

**IN THE HIGH COURT OF TANZANIA  
(SONGEA DISTRICT REGISTRY)**

**AT SONGEA**

**MISC. LAND CASE APPLICATION NO. 40 OF 2019**

*(Arising from Land Case Appeal No. 06 of 2019 of the High Court of Tanzania at Songea and original Land Application No. 206 of 2016 of the Land and Housing Tribunal for Ruvuma at Songea)*

**JOHN MARTIN NDUNGURU ..... APPLICANT**

**VERSUS**

**MUSTAFA ATHUMAN NYONI ..... 1<sup>ST</sup> RESPONDENT**

**JOHA ABBAS TAMBULU ..... 2<sup>ND</sup> RESPONDENT**

*Date of Last Hearing: 26/05/2020.*

*Date of Ruling: 09/07/2020.*

**RULING**

**I. ARUFANI, J**

The applicant is seeking for leave to appeal to the Court of Appeal of Tanzania against the decision of this court (Hon. S. C. Moshi, J) delivered in Land Case Appeal No. 6 of 2019 dated 10<sup>th</sup> October, 2019. The application is made under section 47 (1) of



the Land Disputes Courts Act, Cap 216 R.E 2002 and is supported by the affidavit sworn by the applicant. While the first respondent said is not opposing the application the second respondent opposed the application by filing in the court her own counter affidavit accompanied by notice of preliminary objection which states that, the applicant's affidavit is fatally defective for containing point of law.

The court directed the preliminary objection raised by the second respondent to be argued along with the application. During hearing of the application the applicant was represented by Mr. Edson Mbogoro, learned advocate and the respondents appeared in court in person, without legal representation. The second respondent (hereinafter referred as the respondent) told the court in relation to the point of preliminary objection that, the affidavit of the applicant is violating Order 19 Rule 1. She argued that, the affidavit is not required to contain legal point and prayed that, as paragraph 5 of the affidavit of the applicant contains legal point the application be struck out with costs.

In his reply to the submission made by the respondent in relation to the point of preliminary objection raised in the matter, the counsel for the applicant told the court that, the respondent has not told the court her point of preliminary objection is made

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under which law. He stated that, the respondent has just said the applicant's affidavit is contravening Order 19 Rule 1 without stating is of which law and said that makes the point of preliminary objection to lack legs to stand on.

The counsel for the applicant told the court that, paragraph 5 of the affidavit of the applicant which the respondent states is violating the law contains the grounds which the applicant intends to be considered and determined by the Court of Appeal in the appeal he intends to file in the Court of Appeal. He argued that, according to the nature of the application at hand it was inevitable for the applicant to list the grounds of appeal he intends to take to the Court of Appeal. He said the law requires the grounds of appeal intended to be taken to the Court of Appeal to be considered by the High Court and seeing whether they deserve to be considered by the Court of Appeal before being taken to the Court of Appeal. He finally prayed the court to find the point of preliminary objection raised by the respondent has no merit and overrule it.

As for the merit of the application the counsel for the applicant prayed the court to adopt the affidavit of the applicant as part of his submission. He added that, as the title deed of the plot in dispute was in the name of the applicant and as there was

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no proof of fraud committed it was not proper for the court to decide the land in dispute was the property of the respondents. He stated that is the reason caused the applicant to see there is a need for that point to be considered and determined by the Court of Appeal.

The counsel for the applicant argued further that, the applicant was dissatisfied by the decision of the court after seeing that, although he was the owner of the suit land from 1986 but this court found it was proper for the house to be sold by the order of the court issued in 2015. He argued that, the court relied on section 64 (4) (b) of the Land Act, Cap 113 R.E 2002 to find the house was matrimonial property of the respondents and it was proper for the same to be distributed to the respondents as a matrimonial property.

He said as deposed at paragraph 5 of the affidavit of the applicant they have raised two grounds of appeal which the applicant intends to take to the Court of Appeal for consideration and determination. He said if need will arise they will raise other grounds in the intended appeal. At the end he prayed the application to be granted and the applicant be granted leave to appeal to the Court of Appeal.

