

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

MISC. LAND APPLICATION No. 153 OF 2019

(Arising from an Land Appeal No. 43/2018 - HC - Mwanza (Mgeyekwa J, dated on 06/08/2019, Originating from the decision of the District Land and Housing Tribunal for Mwanza at Mwanza in Land Application No. 143 of 2007)

SAKINA HAMIS MAGEGE.....APPLICANT

VERSUS

DIRECTOR, MWANZA MUNICIPAL COUNCIL1st RESPONDENT

COSMAS PIUS KAMALA 2ND RESPONDENT

RULING

28th May & 22nd July, 2020

TIGANGA, J.:

Land Appeal No. 43/2018 was determined by this court Hon. Mgeyekwa, J, in the favour of the respondents, by dismissing the appeal. That decision aggrieved the applicant, who was the appellant in that appeal. She consequently, as part of the appeal process, filed this application asking for leave to appeal to the Court of Appeal against the decision in Land Appeal No 43/2018.

In this application, the court has been moved under section 47 (1) of the Land Disputes Act (Cap 216 RE. 2019) and Rule 45 (a) of the Tanzania Court of Appeal Rules GN No. 368/2009. The same was preferred by the

chamber summons supported by an affidavit of the applicant in which the grounds for the application were put forth.

The orders sought in the chamber summons are basically three namely, leave to appeal to the Court of Appeal of Tanzania against the decision of the High Court of Tanzania at Mwanza in Land Appeal No 43/2018 delivered on 06/08/2019, other orders as the court may deem just to grant and the costs of the application.

The affidavit supporting the application, apart from narrating the historical background of the case, and informing the court the steps taken by applicant immediately after the decision by lodging a Notice of Appeal, It also points out in paragraph 4 about five points which according to the applicant are worthy of consideration and determination by the Court of Appeal as follows;

- i. Whether in the absence of any deed of transfer from the first owner (appellant) of the land in dispute which is Plot No. 103 Block "B" Nyasaka the title could pass to any other person.
- ii. Whether it was proper for the trial tribunal and the appellate court to rule out that the appellant's offer dated 01/06/1999 was automatically nullified for the late payment of the fees without any evidence adduced from the first respondent (Land Allocating Authority)
- iii. Whether it was proper for the trial tribunal and Appellate Court to ignore the Appellants offer dated 01/06/1999 and consider the offer tendered as exhibit "D1" by the second Respondent which all indicated the same plot number.

- iv. Whether it was proper for the trial tribunal and the appellate court to ignore the contradictory evidence adduced by DW2 (SAKINA MAGEGE).
- v. Whether it was proper for the trial tribunal and appellate court for failure to consider the legal procedure used to disown the title of the appellant.

The Application was countered by the respondent by filling the counter affidavit in which most of the facts were disputed.

On paragraph 4 (i) he deposed that the trial tribunal and the High Court were right in not embarking on the issue of transfer because there was no proof that the appellant ever owned the land in dispute.

Addressing paragraph 4 (ii) he said that point is new as it did not appear in the appeal before the High Court.

Regarding the content of paragraph 4 (iii) of the affidavit, he deposed that the trial tribunal and the High Court adequately and properly evaluated the evidence on record and both found that only one letter of offer tendered by the second respondent herein was available and capable of being referred to in the judgment.

That paragraph 4 (iv) was well dealt with by the High Court and since it is also an evidence, I swear and state that it does not meet the criteria.

Last, the content of paragraph 4 (v) is disputed for the same reason that there was no proof of ownership by the applicant to invoke disowning procedures.

By the consent of the parties and leave of the court the application was argued by way of written submissions which were filed as scheduled.

In the submission in chief, the applicant reiterated the contents of the affidavit filed in support of the application and asked this court to be guided by the authority in the case of **Amralilal D.M t/a Zanzibar Silk Store vs Jaliwala t/a Zanzibar Hotel**, (1980) TLR 31 in which it was held that the appellate court could interfere the findings of the lower court if there is misapprehension of evidence causing miscarriage of justice to any aggrieved party.

In reply, the counsel for the respondents submitted that, the points raised are points of facts, therefore this court cannot interfere with the findings.

Now the law upon which the application has been preferred that is Section 47 (1) of the Land Disputes Courts Act (supra), do not give criteria to be considered in granting leave to appeal, however a plethora of case laws have extensively discussed and provided for general principle and guidance on that matter.

In **Harban Haji Mosi and Another vs Omar Hilal Seif and Another**, Civil reference No 19/1997 CAT, the following principals 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 on the provision is therefore to spare the court the spectre of unmeriting matters and to enable it to give adequate attention to the cases of true public importance"

In the authority of **British Broadcasting Corporation vs Erick Sikujua Ng'maryo**, Civil Application No. 138/2004 (CAT) - Dar es Salaam (unreported) where 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 shows a prima face or arguable appeal ... However, where the grounds of appeal are frivolous, vexations, useless or hypothetical no leave will be granted".

The issue is whether in this Application there are disturbing features proving that there would be arguable appeal. These features must be shown by the applicant, both in the affidavit filed in support of the application and the arguments as contained in the submission.

Whether the said disturbing features have been vividly shown by the applicant or not is a matter to be found in the application especially the supporting affidavit and the arguments by the applicant.

I have carefully passed through the chamber summons and its supporting affidavit, especially paragraph 4 (1) - (v) as well as the arguments in the submissions filed in court by both parties, I am satisfied that the applicant has managed to vindicate the disturbing features worthy of consideration and determination by the Court of Appeal of Tanzania, especially in paragraph 4 (i) to (v) of the affidavit.

The Application is therefore allowed, leave to appeal is therefore granted as prayed. Cost to be in the due course.

It is so ordered.

DATED at MWANZA this 22nd day of July, 2020.

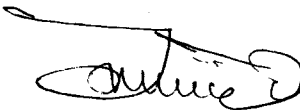


J.C. TIGANGA

JUDGE

22/07/2020

Ruling delivered in the presence of Mr. Ringia advocate for the 1st Respondent but in the absence of the Applicant and 2nd Respondent.



J.C. TIGANGA

JUDGE

22/07/2020