

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

(IRINGA DISTRICT REGISTRY)

AT IRINGA

MISC. LAND APPLICATION NO. 20 OF 2018

(Arising from Misc. Land Application No. 30/2015 and 54/2016)

JENIFA BARAKAEL LYIMO.....APPLICANT

VERSUS

CRDB BANK LIMITED.....1ST RESPONDENT

KASSIMU MWALONGO.....2ND RESPONDENT

RULING

KENTE,J:

This is an application for leave to appeal to the Court of Appeal of Tanzania whereby the applicant herein namely Jenifa Barakaeli Lyimo is aggrieved by the orders and ruling of this court in Misc. Land Application No. 30 of 2015 and Misc Land Application No. 54 of 2016. This requirement is in accordance with the **Land Disputes Courts Act**, the **Appellate Jurisdiction Act** and the rules made thereunder commonly known as **Tanzania Court of Appeal Rules as amended in 2019**. It was agreed

upon by both parties and consequently ordered by this court to argued this application by way of written submissions.

The applicant in her submission stated that, initially she filed Misc. Land Application No. 30/2015 praying for extension of time to file a notice of appeal. After filing and paying the requisite court fees, she kept waiting for the summons or notice to issue but all to no avail. Furthermore, she submitted that on 20th October 2015 while in the corridors of the court without any notice or summons, the 1st Respondent's advocate heard that the matter was coming for mention, he thus entered appearance, whereupon the matter was rescheduled to come on 24th November 2015 for mention. Moreover, she argued that without notice to her, the matter came for mention on 24th November 2015 and on the same day it was dismissed by this court. Furthermore, she said that, she received a summons from the District Land and Housing Tribunal on 1st November 2016 for mention which was scheduled on 10th November 2016.

The applicant applied via Misc. Land Application No. 54/2016 for extension of time to restore Misc. Land Application No. 30/2015 out of time. The said application was heard and this court delivered its ruling

dismissing the same with costs. Being aggrieved by the said ruling and drawn order in Misc. Land Application No. 54/2016 she lodged a notice of appeal on the same day.

Following that decision, the applicant claimed that, there are some issues which need the attention of the Court of Appeal of Tanzania. They are:-

- 1) Whether the parties were notified or summoned but they never entered appearance.
- 2) Effects of lack of summons or notice to the parties.
- 3) Whether the court is duty bound to issue summons to the parties and whether lack of summons in the circumstance amount to sufficient reason for extension of time for the application to restore the application.

She further submitted that, she had read the counter affidavits of both respondents who concede to paragraphs 1-9 of her affidavit. However the respondent's disputed the contents of paragraphs 11-13 saying that:-

- a) Paragraph 11 which insist that the ruling by Dr. Feleshi, J is clear and does not need judicial intervention of the Court of Appeal.

b) Paragraph 12 whether summons was served was answered affirmatively by this court and hence no need of invention by the Court of Appeal of Tanzania.

c) Paragraph 13 the duty of Court is clearly answered.

Still on the same question, the applicant maintained that the Court of Appeal will be invited to determine the following questions thus:-

1. Did the court issue summons or notice as per the records?
2. Was this the duty of the court?
 - (a) After a party has filed and paid the court fee, what remains, what is the duty of the court?
 - (b) What does the record indicate, do the proceeding and ruling indicate that the applicant was notified and never entered appearance?

She concluded that, learning from the circumstances of the application at hand, there are arguable issues demanding for this court to grant the applied leave as it was held in the case of **Sango Bay Estates Ltd and Another V. Dresdner Bank, Civil Application No. 7/1970** (unreported) and the same standard was upheld in the case of **Swissport**

Tanzania Limited and Precision Air Service Limited V. Michael Lugaya, Civil Appeal No. 119 of 2010 (unreported). In the last cited case the court observed that:-

"in granting leave to appeal to the Court of Appeal, the High Court considers whether the ground for the intended appeal raise issues of general importance or a novel point of law or where the grounds of appeal show a prima facie or arguable appeal."

In reply advocate for the respondent submitted that, it is trite law and practice that, it is the duty of the one who moves the court in any proceeding to make close follow ups on the progress of the proceeding. The fact that Misc. Land Application was called before the court on 20th October and 24th November 2015 and the same being confirmed by the applicant is enough fact that the court had done what was necessary to initiate the process.