*Jeeer*

In her rejoinder to the reply made by the counsel for the applicant in relation to the point of preliminary objection she has raised, the respondent reiterated what she stated in her submission in chief that the affidavit is not required to contain legal point. She told the court that, Order 19 Rule 1 she has cited in her submission in chief is of the law governing civil matters and said as she is not a lawyer she cannot cite the relevant law properly.

In reply to the submission of the counsel for the applicant in respect of the merit of the application the respondent stated that, the application has no merit. She argued that, the applicant was the owner of the land in dispute up to 16<sup>th</sup> September, 1995 when he sold it to them at the price of Tshs. 320,000/= and became their matrimonial property. She said in 1999 they started construction of a building on the land in dispute and finished construction in 2000. She said there was no evidence adduced before the trial court to show the applicant gave money to the first respondent to take care of the house that is why it was ordered the house be distributed to them as a matrimonial property.

She said further that, after problems started in their marriage and went to BAKWATA for reconciliation the first

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District and not here at Songea District where the case was pending. Finally he left the matter to the court to decide.

I will start with the point of preliminary objection raised by the respondent which as stated earlier in this ruling states that, the affidavit of the applicant is fatally defective for containing point of law. The court has found that, as rightly argued by the counsel for the applicant the respondent told the court the provision of the law prohibiting deposition of legal argument in an affidavit is Order 19 (1) without citing the law within which that provision of the law is found. The court has taken the provision of the law intended to be cited by the respondent is Order XIX Rule 1 of the Civil Procedure Code, Cap 33 R.E 2002.

However, the court has found the above cited provision of the law is not prohibiting deposition of point of law in an affidavit and is not providing for what is required to be contained in an affidavit to be used in a court of law. The court has found it is providing for the power of the court to order any point to be proved by affidavit. The court has found the provision of the law which prohibits deposing of legal arguments in an affidavit to be used in court is Order XIX Rule 3 (1) of the above cited law which states that:-

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*"Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications on which statements of his belief may be admitted."*

The court is in agreement with the respondent that, the position of the law as stated in the above quoted provision of the law and held in numerous cases is that, an affidavit to prove any point before the court of law is not required to contain matters which are not within the knowledge of the deponent. Clarifications as to what should not be contained in an affidavit for prove of any point before the court of law was stated in the famous case of **Uganda V. Commissioner of Prisons Ex Parte Matove**, [1966] EA 574 where it was stated affidavit to be used in court is not required to contain legal argument stated by the respondent.

The holding made in the above cited case was followed by the Court of Appeal of Tanzania in the case of **Phantom Modern Transport (1985) Limited V. D. T. Dobie Tanzania Limited**, Civil Reference No. 15 of 2001 (unreported) where it was stated inter alia that, an affidavit for use in court being a substitute for oral evidence should only contain statement of facts and the circumstances to which the deponent deposes and should not

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contain extraneous matters by way of objection or prayer or legal argument or conclusion.

However, despite the fact that an affidavit for use in court is not required to contain the above stated matters but to the view of this court and after taking into consideration the nature of the application at hand it cannot be said what is contained at paragraph 5 of the affidavit of the applicant is a legal point which is not required to be contained in an affidavit supporting an application like the one at hand. The court has come to the above finding after seeing the applicant in the application at hand is seeking for leave to appeal to the Court of Appeal of Tanzania against the decision made by this court in his matter.

That being the nature of the application filed in this court by the applicant the court has found the position of the law as stated in numerous cases is that, the court is required to be satisfied there is a ground(s) of appeal worthy to be taken to the Court of Appeal before granting or refusing to grant the application. The above stated view of this court is getting support from the case of **British Broadcasting Corporation V, Eric Sikujua Ngyimaryo**, Civil Application No. 138 of 2004, CAT at DSM (unreported) cited with approval in the case of **Hamis Mdida and Another V. The Registered Trustees of Islamic**

*Justice*



**Foundation, CAT at TBR,** Civil Appeal No. 232 of 2018, (unreported) where the Court of Appeal stated that:-

*"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 a prima facie case or arguable appeal."*

Since before granting leave to appeal to the Court of Appeal the court is required to be satisfied the ground(s) of appeal intended to be taken to the Court of Appeal raise issues of general importance or a novel point of law worthy to be argued before the Court of Appeal the court has found that, listing of the ground(s) intended to be taken to the Court of Appeal for determination is not one of the matters which are prohibited by the law quoted hereinabove. The court has arrived to the above finding after seeing that, it is not only that the respondent has not informed the court how the grounds the applicant intends to be taken to the Court of Appeal should be presented to this court for consideration before being allowed to be taken to the Court of Appeal but the court has also failed to see any other place or mode upon which the said grounds of appeal would have been presented to this court for consideration before leave is granted.

