IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[LAND DIVISION]

AT ARUSHA

MISC. LAND APPLICATION NO. 100 OF 2018

(C/F High Court of Tanzania Land Appeal No. 60 of 2016 and District Land ***and*** *Housing Tribunal for Manyara Region at Babati Application No. 91 of 2014)*

TLUWAY LESSI .....APPLICANT

Versus

LAZARO MATHAYO BADADA ..... 1ST RESPONDENT

QAMBEY LESSI ..... 2ND RESPONDENT

RULING

23rd March & 7th May, 2021

MZUNA, J.

The applicant seeks to be granted leave to appeal to the Court of Appeal against the judgment and decree of this court in Land Appeal No. 60 of 2016 (Moshi, J.) which was delivered on 9/6/2017 upholding Babati District Land and Housing Tribunal (the trial Tribunal) in Land Application No. 91 of 2014. The claim was over a piece of land measuring 3½ acres located at Getesh Village, Tumati Ward within Mbulu District, (suit land). The trial Tribunal gave its decision in favour of the respondents. The applicant was dissatisfied by that decision hence the appeal to this Court.

The application is supported by affidavit of the applicant. He has raised four basic reasons in the accompanying affidavit. There is a joint counter affidavit of the respondents opposing the application. It is worth noting that Misc. Land Application No. 174 of 2017, for extension of time to file application for leave to appeal to the

Court of Appeal out of time was granted by Moshi, J on 27/7/2018, hence the instant application.

At the hearing of this application, the applicant was represented by Mr. Ephraim Koisenge, learned advocate while the respondents were represented by Mr. Yusuph Mlekwa and Amir Said, learned advocates. The application was argued by way of filing written submissions. This ruling is the second one after review of the earlier one which was vacated as it was made in ignorance of the fact that both parties filed submissions only that one was misplaced.

The main issue is whether the intended appeal calls for intervention of the Court of Appeal?

Submitting in support of the application, Mr. Koisenge at first sought to adopt the affidavit in support of the application. Arguing the application, Mr. Koisenge contended that application for leave is a legal requirement before filing appeal to the Court of Appeal, therefore this application is in compliance with the procedure provided by the law. He averred that in order an application for leave to be granted, the applicant must satisfy the Court that there is a point of law or point of fact and law which need to be revisited by the Court of Appeal before the rights of the parties contesting can be conclusively determined. To support his assertion the learned advocate cited the cases of **Swissport Tanzania Limited vs. Michael Lugaiya**, Civil Appeal No. 119 of 2010 (unreported) and **Nurbhai N. Rattansi vs. Ministry of Water Cooperation Energy Land & Another** [2005] TLR 220.

In the instant application, according to Mr. Koisenge, the applicant raised grounds which show that in the impugned judgment there are questions of both law

and facts which were not properly dealt with by this Court. In the first place, he faulted the High Court Judge on whether it was proper for her to assess and rule on the demeanour of the witnesses without considering the record of the trial Tribunal. The Judge also failed to appreciate the role of 'operation vijiji' which was brought about by law. Another legal issue that needs to be addressed by the Court of Appeal is that in the impugned judgment the learned Madam Judge granted reliefs that were not sought by the respondents. The first Appellate Judge also failed to analyse the evidence on record. All these grounds, in Mr. Koisenge's view call for intervention of the Court of Appeal so as to have the record cleared. To support his argument, he cited the case of **Principal Secretary, Ministry of Defence and National Service Vs. Devram P. Valambia** [1992] TLR 185. In totality, Mr. Koisenge implored the Court to grant the application and order costs to be in the main cause.

Contesting the application, Mr. Said submitted that leave to appeal to the Court of Appeal is only grantable when the grounds of appeal raise issues of general importance or novel point of law or where the grounds show prima facie or arguable appeal. He contended that leave cannot be granted where the grounds of appeal are frivolous, vexatious or useless/hypothetical. To back up his argument, the learned advocate cited the following Court of Appeal decisions: **British Broadcasting Corporation vs. Erick Sikujua Ng'maryo**, Civil Application No. 138 of 2004, **Rutagatina C.L vs. The Advocates Committee and Another**, Civil Appeal No. 98 of 2010 and **Harban Haji Mosi and Another Vs. Omar Hilal Seif and Another**, Civil Reference No. 19 of 1997 (all unreported).

Regarding the application under scrutiny, Mr. Said stated that the intended appeal has no sufficient grounds to be argued to the Court of Appeal and does not

have specifically legal point but only hypothetical reasons. He reiterated that considering the evidence on record, the learned Judge was right to hold that the suit land was the lawful property of the respondents. She assessed the evidence that was adduced by both sides in the trial Tribunal. Mr. Said concluded that the application intends to waste the time of the Court since the grounds raised are frivolous and vexatious therefore leave should not be granted. He implored the Court to dismiss the application with costs.

As a matter of fact, this application is made under Section 47(1) of Land Disputes Courts Act, Cap. 216, [R.E 2002] and Rule 45(a) of the Court of Appeal Rules 2009 as amended. This court was exercising its "*appellate jurisdiction*" and therefore leave from this court to the Court of Appeal in accordance with the Appellate Jurisdiction Act is mandatory.

In determining this application for leave to appeal to the Court of Appeal, the paramount consideration is as well stated in the case of **Harban Haji Mosi and Another vs. Omar Hilal Seif and Another**, (supra), where the Court 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 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."*

Applying the above principles in the instant application, according to paragraph 5 of the affidavit in support of the application, the applicant stated that the first Appellate

Court failed to consider the role of operation vijiji which was a creature of law and that the High Court Judge failed to analyse the evidence before her properly.

This court agrees with the learned counsel for the appellant that there are legal issues which calls for intervention of the Court of Appeal. The allegation by the learned counsel for the respondent that this application is frivolous and vexatious based on the re-evaluation of the evidence, with due respect are points to be addressed at the Court of Appeal. This Court is not in a position to say whether the first Appellate Court was proper in its decision because we enjoy the same jurisdiction. The reasons advanced by the applicant sufficiently moves this Court to find and hold that there is need for intervention by the court of appeal. The points are (among others):-

i. *Whether the first Appellate court was justified to assess the demeanor of the witnesses that was not the issue before the trial Tribunal.*
ii. *Whether the court properly granted the relief sought which were not party (sic) of the relief sought by the party.*
iii. *Whether the court properly considered and appreciates the role of Operation Vijiji which was established by the laws of the Land.*
iv. *Whether the first appellate court legally analysed and evaluate (sic) the evidence on records and makes justifiable decision.*

Application is allowed. The applicant is given 21 days from the date this ruling is delivered, within which to file the appeal to the Court of Appeal. Costs shall abide to the outcome of the intended appeal.

Order accordingly.

THE HIGH COURT OF TANZANIA

M.G. MZUNA,
JUDGE.
May, 7th, 2021