

**IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA**

MISC. LAND APPLICATION NO. 40 OF 2019

MARTINE MWIPAGI KALUMBETE.....APPLICANT

VERSUS

ELIAS NKINDA.....1ST RESPONDENT

NDAMO NGH'UJO.....2ND RESPONDENT

**(Application from the Judgment of the High Court of Tanzania at
Shinyanga)**

**dated 8th day of June, 2018
in
Land Appeal No. 106 of 2016**

RULING

19th November, 2020 & 5th February, 2021.

MDEMU, J.:

This civil application for leave to appeal has been filed by the Applicant by way of chamber summons in terms of the provisions of sections 47(1) of the Land Disputes Courts Act, Cap. 216 and Rule 45(a) of the Court of Appeal Rules, 2009 as amended by Rule 6 of the Court of Appeal (Amendments) Rules, 2017 G.N 362. In the chamber summons, the Applicant prays for this Court to grant leave to appeal to Court of Appeal against the Judgment of this court in Land Appeal No. 106 of 2016.

The application is supported by an affidavit sworn by Mr. Frank Samwel on 17th October, 2019.

In a nut shell, the Applicant was the Appellant in land appeal No. 106 of 2016. Its judgment was delivered in favor of the Respondent herein. That was on 8th June, 2018. The Applicant herein seeks for leave as he intends to challenge such Judgment on three points, **one**, the first Appellate Judge disregarded and failed to evaluate properly the Applicant/Appellant's submissions, **two**, the first Appellate judge disregarded undisputed facts that the Applicant/Appellant stayed in the disputed property for more than 12 years and **three**, the first Appellate Judge failed to deal with issues raised on appeal.

In this application, Mr. Frank Samwel, learned Advocate represented the Applicant, whereas Mr. Wilson Kalyango, learned Advocate represented the Respondent. On 19th November, 2020, the matter came for hearing. Both parties were also present.

Submitting in support of the application, Mr. Frank started by praying that his affidavit in support of the application be adopted to form part of his submissions. He then submitted that, the learned judge did not consider in his judgment submissions in land Appeal No. 106/2016. He

said, such submissions was important as it analyzed the DLHT's evidence in proving how the Applicant acquired the disputed land.

Mr. Frank on another point submitted that, there is evidence on record which was not disputed such that the Applicant started living in the disputed land as from 1982 while the dispute arose in 2015. He thought, had this evidence been considered, the decision could be in the Applicant's favor.

On the third point Mr. Frank submitted that, their submissions in land appeal No. 106/2016 indicated that, the dispute is connected to graves. He added that, it was disputed that the deceased one Nkinga, was buried in the disputed plot. On this, Mr. Frank said that was not resolved in the Tribunal. He again added that, there is no evidence showing where the father of the 1st Respondent got the disputed land. It was Mr. Frank's view that, those premises suffices to them for the court to grant leave to appeal.

In reply, Mr. Kalyango objected the application. He said; the issue of submissions is unmaintainable as it was raised as a new issue. Again, Mr. Kalyango said; at the tribunal neither the issue of burial of the deceased was discussed nor location of the deceased's land was raised.

He referred us at page 7 of the Judgement emphasizing how the court rejected the matter on that ground.

On another account, Mr. Kalyango submitted that, there is no evidence proving that the Applicant lived in the disputed land for over 12 years. To emphasize his point, he said that, a visit to the disputed area revealed that, the Applicant never lived on it and termed it to be an afterthought.

Lastly, Mr. Kalyango observed that, issues raised during appeal for the first time are irrelevant. On this, he said, as they are new issues, then it was correct for the court to disregard them. He further added that, the same were not legal issues but factual ones.

In rejoinder Mr. Frank rejoined that, leave may be sought on both point of law and on matters of facts. However, Mr. Frank said, issues raised were not new that is why they came to court. Again, he observed by referring to the same page 7 of the trial tribunal's judgment that, the Applicant together with his children were living in the disputed land.

On the issue of adverse possession; Mr. Frank said that, physical presence is immaterial. To him, only usage of the land is what is required. That was the end of both parties' submissions.

I have considered both parties' submissions and the records available as well. The issue before me is whether leave to appeal to the Court of Appeal be granted. It is a settled position of the law as expounded in the case of **Rudolf Temba and Another Vs. Zanzibar Insurance Corporation, Civil Application No. 167 of 2008** (unreported) that:

"Leave to appeal will be granted where the grounds of appeal raise issues of general importance, a novel point of law or where the grounds show a prima facie or arguable appeal"

Again, the same position was stated in the case of **Harban Haji Mosi and Another Vs. Omar Hilal Seif and Another [2001] TLR 409 at Pages 414-415**, where the Court of Appeal stated thus;-

"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 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"

On the bases of the above position of the law and having considered the averments contained in the affidavit together with the submissions explaining the same, the applicant's complaints are that **one**, the first Appellate Judge disregarded and failed to evaluate properly the Applicant/Appellant's submissions, **two**, the first Appellate judge disregarded the undisputed facts that the Applicant/Appellant stayed in the disputed property for more than 12 years and **three**, the first Appellate judge failed to deal with issues raised in appeal.

The way they appear, dealing with those three points above, at this stage, will be like sitting as an appellate Court of which I am not. Taking that into account, the concession of the counsel by the Respondents that some issues were not considered in the appeal decision, it follows therefore that, if these allegations are true, then I am settled in my mind that, there is an arguable appeal. And for that matter, there is a need for the Court of Appeal to adjudicate upon rival contentions by parties as seen in their submissions. Specific in the first ground for leave as contained in paragraph 5(i) of the affidavit, I do not think if the same is best placed. It is trite law that, submissions is not part of evidence. It follows that,

failure to consider submissions in appeal at any rate, may not constitute ground of appeal. It has not been shown how such omission caused miscarriage of justice. Appeals to the Court of Appeal may rise on matters of facts (evidence) and law and not on failure to consider submissions. The above being the case, I find this application to have merits. I accordingly allow it. All parties to bear own costs.



Order accordingly.

Gerson J. Mdemu
JUDGE
05/02/2021

DATED at SHINYANGA this 5th day of February, 2021.

Gerson J. Mdemu
JUDGE
05/02/2021