IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

MISCELLANEOUS LAND APPLICATION No. 23 OF 2021

(Arising from HC Miscellaneous Land Application No. 135 of 2018)

HAMAD HUMUD (Suing as a Next Friend of HUMUD Seif Riyami).....**APPLICANT**

VERSUS

EMILIANA KAGERE.....**RESPONDENT**

RULING

08th June & 29th July, 2021.

TIGANGA, J.

Through chamber summons that has been supported by the affidavit dully sworn by the applicant in this application, the applicant applies for this court to grant leave to appeal to the Court of Appeal of Tanzania against the ruling and drawn order of her Ladyship Madeha, J in Misc. Land Application No. 135 of 2018 dated 20th May, 2019. It was also prayed and that the costs of the application be in the cause as well as any other relief(s) as the Honourable Court may deem fit and just to grant.

The application was made under section 47(2) of the Land Disputes Court Act, [Cap 216 R.E 2019] and Rule 45 (a) and (b) of the Tanzanian Court of Appeal Rules, 2009 GN No. 368 of 2009, as

amended by the Court of Appeal (Amendment) Rules, GN. No.362 published on 22nd September 2017.

The applicant was represented by Mr. Njelwa, learned counsel; while the respondent was represented by Mr. Stephen Kaijage, also learned, counsel.

The On 29th April, 2021 when this application was called for hearing, parties through their counsel asked for leave to argue the application by way of written submissions. The prayers were granted and a filing schedule was fixed and counsel filed their respective submissions as scheduled.

Submitting for the applicant, Mr. Njelwa, stated that, the genesis of this application is the ruling of this court in Misc. Land Application No. 135 of 2018 before Hon. Madeha, J which was dismissed for being res judicata. According to him, that ruling aggrieved the applicant, who commenced the appeal process by first lodging the notice of appeal in time, but could not lodge the application for leave within time. He then through Misc. Land Application No. 116 of 2019, successfully applied for extension of time, hence this application for leave to appeal to the Court of Appeal of Tanzania.

The counsel submitted further that the reasons for which this application is brought are set out in the affidavit filed in support of the application and the would be grounds of appeal are set out in paragraph 10 of the affidavit which this court is asked to consider in granting the application at hand. The said grounds can be paraphrased as follows;

1. The honourable High Court Judge erred in law in dismissing the Misc. Land Application No. 135 of 2018 allegedly for being *res judicata,* the decision which is irregular and against the law.
2. That the Honourable High Court Judge failed to appreciate the position that, upon grant of Misc. Application No. 234 of 2017 in which the period within which to file the said Revision was extended by 30 days which order was compiled with but later on struck out and that upon expiry of the said period the applicant could not file the same without seeking for extension of time to do so and therefore the filing of Misc. Application No. 135 of 2018 was appropriate and not res judicata.

He submitted that, in his submission the main issue is the doctrine of res judicata and its applicability in the circumstances of Misc. Application No. 135 of 2018. To buttress his argument, he referred this court to section 9 of the Civil Procedure Code and the authority in the

case of **Gerad Chuchuba vs Rector, Itaga Seminary** (2002) T.L.R 13 in which the essential elements that need to be proved for the doctrine of *res judicata* to apply were pointed out, these elements were listed to be, first, the judicial decision which was pronounced by a court of competent jurisdiction, that the subject matter and the issues decided are substantially the same as the issues in the subsequent suit, that the judicial decision was final, and that it was in respect of the same parties litigating under the same title.

Counsel was of the view that the presiding judge did not subject the application to the test above in order to satisfy herself that the said application was in consonant with and it met the requisite conditions provided for in the law. In his opinion, it was unfortunate that, it was not done. Further to that, he stated that, the presiding judge was not right to rule that the Application No. 135 of 2018 was barred by res judicata simply because the applicant had applied and was granted extension of time in Misc. Application No. 234 of 2017.

In his conclusion, the learned counsel submitted that, if the applicant will be granted leave, then he will have an opportunity to address the point "whether expiry of the extended time within which to file an application operates as a bar for further application for extension

of time, should the previously extended time expires before the applicant had filed the application because of the sound reasons beyond his control, whether that amounts to res judicata?

For that reason, it was the applicant's prayer that the application for leave be granted so that the errors can be addressed by the Court of Appeal. He also prayed for costs of the application.

Replying to the submissions by the applicant, the respondent submitted that, the application emanates from the decision of DLHT in Application No. 60 of 2013 in which the applicant instituted a complaint against the respondent without joining the Mwanza City Council as a necessary party an application which was struck out for non-joinder of necessary party.

He submitted that, the only remedy therefore that was available to the applicant was not to seek an appeal but to comply with the court order, by refiling a new application joining the necessary party as directed by the tribunal. She also submitted that as of now the appeal has been overtaken by events, as the area in dispute has already been surveyed, the points of law raised by the applicant have been rendered redundant and therefore whether or not the leave is granted, it will not change anything as it is of less value.

