

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

(IRINGA DISTRICT REGISTRY)

(LAND DIVISION)

AT IRINGA

LAND APPEAL NO. 18 OF 2020

(Arising from Land Appeal No.21 of 2019 (Restoration Land Appeal No.02 of 2019))

EDESIUS MWINUKA 1ST APPLICANT

PATRICK B. MBATA 2ND APPLICANT

VERSUS

PATRICK B. MGAYA RESPONDENT

22/9/2020 & 16/10/2020

RULING

MATOGOLO, J.

The applicants, Edesius Mwinuka and Patrick B. Mbata have come to this court with their application seeking for leave to appeal to the Court of Appeal of Tanzania.

The application is by way of chamber summons made under section 47(1) of the Land Disputes Courts Act, [Cap 216 R.E 2019].

The application is supported by an affidavit sworn by Frank Ngafumika.

The application was argued by way of written submissions. At the hearing of this application applicants were represented by Mr. Frank Ngafumika learned advocate while the respondent enjoyed the service of Mr. Musa Mhagama learned advocate.

In support of the application Mr. Ngafumika submitted that this application was brought under sections 47(1) of the Land Disputes Courts Act and Rule 45(a) of the Tanzania Court of Appeal Rules and is supported by the affidavit of Frank Ngafumika which he adopted and form part of his submission.

He submitted that the intended appeal seeks to raise points of law as intimated on paragraph 3 of the affidavit in support of this application. He said these are serious legal points which call for a need to be placed to the attention of the Court of Appeal. He went on submitting that, if this application is not granted then the applicants will be deprived of the right to appeal to the Court of Appeal but also the intimated points of law shall be left unattended to by the Court of Appeal something which shall occasion failure of justice to the applicants.

Mr. Ngafumika submitted further that the grant of leave sought is a discretion of this honourable court, which however has to be judiciously applied and the principles for the grant or refuse of such leave were abundantly articulated in the case of ***British Broadcasting Corporation versus Erick Sikujua Ng'amaryo***, Civil Application No. 138 of 2004 CA of Tanzania at DSM (unreported) which cited with approval other relevant cases.

He contended further that this is among the cases which require attention of the Court of Appeal in order to serve the ends of justice but such attention of the Court of Appeal cannot be brought to unless this court grant the leave as sought. He therefore prayed to this court to grant this application.

In reply Mr. Mhagama submitted that, the applicants seek leave of this Court to appeal to the Court of Appeal of Tanzania as required by the law, however the application is subject to the compliance of the principles guiding the court in granting leave as clearly stated in the case cited by the counsel for the applicants, the case of ***British Broadcasting Corporation versus Erick Sikujua Ng'amaryo*** (supra).

He submitted that, the grounds raised by the applicants which need the guidance by the Court of Appeal is the interpretation whether or not section 46 of the Law of Limitation Act, Cap 89 R.E 2019 and the provisions of section 19 (2) of the same Act are inapplicable in land cases originating from the District Land and Housing Tribunal and on whether section 47(2) of the Land Disputes Courts Act applying to land cases renders other provisions of the Law of Limitation Act inapplicable in Land cases.

He said the counsel for the applicants misdirected himself to apply the Law of limitation Act in the High Court while it is exercising appellate jurisdiction contrary to the law governing land matters as provided for under section 52(2) of Land Disputes Courts Act which requires the application of the Law of Limitation Act in the High Court only when exercising original jurisdiction.

Mr. Mhagama contended that, the application by the applicants has no merit since the issues raised have been already determined by the Court of Appeal of Tanzania as clearly stated in the case of ***Fortunatus Nyigana Paul versus Permanent Secretary Ministry Affairs and Another***, Civil Appeal No.37 of 2014 CA at DSM, (unreported) at page No.9 and 10, the Court of Appeal has already shown the stand of the applicability of Section 19(2) of the Law of Limitation Act, that it cannot apply if there is specific law providing the time limitation on lodging appeal. He argued that this is the same issue of time limitation governing appeals from the District Land and Housing Tribunal to High Court which is governed by section 41(2) of the Land Dispute Courts Act as amended by the Written Laws Miscellaneous Amendment No.2 of 2016, which provides that the time to appeal is forty five days from the date of decision or order. He submitted further that, this is a specific law to be applied, hence the law of Limitation Act cannot apply as the Court of Appeal insisted on that issue.

Mr. Mhagama submitted that, the application by the applicants to this honourable Court on grant of leave to appeal to the Court of Appeal of Tanzania has no merit as no any important issue raised for the Court of Appeal to be invited to intervene for interpretation as sought by the applicants.

