IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MOSHI

AT MOSHI

MISC. LAND CASE APPLICATION NO. 40 OF 2020

(c/f Land appeal No. 25 of 2017, Misc. Land Application No. 62 of 2018, High Court of the United Republic of Tanzania at Moshi District Registry)

ALOYCE STEPHEN SHIYO ..... APPLICANT

VERSUS

FELISTA ALOYCE SABAYA ..... RESPONDENT

RULING

1/12/2020, 16/12/2020

MWENEMPAZI, J.

The applicant has filed this application under the provisions of section 5(1)(c) of the Appellate Jurisdiction Act, Cap. 141 and Rule 45(a) of the Court of Appeal Rules of 2009 as amended by Tanzania Court of Appeal (Amendment) Rules, 2017, G. N. No. 362 of 2017 praying for leave to appeal to the Court of Appeal of Tanzania against the decision of the High Court of the United Republic of Tanzania dated 26th July, 2018 in Land Appeal No. 25 of 2017. He is praying also for cost for the application and any other relief this Honourable Court may deem fit and just to grant. The application is supported with an affidavit of the Applicant, Aloyce Stephen Shiyo. According to paragraph 4 of the affidavit the applicant has listed grounds on which he

intends to rely in an appeal against the decree issued by the High Court. I will not repeat them here because they were also mentioned during submission in chief as it will be shown below.

The respondent is opposing the application; she has filed a counter affidavit sworn by her advocate one Erick Gabriel. In paragraphs 6,7 and 8 the deponent has stated that the applicant applied for extension of time to file an application for leave to appeal to the Court of appeal through Misc. Land Application No. 62 of 2018 in the High Court of the United Republic of Tanzania at Moshi. The same was granted on 12th November, 2019 but the present application was filed on 9th July, 2020. More than eight months have passed from the time an order for extension of time was issued to the time of filing the application.

In the Ward Tribunal the dispute between the parties was the use of public road in which the appellant is alleging that the respondent encroached into it and made a way to pass without consulting the applicant. According to him when he bought the land there was no public way but only a narrow passage where people used to pass. The High court agreed with the findings of tribunals below that the issue was not on ownership of the land but on the right to use the way or road. The court dismissed the appeal.

At the hearing the applicant was represented by Mr. Ulirck Gabriel Shayo, learned advocate and the respondent was being represented by Mr. Erick Gabriel, learned advocate. The counsel for the applicant submitted that on 9/7/2020 the applicant filed this application praying for leave to file an appeal in the Court of Appeal of Tanzania for the following reasons.

1. This court did not consider irregularity in the DL&HT for failing to recognize that the applicant is a lawful owner of the dispute area, holding a customary right of occupancy Title No. 2MSH/1233 within which the right of way has been granted to the respondent in absence of procedural requirement.

2. This court failed to consider elements of biasness by the chairman of the DL & HT in adjudicating Land Appeal No. 40/2011.

3. That this court failed to consider the importance of admitting a documentary evidence, customary right of occupancy No. 2MSH/1233. This was the document which had impact in the decision of the case.

4. The court did not consider the importance of visiting the locus in quo in order to ascertain disputed facts.

The learned counsel submitted that it is true that the applicant is a lawful owner of the dispute land and the easement granted was done unlawfully. The applicant was not consulted and no prescribed form was filled, though they were addressed. Easement is one of disposition according to section 2 of Village Land Act, Cap. 114 R.E. 2002. The counsel prayed that this court certifies as a point of law because there was no compliance to section 32(9) of the said law, Village Land Act, Cap. 114.

Another reason advanced is that the court did not consider that the chairman in the DL & HT was biased knowing that he ought to have been impartial and rely on evidence to arrive at the conclusion. Being biased

should be looked at together with being denied to admit the customary right of occupancy. In the applicants' view, the document had an influence and or impact to the determination of the matter in order to achieve substantive justice. In the case of ***Sayi Bubinza and 4 others Vs. Marco Maqese, Misc. Land Application No. 4/2017, HCT Shinyanga (unreported)*** Hon. Judge C.P. Mkeha at page 6 – 7 referred to the case ***Karmali Tarmohamed and another Vs. Lakhan & Co. [1958] E.A. 567.***

In that case, it was held that in order for a fresh evidence to be admissible three conditions must be considered.

1. the evidence must be difficult to obtain
2. it must have direct impact to the result of the case
3. The evidence must be credible.

The court did not consider all that and therefore he prayed that this court finds that it is one of a point to allow the applicant to file an appeal to the court of Appeal of Tanzania.