In his rejoinder, counsel for the applicant started by informing this court that the respondent's reply was filed out of the schedule as the same was supposed to be filed 14 days after the date of service of the submission in chief, which was filed on 13th May, 2021 meaning that the reply was to be filed on 27th May, 2021. By filing the reply on 3rd June, 2021, it meant that the respondent filed it out of the time scheduled for filing it and thus he prayed that the same be expunged from the records for being filed out of time and without any reasons advanced for such delay and without leave of this court.

He supported his argument by citing the case of **Famari Investment (T) Ltd vs Abdallah Seleman Komba**, Misc. Civil Application No. 41 of 2018 which quoted the position of this court in **P.3525 Lt Idahya Maganga Gregory vs The Judge Advocate General** regarding the consequence of failure to file written submissions within the time frame ordered. He therefore invited this court to find that the reply by the respondent is time barred and that it be disregarded.

On the other hand, counsel submitted that in case the prayer to disregard the respondent's submission is overruled, then the court should find that the respondent has failed to respond to the appellant's

submission as he has brought new issues which were not issues at the trial and thus did not form part of the judgment subject of the intended appeal.

Counsel concluded his submission by reiterating his contention that since there are legal issues that were improperly addressed, then this court should see to it that those issues need to be addressed by the Court of Appeal. That since that cannot be done without leave from this court, then he prayed that leave be granted, with costs.

Before going to the merit of the application, it is important to note that the applicant's counsel raised a procedural concern in the rejoinder which I find important to consider first. He claimed that the reply by the respondent was filed out of the prescribed time. By the order of this court which was a result of a prayer to argue the application by way of written submissions, parties were supposed to file their respective submissions as per the given order, whereby after being served with the submission in chief, the respondent was to file her reply within 14 days. According to the applicant, the submission in chief was filed on 13th May 2021 and the respondent was served within time thus he was expected, just as ordered to present her reply submissions on or before 27th May 2021.

The respondent however did not file his submission on 27th May 2021 as ordered, instead he filed the reply on 3rd June 2021 which was after seven days from the date he was ordered to file the said reply and without leave of this court.

However, it should be noted that, the order which scheduled the filing of written submissions, ordered that the reply be filed within fourteen days from the date of service of the submission in chief. The applicant did not submit the proof of service proving that he served the respondent on the same day he filed the submission in chief. His complaint would have been justified had he attached with the rejoinder the proof of service showing that he served him on time, which he did not attach. By a re known cardinal principle of law that "he who alleges must prove", the applicant was required to prove that he served the respondent in time, before claiming that the respondent filed his reply out of time, short of that, the respondent is hereby given a benefit of doubt, and has his submission taken to be filed within the schedule.

Having overruled the objection above, I will therefore straight away go to the submissions regarding the application made by the applicant, the gist of which is a prayer that he be granted leave to

appeal to the Court of Appeal of Tanzania against the decision of this court in Misc. Land Application No. 135 of 2018.

Generally, in applications of this nature, what should be considered in granting or refusing leave have been analytically provided in various decisions of the Court of Appeal of Tanzania, for instance in the case of **Harban Haji Mosi and Another Vrs Omar Hilal Seif and Another**, Civil Reference No. 19 of 1997 CAT, the following principles were laid down;

> *"Leave is grantable where the proposed appeal stands reasonable chances of success or where, but not necessarily the proceedings as a whole reveals such disturbing feature as to require the guidance of the Court of Appeal. The purpose of the provision is therefore to spare the court the spectre of un meriting matters and to enable it to give adequate attention to cases of true public importance"*

Further to that, in the authority of **British Broadcasting Cooperation vrs Erick Sikujua Ng'maryo,** Civil Application No.138 of 2004 (CAT) - Dar Es Salaam (Unreported) (which was cited and relied on in the decision of **Swiss Port Tanzania Ltd Vs Michael Lugaiya** (supra)) it was held *inter alia* 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 should however be judiciously exercised and 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, useless or hypothetical, no leave will be granted."

Those issues with such disturbing features proving that there would be the arguable appeal must be shown by the applicant both in his/her affidavit and the submissions made in support of the application.

Now the issue is whether the applicant in this application has managed to show through the issues raised, the arguable points or disturbing feature or any novel point of law worthy to be attended by the Court of Appeal?

In paragraph 10 of the affidavit filed in support of the application the applicant indicates two points which form the intended grounds of appeal, and in the submission in chief, the applicant has indicated that should he be granted leave to appeal, he will have the opportunity to address the following point of law, namely;

"whether upon expiry of the extended time within which to file an application in the same court bars further

application for extension on the same and amounts to res judicata"

As this court is not a forum to probe into the points raised and upon which leave is being sought, it is sufficient to state that, the point raised by the applicant qualifies to be termed as a point of law worthy of consideration by the Court of Appeal.

Having said as above, the application for leave to appeal to the Court of Appeal of Tanzania is hereby granted. Costs be in due cause.

It is accordingly ordered.

DATED at **MWANZA** this 29th day of July, 2021

J.C. TIGANGA

JUDGE

29/07/2019

Ruling delivered in open chambers in the presence Mr. Njelwa, Advocate, for the applicant and the respondent in person through audio tele-conference.

THE HIGH COURT OF TANZANIA
MWANZA
UHURU NA UMOJA

J. C. TIGANGA

JUDGE

29/07/2021