Furthermore, they submitted that, it took about one year for the applicant to become aware that **Misc. Land Application No. 30/2015** had been dismissed and for the same note, the applicant is now blaming

the court for failure to properly discharge its duties prompting the applicant to file the application for extension of time.

Moreover, they argued that, the point of law raised by the applicant seeking the leave to appeal to the Court of Appeal of Tanzania the same is invalid because the real question to be determined is not whose duty is to issue summons but rather the valid question is whose duty is to follow up whether the summons had been issued or not. Thus in their view, the respondents think such a question does not need the attention of the Court of Appeal of Tanzania because it is clear that, it is the duty of the applicant to follow up on the progress of the case and she did not do so. If the applicant was keen enough, the respondents said, she ought to have known the scheduling date and even the dismissal order much earlier than after one year. To cement their argument, they referred to the case of **British Broadcasting Corporation V. Erick Sikujua Ng'maryo, Civil Application No. 138/2004** (unreported). In that case the court was of view and it consequently held that:-

"for the appeal, leave application to be granted, the ground of such appeal must raise a prima facie appeal ,novel point of law or an issue generally important."

Thus they submitted that, the grounds raised by the applicant in the affidavit do not fit in any principle stated in the case.

They finally concluded that, the arguments put up by the applicant are just intended to shift the blame onto the court because of her own failure to follow up her case. According to the respondent, the intended grounds of appeal do not constitute *prima facie* tenable grounds of appeal and neither do they constitute a novel point of law that would require the attention of the Court of Appeal as to prevent it from dealing with other cases deserving the attention of the highest court of the land.

In rejoinder the applicant insisted that, there are arguable point of law which need the attention of the Court of Appeal and she thinks that the standards set out in the case of **British Broadcasting Corporation V. Erick Sikujua Ng'maryo, Civil Application No. 138/2004** (supra) have been met.

In determining this application I wish to associate myself with the views and the standard expressed in the cases of **British Broadcasting Corporation V. Erick Sikujua Ng'maryo, Civil Application No. 138/2004** (unreported) and **Swissport Tanzania Limited and Precision Air Service Limited V. Michael Lugaya, Civil Appeal No. 119 of 2010** (unreported). To that end I am enjoined to determine:-

- a) Whether the grounds of the intended appeal may raise any issue of general importance or a novel point of law; and
- b) Whether the grounds of appeal have demonstrated that there is a prima facie or arguable appeal.

With regard to Misc. Land Application No. 30/2015 which was dismissed by this court for want of prosecution, there is no doubt that, the one who moves the court, shall make a close follow up to know the scheduling date of his case. It is not the duty of the court to ensure that the applicant appears before the court to prosecute his case. This court has revisited the whole court proceeding in Misc. Land Application No. 30/2016 from 15/8/2015- 24/11/2016. It appears to me that for almost three months; the applicant never appeared in court. In these circumstances, if

the applicant was the defendants, at least the court would have such a duty as per section 23 of the **Civil Procedure Code, Cap 33 RE 2019** which states that:-

"Where a suit has been duly instituted, a summons may be issued to the defendant to appear and answer the claim and may be served in the manner prescribed".

Therefore in the present situation, there is no arguable point to be referred to the Court of Appeal and no ground to grant the sought leave.

Moreover, the applicant in her affidavit in the Misc. Land Application No. 54/2016 stated under paragraph 4 that *"since the said application was filed in court, no summons was issued for either mention or hearing"*. In my opinion the averment in this paragraph do not advance her case any further as the applicant's advocate knows well that it was not the duty of the court to compel the applicant to attend the court.

Furthermore, if the applicant was told by the registry officer that, the summons was going to issue and that she would be notified as she claimed, she ought to have attached the affidavit of the said officer to

support her statement. (Vide **Christopher Mtikila V. Jacobo Nkomola & 3 others, Civil Case No. 278 of 1997** (unreported)).

For the foregoing reasons, I entirely agree with the respondent that, indeed the intended grounds of appeal do not raise any arguable or novel point of law which needs the attention of the Court of Appeal. Therefore, this application has no merits and is accordingly dismissed in its entirety with costs.

It is so ordered.

DATED at IRINGA this 16th day of September, 2020.



P. M. KENTE

JUDGE