The last point, the court failed to see the importance of visiting the *locus in quo*. The applicant's counsel had the opinion that the court erred. It was supposed to visit the scene and make necessary findings on both sides of the evidence. In the case of ***Nizar M.H Ladak Vs. Gulamali Fazal Janmohamed [1980] T.L.R 29*** in that case, court of appeal Judges, held that where it is necessary or appropriate to visit the locus in quo the court should attend with the parties and their advocates, if any, and with such witnesses as may have to testify in that particular matter.

The applicant's counsel had the opinion that due to the reasons stated they have the good reasons for the application to be allowed.

As to the time factor, he submitted that they believe the application is within time, from the date the Judgement and proceedings for Misc. Land Application No. 62 of 2019 were received to the date of filing the same.

According to section 19(2) of Law Limitation Act, Cap. 89 days spent waiting for documents are excluded 9/6/2020 to 9th July 2020, when we filed our application. The delay was caused with the need to procure the copy of ruling and drawn order so that they are attached to the application. The counsel referred the court to the case of support our submission with the case of **Commissioner for Land and another Vs. Registered trustee of Evangelistic and another, Misc. Land Application 358/2015 HCT Dar es salaam** Hon. Makuru J., referred to Rule 49 (a) of court of Appeal Rules, 2009 on the point that in an application for leave to appeal copies of decision must be attached.

The counsel for the Respondent, Mr. Erick Gabriel Advocate submitted starting with the last point that the application for leave to appeal to the Court of Appeal has been filed within time.

He submitted that this application originates from Land Case Appeal No. 25 of 2017 (HCT) Moshi. The Judgement was delivered on 26/7/2018. The applicant herein applied for copies of Judgement and proceedings which according to record they were supplied to him on 10/8/2018, 14 days after delivery of Judgement.

Instead of filing for leave to appeal to the court of appeal, the applicant filed an application for extension of time to file an application for leave to appeal, mistakenly believing that he ought to have filed an application for leave within 10 days. That application was Misc. Land Application No. 62/2018. In that miscellaneous Application this court granted the applicant his prayer to file an application for leave to appeal. The order was delivered on 12/11/2019 without specifying time within which the application should be filed. Since no time was specified, it is logical that the provisions of Rule 45(a) of CAR, 2009 as amended by GN 362/2017 which requires any person to file an application for leave within 30 days would apply.

The applicant waited for more than eight(8) months to file application for leave to appeal without any sufficient reasons; the applicant failed to file an application in time.

The counsel has submitted that he applied for copies of proceedings and obtained them on 9th June 2020. But the same are not substantiated because they have no certificate of delay from the DR.

He also cited the provisions of Section 19 (2) of Law of Limitation Act, Cap. 89. That provision is also misplaced under the circumstances because that can only be used as mere reason in an application for extension of time not in an application for leave to appeal.

In one of the grounds of application, the applicant is alleging that the tribunal was biased. That has not been substantiated. The counsel for the respondent prayed not to dwell much on it.

The counsel for the applicant also mentioned that the easement was granted illegally I feel a little bit hesitant on the point. I feel like trying to argue an appeal itself and not an application for leave itself.

The counsel for the respondent submitted that it is on record that the applicant herein bought his property way back in 2006. Four years later, he started this dispute with the respondent. It is record as well that the respondent and her late husband bought their piece of land in 1976; 30 years before the applicant bought his land.

It is on record that the said easement had been used by the respondent and other villagers for more than 30 years before the applicant bought his land, that being said it is misleading to say that the easement was created by the court.

Again, the applicant is counsel argues that the DL&HT failed to admit a customary right of occupancy. This also is misleading because the applicant prayed for leave to adduce additional evidence, and leave was granted. Only that in the opinion of the appellate DL & HT, this customary tittle deed was not sufficient to deny the respondents the right of way. The counsel for the applicant also contends that the appellate DL & hT erred in law for not visiting the locus in quo. The case at had originated from the ward tribunal and it's on record that the trial tribunal visited the locus in quo and made its own observation which is also documented.

Basing on what I have submitted, the Respondent's counsel prayed that this application be dismissed with costs because it frivolous with were motive of disturbing the respondent.

The counsel for the applicant made a rejoinder to the effect that the applicant is the real owner of the suit land as he holds a customary Right of occupancy. No 2MSH/1233. He ought to have been consulted and further the procedure was not followed that it why they would like the matter be dealt with the superior court.

