IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF BUKOBA)

AT BUKOBA

Misc. LAND CASE APPLICATION No. 48 OF 2020

(Arising from the High Court (Bukoba District Registry) in Land Appeal Case No. 26 of 2013 & Original from the District Land and Housing Tribunal for Chato at Chato in Application No.11 of 2008)

NEHEMIA JACOBO ---------- APPLICANT

Versus

MURUKULAZO VILLAGE COUNCIL ---------- RESPONDENT

RULING

30/03/2021 & 06/04/2021

Mtulya, J.:

In the present Application four (4) issues were registered by Mr. Nehemia Jacob (the Applicant) to persuade this court to grant leave for appeal purposes to access our superior court in judicial hierarchy, the Court of Appeal. The Applicant is intended to dispute the determination of this court in **Land Appeal Case No. 26 of 2013** (the case) originated from the **District Land and Housing Tribunal for Chato at Chato** (the District Tribunal) in **Application No.11 of 2008**. (Application No. 11).

The specific issues which the Applicant prays to Invite the Court of Appeal are in brief, that: first, whether this court has powers to determine a dispute which is filed out of time; second, whether this court can grant rights in an appeal originated from irregular

proceedings; third, whether this court can proceed with the determination of an appeal which is improperly filed; and finally, whether the rights in land can be revoked by customary conditions of preparing local liquor.

On 30th March 2021, when the Application was scheduled for hearing, the Applicant invited the legal services of Mr. Ali Chamani, learned counsel, to argue the Application for him whereas Murukulazo Village Council preferred the services of Ngara District Council Solicitor Mr. Job Mrema, learned State Attorney, to protest the Application. When Mr. Chamani was called to argue the Application, he prayed the Chamber Summons and Applicant's Affidavit be part of his oral submission, and briefly stated that there are issues which need intervention of the Court of Appeal to put record in the case straight.

On the guiding principles in determination of an application like the present one, Mr. Chamani submitted that there are already precedents in place determined by this court and Court of Appeal in **Joseph Nyamukama v. NIC Bank & Two Others**, Misc. Land Application No. 10 of 2014 and **British Broadcasting Corporation v. Eric Sikujua Ng'maryo**, Civil Application No. 138 of 2004 respectively. To his opinion, Mr. Chamani thinks that leave to prefer

an appeal to the Court of Appeal may be granted where the grounds of appeal raise issues of general importance or arguable appeal, provided there is no abuse of court process in terms of frivolous or vexatious application.

The thinking of Mr. Chamani was protested by Mr. Mrema who contended that the principle is that the court must satisfy itself whether there is a point of law. Mr. Mrema thinks that this court may decline to grant leave to access the Court of Appeal if the Application is frivolous or vexatious. According to him, the raised four (4) issues by the Applicant are frivolous as were drafted based on procedural issues registered in this court without considering the enactment of the new section 3A of the **Civil Procedure Code** [Cap. 33 R.E. 2019] (the Code) which bars technicalities in courts in favour of the substantive rights.

To Mr. Mrema, all that is complained by Mr. Chamani in the present Application, has already been well determined by this court and no need to keep our superior court busy with obvious issues without any point of law. Finally, Mr. Mrema conceded and cherished all precedents registered by Mr. Chamani in the Application, but thought that the Application does not meet the criteria mentioned in the cited precedents. In building up his submission, Mr. Chamani

briefly stated that the Application has merit as there are triable issues both in fact and law, and not the question of law alone.

In the present Application, the Applicant cited section 47 (2) of the **Land Disputes Courts Act** [Cap. 216 R.E. 2019] (the Act), which reads that:

> *A person who is aggrieved by the decision of the High Court in the exercise of its revisional or appellate jurisdiction may, with leave of the High Court or Court of Appeal, appeal to the Court of Appeal.*

Whereas section 47 (3) of the Act provides that:

> *Where an appeal to the Court of Appeal originates from the Ward Tribunal, the appellant shall be required to seek for the Certificate from the High Court certifying that there is point of law involved in the appeal.*

From the two sub sections, it is obvious that there is no ambiguities hence the literal rule of interpretation must be employed. It is clear that the text in section 47 (2) of the Act regulates applications originated in District Tribunals in exercising their original mandate of hearing and determining land disputes, whereas section 47 (3) of the Act concerns applications originated

from Ward Tribunals. I think the guiding principles with regard to the two (2) sections are quietly different. Sub section 2 require a proof of issues of general importance or arguable matters or triable disputes before the Court of Appeal, and not certification on point of law. It can be easily said, without mincing words, that the requirements or conditions in sub section 2 of section 47 of the Act are more lenient and flexible than those in sub section 3 of section 47 of the Act.

I have also perused the record of this Application and submission of the learned brothers, Mr. Chamani and Mr. Mrema. Mr. Chamani argued that for this dispute to access the Court of Appeal, both matters of facts and law may be registered whereas Mr. Mrema thinks and submitted on point of law alone contending there must be determination on the point of law. On my part, I have scanned the record and found out that this Application is originated from the **District Tribunal** in **Application No. 11 of 2018**. It is therefore subjected to sub section 2 of section 47 of the Act.

