

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

MISCELLANEOUS LAND APPLICATION NO. 28 OF 2020

(Arising from the judgment of the High Court of Tanzania at Mtwara in Misc. Land Case Appeal No. 3 of 2018, Land Appeal No. 4 of 2017 Mtwara District Land and Housing Tribunal. Original Nanyanga Ward Tribunal Land Case No. 3 of 2017)

ABDALLAH RASHID JALINI.....APPLICANT

VERSUS

AHMADI ASALI SILI.....RESPONDENT

RULING

9 March & 10 June, 2021

DYANSOBERA, J:

This ruling is on an application made under section 47 (1) of the Land Disputes Act [Cap. 216 R.E.2002]. The applicant, namely, Abdallah Rashid Jalini is, according to chamber summons, seeking the following orders:

- a. This Honourable Court may be pleased to grant leave to the applicant herein to appeal to the Court of Appeal of Tanzania against the decision of the High Court of Tanzania at Mtwara in Land Appeal No. 03 of 2018 delivered on 5th June 2018 by Hon. Twaib, J.

b. Any other reliefs as the court may deem fit to grant.

The application is supported by the affidavit affirmed by the applicant. No counter affidavit has been filed by the respondent one Ahmad Asali Sili to counter the application.

A brief history of the matter is the following. The respondent Ahmadi Asali Sili successfully sued the appellant at Nanyanga Ward Tribunal in Land Case No. 3 of 2020 for recovery of his cashewnut farm situated at Likang'a estimated to be measuring four acres. The appellant's first appeal before the District Land and Housing Tribunal in Land Appeal No. 64 of 2017 was dismissed on 3rd November, 2017

The same appellant unsuccessfully appealed to this court vide Misc. Land Case Appeal No. 3 of 2018.

The applicant's application for extension of time within which to file leave to appeal was granted hence this application for leave to lodge his appeal to the Court of Appeal.

The hearing of this appeal proceeded ex parte after the respondent was served but neither appeared in court nor filed a counter affidavit. At the hearing of the application the applicant appeared in person. In his oral submission, he argued that he is applying for the leave of appeal as he has stated in his affidavit. He informed the court that the respondent has not objected his application.

As indicated above, this court has been moved by the applicant under section 47(1) of the Land Disputes Courts Act [Cap.216 R.E.2002] which provides as hereunder:

"S.47.-

(1) Any person who is aggrieved by the decision of the High

Court (Land Division) in exercise of its original, revisional or appellate jurisdiction, may with the leave from the High Court appeal to the Court of Appeal in accordance with the Appellate Jurisdiction Act."

The applicant argues that since the respondent has not filed any counter affidavit, the latter should be regarded to have not opposed the application for leave. With respect, that is not the position of the law. In my view, the proper legal position was clarified in the case of **Daniel John Peters v. the Administrator General of Nyasaland** [1942 – 43] 19 – 10. EACA 14; thus:-

"That it does not follow, because the Respondent does not oppose the application for leave to appeal out of time, that it must be granted."

This means that although a respondent may not have filed a counter affidavit or a submission, it does not, necessarily mean that he does not oppose it and that the application for leave to appeal should be automatically granted. In other words, the respondent's failure to file a counter affidavit does not lessen the duty of this court to scrutinize the merits of the application.

This brings me to the next issue which pertains to the principles applicable for determining applications of this nature. An application for leave to appeal must demonstrate prima facie grounds meriting appeal. This position was emphasised by the Court of Appeal in the case of **Gaudensia Mzungu v. IDM Mzumbe**, Civil Application No. 94 of 1999 in which His Lordship Kalegeya, J.A had this to say:-

"What is important is whether there are prima facie, grounds meriting an appeal to this Court. The echo stands as a guidance for the High Court and Court of Appeal."

In the instant application, the applicant has, under paragraph 7 of his affidavit, pointed two serious issues of the law which he thinks need to be determined by the Court of Appeal. These are, one, whether it was proper for this Honourable court to rely in the principle of law which says that in a dispute relating to land allegedly sold to two parties, the person who was the first to buy the same and to whom the title has passed may be declared the lawful owner? Second, whether it is proper for the tribunal to proceed with the hearing without joining the seller of the disputed property to both appellant and respondent.

With respect, these cannot be arguable points worthy of consideration by the Court of Appeal which is the highest Court of the land. The reasons are not far-fetched. In the first place these issues were not raised in the first appellate court nor were they raised in this court. The records are clear that in the District Land and Housing Tribunal, the issue was whether the Ward Tribunal was wrong to set aside *ex parte* and hear the matter afresh while in this court, the applicant's complaint was that the respondent had failed to prove his case on balance of probabilities.

So the issues raised in the applicant's affidavit are not only new but also not serious containing misdirection or non-direction likely to result in a failure of justice.

Indeed, on the principle of law which says that in a dispute relating to land allegedly sold to two parties, the person who was the first to buy the same and to whom the title has passed may be declared the lawful owner was settled by this court after it there was a concurrent finding by the two lower Tribunals. According to the record, in dismissing the appeal, this court (Hon. Twaib, J.) at page 5 of the typed judgment observed:

It is a general principle of law that, in a dispute relating to land, allegedly sold to two parties in a dispute, the person who was the first to buy the same and to whom the title had passed may, as a matter of principle, be declared the lawful owner. Thus, basic on this principle, the lower tribunals were justified in declaring the respondent the lawful owner of the suit land.

It is my finding that there are no contentions or serious issues containing misdirection or non-direction likely to result in a failure of justice and worthy consideration by the highest court of the land.

For those reasons, the application for leave to appeal to the Court of Appeal is devoid of merit and is dismissed.

Order accordingly.



W.P. Dyansobera

Judge

This ruling is delivered under my hand and the seal of this Court on this 10th day of June, 2021 in the presence of the applicant but in the absence of the respondent.



W.P. Dyansobera

Judge