As to the time limitation he submitted that through Misc. Land Application No. 62 of 2018, Mkapa J., granted the applicant extension of time to apply for leave. That application was granted. The argument by the counsel for the respondent is devoid of merit as the court had already allowed the applicant. The applicant needed copies of the application proceeding and ruling before lodging the application. Mr. Ulirck Advocate submitted that on the issue of time limitation, section 19(2) of Law Limitation Act, Cap. 89 R.E. 2002 is self-explanatory. It only provides exclusion of a certain period. Justification to that effect is in the letter issued by the Deputy Registrar on 9/6/2020 and was received on the same day by the applicant. I hope it is also on court record.

On the issue of casement as addressed by the counsel for the respondent, it is submitted that the casement ought to have been granted subject to statutory procedure.

He prayed that the application be granted considering the need to have substantive justice.

I have gone in the record and found that the ruling was delivered on the 12th November, 2019. The record shows the copies were issued on the 9th June, 2020. It is not clear as to when the application for the record was

made. All be it, this application was filed in court on the 9th July 2020. Rule 45(a) of the Court of Appeal Rules of 2009 as amended by GN. 362 of 2017 provides that:

> *"Notwithstanding the provisions of rule 46(1), where an appeal lies with the leave ofthe High Court, application for leave may be made informally, when the decision against which it is desired to appeal is given, or by chamber summons according to the practice of the High Court,* ***within thirty days*** *of the decision;"*

Since, the ruling extending time was not specific on the time on which to file an application for leave, reasonably, it would be expected the applicant would file an application within thirty days. Since he did not do that then it is out of time given the fact that the applicant took almost eight months to file the application.

Assuming that the matter was within time, it would be the duty of this court to decide whether there is a good reason on a point of law or a point of public importance. In the case of **Rutagina C.L vs. The Advocates Committee and Clavery Mtindo Ngalapa, Civil Application No. 98 of 2010, Court of Appeal at Dar es salaam(unreported)** the court of appeal held that:

> *"An application for leave is usually granted if there is good reason, normally on a point of law or on a point of public importance, that calls for this Court's intervention."*

in the case of **Harban Haji Mosi and Another v Omar Hilal Seif and Another, Civil Reference No. 19 of 1997 (unreported)** it was held that:

"Leave is grantable 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 provisions is therefore to spare the Court the spectre of unmeriting matters and to enable it to give adequate attention to cases of true public importance."

The principle was further restated in the case of **British Broadcasting Corporation Vs. Eric Sikujua Ng'maryo, Civil Application No. 133 of 2004 (unreported) where it was held 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 must, however be judiciously exercised on the materials before the court. 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 or arguable appeal. However, where the grounds of appeal are frivolous, vexatious or useless or hypothetical not leave will be granted."

At this point I am called now to look at the grounds vis a vis the principles quoted above if will compel this court to find that leave of appeal should be issued. On a general note, as I have observed herein above, the applicant delayed to file an application for leave for good eight (8) months. No explanation has been given save for the allegation of applying for the

copies which should accompany the application as per Rule 49(3) of the Court of Appeal Rules, 2009.

The applicant insists on the issue of ownership. However, the record shows that the dispute is on the right to use a pathway. Basing on that, the High Court made its findings of concurring with both lower tribunals. The second point the applicant has raised the issue of biasness by the Chairman and he explains it that he denied admitting the Customary Right of Occupancy. That however is shown on record of the DL&HT to have been considered without, of course, being received properly in law. It was just attached by the Advocate for the appellant in the amended Memorandum of appeal. I have the opinion the ground is not based on legal footing and therefore frivolous. The applicant being represented ought to have considered the need to adhere to the laid down procedure of receiving evidence, including additional evidence as it is in this case. The last point is on the need to visit the locus in quo, the case of ***Nizar M.H Ladak Vs. Gulamali Fazal Janmohamed [1980] T.L.R 29*** **is** good to guide us, the court and the parties. In that case it was held that *it is only in exceptional circumstances that a court should inspect a locus in quo, as by doing so a court may unconsciously take the role of a witness rather that an adjudicator.*

Now, it is my view that despite the fact that the applicant came late according to his whim and needs, in that he filed the case eight (8) months beyond the allowed time, still the grounds sought to be relied in an appeal are, in my view, not substantive as to require the attention of the Court of Appeal of Tanzania. This is even inferred to the delay by the applicant himself to seek the attention of the said court.

For the reasons stated, I find the application lacking merit to be allowed. It is therefore dismissed with costs.

It is ordered accordingly.

T. M. MWENEMPAZI

JUDGE

16/12/2020

Ruling delivered in the presence of the applicant and Mr. Ulirck Gabriel, his advocate and the Respondent and Mr. Erick Gabriel, her advocate.

T. M. MWENEMPAZI

JUDGE

16/12/2020