The interpretation of section 47 (2) of the Act from the practice of our courts of record is that leave is not automatic, but a judge may exercise his discretionary mandate judiciously to grant the same based on the issues raised by the Applicant as to whether the worth

consideration by the Court of Appeal (see: **British Broadcasting Corporation v. Eric Sikujua Ng'maryo** (supra) and English decision of **Buckle v. Holmes** (1926) All ER. Rep. 90). Therefore, leave will be granted in favour of applicants where grounds of appeal raise issues of general importance or novel point of law or arguable case. A text in the precedent of **Harban Haji Mosi & Shauri Haji Mosi v. Omar Hilal Seif & Seif Omar,** Civil Reference No. 19 of 1997 was borrowed at page 7 in the decision of **British Broadcasting Corporation v. Eric Sikujua Ng'maryo** (supra) displaying the following factors:

> *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 enable it to give adequate attention to cases of true public importance.*

After this decision of our superior court, lower courts, including this court were bound with the text in the precedent. Following the directives of our superior court, this court on 9th February 2017, in

the decision of **Joseph Nyamukama v. NIC Bank & Two Others** (supra) followed the same text and granted leave to an applicant who prayed the same. At page 3 of the decision, this court stated that:

> *...the function of leave is to sieve appeals and leave deserving ones for the Court of Appeal. In so doing, the court may not look at the merits as this is not within the parlance of the court which made the decision to decide applications on merits. It is for the Court of Appeal to do so. This court can only look at the application and if it is not vexatious or frivolous then it will allow the application. It is very rare for leave on matter which has been determined on merits, going for the first appeal, to be declined unless there is a piece of evidence to show that the matter is indeed vexing or frivolous.*

However, several decisions cited in this Application, have the usual *however* text normally found in precedents within common law legal tradition. The *however* clause in these applications is: *if there is a piece of evidence displaying that the application or grounds of appeal are frivolous, vexatious or useless or hypothetical, no leave*

will be granted (see: **British Broadcasting Corporation v. Eric Sikujua Ng'maryo** (supra) and of **Joseph Nyamukama v. NIC Bank & Two Others** (supra). An application is said to be frivolous when it has no substance; it is fanciful; it is trifling; it is wasting time; and it has no reasons or arguments (see: **Wangai v. Mugambi & Another** [2013] EA 474). Again, an application is stated to be vexatious when it has no foundation; it has no good defence; it was initiated to take fanciful advantage; and it leads to impossibility of the matter prayed (see: **Jebra Kambole v. The Attorney General**, Misc. Civil Cause No. 27 of 2017).

I have gone through and learned the grounds of intended appeal, and scanned the submissions of the dual learned brothers in this Application and I formed an opinion that the grounds cannot be labelled as frivolous, vexatious or hypothetical or useless. The grounds raise issues of general importance and arguable appeal to set new precedent in our judicial practice. Again, the cited precedents of this court and the Court of Appeal on the subject of leave to the Court of Appeal require this court to exercise its discretionary mandate judiciously based on materials presented before it. The materials registered by the Applicant show arguable case in the Court of Appeal in search of precedents. He must be

granted leave to access our superior court as part of cherishing enactment of articles 13 (6) (a) and 107 (2) (b) & (e) of the **Constitution of the United Republic of Tanzania** [Cap. 2 R.E. 2002] (the Constitution) on right to be heard, right of appeal and speed trials, and insertion of section 3A & 3B in the Code on timely disposal of cases at affordable costs to the parties.

After enactment of the cited articles in the Constitution and insertion of the sections in the Code, this court has been flexible in granting leave to prefer an appeal to dispute its decisions in the Court of Appeal. In some instances it was even stated that the ticket towards the Court of Appeal may be granted to an applicant who depicts that he is against or aggrieved by the decision of this court (see: **Frank Edward Bashamula v. The Secretary General WAMATA & Two Others**, Misc. Land Case Application No. 113 of 2016 and **Athanasiyo Isaya v. Denis Rwiza Ndyetabula & Four Others**, Misc. Land Application No. 96 of 2020). The reasons of doing so, is the fear of miscarriage of justice attributed by the lower courts by inviting the Court of Appeal. I also fear failure of justice to the parties and improper records in our courts.

In conclusion, this application succeeds and leave to access the Court of Appeal to dispute the decision of this court in **Land Appeal**

Case No. 26 of 2013, is hereby granted. The Applicant shall prefer his appeal in accordance to the laws regulating appeals from this court to the Court of Appeal.

It is so ordered.

F.H. Mtulya

Judge

06.04.2021

This Ruling was delivered in chamber under the seal of this court in the presence of the Applicant, Mr. Nehemia Jacobo and his learned counsel Mr. Ali Chamani and in the absence of the Respondent, Murukulazo Village Council.

F.H. Mtulya

Judge

06.04.2021