Assuming that the provision upon which the application has been preferred is correct, the issue remains to be what are the requirements

which the applicant must fulfil in order to be entitled to the grant of leave to appeal in land matter? In other words, what should the court before which an application for leave has been filed consider in granting the leave?

As the provision of Section 47(2) cited above does not provide for the criteria to be considered in granting for leave to appeal, a plethora of case laws have extensively discussed and provided for general principles and guidance.

In **Harban Haji Mosi and Another Vrs Omar Hilal Seif and Another**, Civil Reference No. 19 of 1997 CAT, the following principles were laid down;

*"Leave is grantable where the proposed appeal stands reasonable chances of success or where, but not necessarily the proceedings as a whole reveals such disturbing feature as to require the guidance of the Court of Appeal. The purpose of the provision is therefore to spare the court the specter of unmeriting matters and to enable it to give adequate attention to cases of true public importance"*

In the authority of **British Broadcasting Cooperation Vrs Erick Sikujua Ng'maryo** Civil Application No.138 of 2004 (CAT) - Dar Es Salaam (Unreported) it was held *inter alia* that;

*"Needless to say leave to Appeal is not automatic. It is within the discretion of the court to grant or refuse leave. The discretion should however be judiciously 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 raises 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, useless or hypothetical, no leave will be granted."*

Those issues with such disturbing features proving that there would be the arguable Appeal must be shown by the applicant both in his affidavit and the submissions.

Now the issue is whether the applicant in this application has managed to fulfil the conditions elaborated in the above cited authorities?

This issue can be established by looking at the affidavit and the submissions in support of the application as filed by the Applicant. Now starting with the Affidavit in support of the Application, the applicant averred in paragraphs 4, 5, 6 and 8 of the affidavit that, Land Appeal No. 37 of 2019 was filed within time and that looking at the nature of the facts of the case, the said land appeal had a big chance of success. Last was that, if this application will not be granted the applicant stand at a high loss as the sought Appeal also will have automatically denied as opposite (sic) to the respondent if the application is allowed.

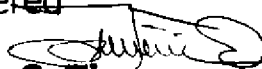
The submission filed by him did not at all deal with the grounds of the application, instead all efforts were directed to attacking the counter affidavit filed by the respondent on the ground that, it was general, as it did not specifically respond to the issues raised in the Affidavit filed in support of the Application. Instead of showing the issues for consideration by the Court of Appeal, or that there is arguable Appeal before the Court of Appeal, the applicant resorted in asking the court to punish the Advocate for the respondent for filing an incompetent counter affidavit.

As I have already pointed out that I have laboured much to try to consider and analyse each and every issue, point, and argument presented by the applicant in the affidavit and submissions in order to figure out the points or issues worth for consideration by the Court of Appeal. In such efforts with respect, I did not find any. The applicant has not singled out any issue whether legal or factual worth for consideration by the Court of Appeal. He has not shown that there would be otherwise the arguable Appeal before the Court of Appeal.


Further to that, I have personally carefully looked into the proceedings of the High Court in Land Appeal No.37/2018 and the ruling delivered by my brother Hon. Ismail, J, with greatest respect to the Applicant, I failed to find any disturbing feature or issues of general importance or a novel point of law which require the guidance of the Court of Appeal. The appeal was dismissed on the ground that it was filed out of time, the applicant has not shown the falsity of the finding of my brother Hon. Ismail, J the fact which would have made the arguable ground before the Court of Appeal.

That being the case, there cannot be point on which the said intended Appeal can escape to be frivolous, vexatious, useless or hypothetical. That said and done, I find no ground upon which I can allow the application. In consequent, the leave is refused and application is dismissed with cost.

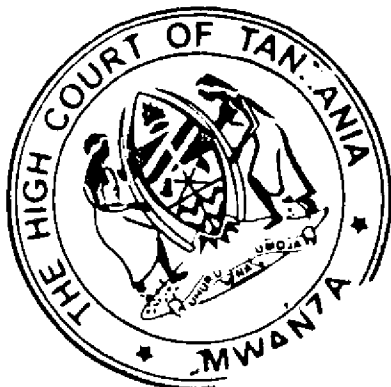
It is accordingly ordered

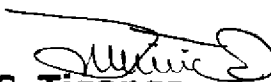
  
**J. C. Tiganga**  
**Judge**  
**17/02/2020**

Ruling delivered in open chambers in the presence of the Applicant in person and the respondent and his Advocate Mr. Mwita Emmanuel learned counsel this 17<sup>th</sup> Day of February 2020.

  
**J. C. Tiganga**  
**Judge**  
**17/02/2020**

Right of Appeal explained and guaranteed.



  
**J. C. Tiganga**  
**Judge**  
**17/02/2020**