Having carefully read the respective submissions from both sides, my starting point will be on the provisions cited by the applicant's counsel as enabling provision. Although in his written submission in support of the

application, Mr. Frank Ngafumika stated that the application was made under section 47(1) of Cap.216 and Rule 45(a) of the Court of Appeal Rules, in actual fact what appears in the chamber summons is section 47(1) of Cap.216 only. Rule 45(a) was not cited. However by virtue of amendments to rule 48 of the Court of Appeal Rules made by the Court of Appeal (Amendment) Rules 2019, the omission to cite Rule 45(a) may simply be ignored or the court permit the applicant to insert the omitted provision. But it was important for the learned counsel to cite the same as enabling provision than just mentioning it in his written submission while the application itself was not made under that rule.

Understandably, as was rightly submitted by Mr. Ngafumika, grant of the leave sought is in the discretion of this court, which of course is to be exercised judiciously. But it should be noted that grant of leave to appeal is not automatic. The same can be granted upon consideration of the materials presented before the court. The Court of Appeal in the case of ***British Broadcasting Corporation*** (supra), gave an elaborate guidance under what circumstances leave to appeal to the Court can be granted. It is when the grounds of appeal raise issue of general importance or a new point of law or where the grounds show a prima facie or arguable appeal. In that case, the Court referred its previous decision in Civil Reference No. 19 of 1997 ***Harban Haji Mosi and Shauri Mosi v. Omary Hilal Seif and Seif Omar*** (unreported), in which it was held:-

“Leave is granted where the proposed appeal stands reasonable chances of success or where but not

necessarily the proceedings as a whole reveal such disturbing features 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". (Emphasis supplied).

In the application at hand, what has moved the applicants' counsel to file this application for leave is for the Court of Appeal to consider the following issues:-

- (i) Whether, by interpretation of section 46 of the law of Limitation Act, Cap.89 R.E.2019, the provisions of section 19(2) of the same Act becomes inapplicable in respect of land cases originating from the District Land and Housing Tribunals.
- (ii) Whether, section 47(2) of the Land Disputes Courts Act applying to the land cases, renders the other provisions of the Law of Limitation Act inapplicable in such cases.

But Mr. Mhagama argued that the application lacks merit as the issues raised have been determined in ***Fortunatus Nyigana Paul case*** (supra).

It is trite law that for leave to appeal to be granted the applicant must raise contentious issues of law and that it is a fit case for further consideration by the Court of Appeal.

The Court of Appeal of Tanzania in **Lazaro Mabinza V The General Manager, Mbeya Cement Co. Ltd**, Civil Application No. 1 of 1999 at Mbeya Registry (unreported) held that:-

"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."

Similarly it was authoritatively held by the defunct East African Court of Appeal in **Sango Bay Estates Ltd & Others V Dresdner Bank** [1971] 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."

In the instant case the applicants contends that, they need attention of the Courts of Appeal to be drawn on the issues above mentioned.

The two raised issues do relate. It is my considered opinion that, section 46 of the Law of Limitation can not apply in land cases originating from the District Land and Housing Tribunal, as there is a specific law providing for time limitation for one to appeal to the High court against the decision when the District and Housing Tribunal exercising original jurisdiction. Section 46 of the Law of Limitation Act as a general law cannot

apply. Section 41(2) of the Land Disputes Courts Act as amended by the written Laws (Miscellaneous Amendments) Act No. 2 of 2016 is a specific law which provides for the time limitation for one to appeal to the High Court.

It is trite Law that, where there is a specific law providing for time limitation for any proceeding, the general law cannot apply. See the case of ***James Sendana versus Republic***, Criminal Appeal No. 279B of 2013 (unreported).

With regard to the application of section 19(2) of Law of Limitation Act, this is applicable in land cases but the same cannot be applied automatically, that is the exclusion of the period spent in obtaining copies of judgment and decree is not automatically assumed by the parties. The provision apply when a party files an application for enlargement of time, and among the reasons for his delay is a delay to be supplied with copies of judgment and decree, and not as the applicants did by lodging their appeal out of time without seeking enlargement of time.

The applicants were supposed to apply for extension of time so as to lodge their appeal out of time and the delay to be supplied with the copies would be sufficient cause for the delay.

Having discussed as herein above it is my considered opinion that, in the instant application there are no grounds of appeal advanced by the applicants which merit serious judicial consideration by the Court of Appeal. Thus this application has no merit the same is dismissed.

It is so ordered.


F.N. MATOGOLO

JUDGE

16/10/2020.

Date: 16/10/2020
Coram: Hon. F. N. Matogolo – Judge
Appellants: Absent
Respondent: Present
C/C: Grace

COURT:

The matter is for ruling. Ruling delivered in the presence of the Respondent but in the absence of the appellant.


F. N. MATOGOLO

JUDGE

16/10/2020