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That makes the court to come to the view that, listing of point (s) of law involved in ground(s) of appeal intended to be taken to the Court of Appeal in an affidavit supporting an application for leave to appeal to the Court of Appeal is not among the matters prohibited by the law or any other principle prohibiting involvement of point of law in an affidavit to be used in court. In the premises the court has found as rightly submitted by the counsel for the applicant the point of preliminary objection raised by the respondent that the applicant's affidavit is incurably defective for containing point of law has no merit. Consequently, the said point of preliminary objection is hereby overruled in its entirety.

Back to the merit of the application at hand the court has found that, as what the applicant is seeking from the court is leave to appeal to the Court of Appeal then as stated in the case of **British Broadcasting Corporation** (supra), the court is required to be satisfied the grounds of appeal the applicant intends to take to the Court of Appeal raise issues of general importance or novel point of law worthy to be considered by the court of Appeal. The court has found as stated by the counsel for the applicant the grounds which the applicant wish to be considered and determined by the Court of Appeal are listed at

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paragraph 5 of the affidavit of the applicants. The stated grounds are as quoted hereunder:-

- i. In the absence of proof of fraud, whether in law proof of ownership of registered land by title deed can be overturned by oral evidence.*
- ii. Whether in law the High Court correctly relied on section 64 (4) (b) of the Land Act, Cap 113 R.E 2002 in giving decision in favour of the respondent bearing in mind that disposition by the court was in 2015 whereas ownership by the appellant was effective as from 1986.*

To the view of this court it is also apposite to state here that, the position of the law as stated in the case of **Hamis Mdida and Another** (supra), the application for leave does not involve rehearing of the matter for which leave to appeal is being sought. The court is only required to be satisfied the applicant has established there are factual or legal issues arising from the matter worthy of consideration by the Court of Appeal. The court has found it was stated by the Court of Appeal of Tanzania in the cases of **Lazaro Mabinza V. The General Manager, Mbeya Cement Co. Ltd**, Civil Application No. 1 of 1999 CAT at Mbeya (Unreported) that: -

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*"Leave to appeal should be granted in matters of public importance, and serious issues of misdirection or non-direction likely to result in a failure of justice."*

While being guided by the above position of the law the court has carefully considered the proposed grounds of the intended appeal listed at paragraph 5 of the affidavit of the applicant and quoted hereinabove and find are points of mixed facts and law and both of them arises from the matter decided by the court which the applicant intends to be considered and determined by the Court of Appeal of Tanzania. The court has found as the applicant is challenging the finding of the court made in Land Case Appeal No. 6 of 2019 that it was proper under section 64 (4) (b) of the Land Act No. 113 R.E 2002 for the land in disputed to be distributed to the respondents as their matrimonial property is a point of law worthy to be considered by the Court of Appeal.

That make the court to find the applicant has managed to satisfy the court has a prima facie or arguable appeal which deserve to be considered and determined by the Court of Appeal of Tanzania against the decision of the court delivered in Land Case Appeal No.6 of 2019. In the premises the court has found the application of the applicant has merit, hence the applicant is



granted leave to appeal to the Court of Appeal of Tanzania on the grounds of appeal listed hereinabove. After considering the circumstance of the application the court has found proper for the interest of justice to make no order as to costs in this matter. It is so ordered.

Dated at Songea this 9<sup>th</sup> day of July, 2020

  
**I. ARUFANI, J.**

**JUDGE**

**09/07/2020**

**Court:**

Ruling delivered today 9<sup>th</sup> day of July, 2020 in the presence of Mr. Dickson Ndunguru holding brief of Mr. Edson Mbogoro advocate for the applicant and in the presence of the first respondent in person. The second respondent is absent. Right of appeal is fully explained to the parties.

  
**I. ARUFANI, J.**

**JUDGE**

**09/07/2020**