

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[LAND DIVISION]

AT ARUSHA

MISC. LAND APPLICATION NO. 101 OF 2020

(C/F High Court of Tanzania Land Appeal No. 3 of 2019; Originating from the District Land and Housing Tribunal for Karatu, Land Application No. 45 of 2018)

JOHN PIUS TSOXHO APPLICANT

Versus

HERMAN PAULO AWE RESPONDENT

RULING

6th May & 9th July 2021

Masara, J.

I am invited by the Applicant under Section 47(2) of the Land Disputes Courts Act, Cap. 216, [R.E 2019], to grant him leave to appeal to the Court of Appeal against the decision of this Court in Land Appeal No. 3 of 2019 which was delivered on 11/12/2020. The Application is supported by the affidavit of the Applicant. The Respondent filed a Counter Affidavit opposing the Application.

Brief facts leading to this application as can be gathered from the affidavit and annexes in support thereof can be summarized as follows: The Applicant and the Respondent have had prolonged land dispute. The Applicant filed Land dispute No. 68 of 1999 in Customary Land Tribunal of Karatu District where the Respondent was declared the lawful owner of the suit land. The record is not complete, but it shows that there was an appeal to this Court which was preferred by the Applicant, but still the Respondent emerged victorious and the appeal was dismissed. The Respondent filed Application for Execution No. 63 of 2016 in the District Land and Housing Tribunal for Karatu (herein after the District Tribunal), and he was handed

over the suit land measuring 2¾ acres, located at Mangafi suburb, Gekrum Arusha Village within Karatu District.

Thereafter, the Applicant filed Land Application No. 45 of 2018 seeking to claim back the land that was handed over to the Respondent stating that the land was erroneously handed to him as it was not the one involved in the case. The District Tribunal in a ruling dated 29/11/2018, while considering a preliminary objection preferred by the Respondent, struck out the suit for being *res judicata*. Discontented, the Applicant appealed to this Court vide Land Appeal No. 3 of 2019. This Court (Mzuna, J.), dismissed the appeal upholding the decision of the District Tribunal. Still aggrieved by that decision, the Applicant intends to appeal to the Court of Appeal, but as a matter of law, he cannot approach the Court of Appeal without leave of this Court; hence this Application.

At the hearing of the application, both parties appeared in Court in person, unrepresented. It was resolved that hearing proceed by way of filing written submissions. Both parties filed their submissions within the scheduled time.

The Applicant, after adopting the contents of his affidavit, contended that in an application for leave to Appeal to the Court of Appeal the Applicant is required to show that his intended grounds of appeal raise serious issues for consideration by the Court of Appeal. To support his argument, he cited the case of ***Jireys Nestory Mutalemwa Vs. Ngorongoro Conservation Authority Area***, Civil Appeal No. 154/2016 (unreported). He submitted that the District Tribunal in Land Application No.45/2018 and this Court in Land Appeal No 3/2019 erred by holding that Land Application No. 45/2018 is *res judicata* to Land Application No. 68/1999 without ascertaining the size of the land litigated in both cases, its boundaries and nature

of the cause of action. He maintained that in Land Application No. 68/1999, what was in dispute was only boundaries unlike Land Application No. 45 of 2018 whose dispute involved ownership. The Applicant added that there was no evidence adduced by parties to conclude that the issue was *res judicata*.

According to the Applicant, in Land Appeal No. 3 of 2019, he filed rejoinder submission, but in its judgment this Court did not consider his rejoinder which denied him the right of a fair hearing citing the case of ***Hai District Council and Another Vs. Kilempu Kinoka Laizer and 15 Others***, Civil Appeal No. 110/2018 (unreported), where the Court of Appeal nullified the proceedings of the High Court for denial of the right to make rejoinder submission. He implored the Court to ignore the Respondent's argument that he was not served with the Notice of Appeal since the notice is attached in this application, praying for the application to be granted.

On his part, the Respondent also prayed to adopt his counter affidavit, to make part of his submission. Contesting the application, the Respondent contended that the issue of *res judicata* was well attended by both the District Tribunal and this Court, stating that nothing is left for determination by the Court of Appeal. Regarding denial of a fair hearing, he submitted that rejoinder was not filed. He vehemently submitted that submissions from both parties were considered by this Court therefore there is no ground to grant leave to the Applicant to appeal to the Court of Appeal.

The Respondent, on the other hand, stated that the Applicant failed to take necessary steps in institution of his intended appeal to the Court of Appeal as he failed to serve him the letter applying for necessary documents and Notice of

Appeal. He cited Rule 84 of the Court of Appeal Rules, 2009 showing the effect of failure to serve the Respondent with the Notice of Appeal. The Respondent cited various other Court of Appeal Rules and myriad of decisions on the consequences of failure to serve the Respondent with the Notice of Appeal which I find no reason to dwell on as that is in the domain of the Court of Appeal itself. He urged this Court to find the application misconceived and dismiss it with costs.

In his rejoinder submission, he submitted that the question whether the Notice of Appeal and the letter applying for necessary documents of appeal were served to the Respondent, that is purely matter of fact that should be deliberated by the Court of Appeal in the intended appeal.

I have thoroughly considered the Applicant's application, the affidavits by the parties as well as their rival written submissions, the pertinent issue I am invited to determine is whether there are arguable grounds/points for the Applicant to be granted leave to appeal to the Court of Appeal.

The Applicant maintains that his intended appeal to the Court of Appeal is necessitated by legal points to be addressed by the Court of Appeal. He referred to paragraphs 3, 4 and 5 of the affidavit in support of the application as well as on pages 4 and 5 of the Applicant's written submission.

I have closely scrutinized the said paragraphs. The main complaint in those paragraphs is that there was no evidence adduced leading to the conclusion that Land Application No. 45 of 2018 and Land Appeal No. 3 of 2019 were *res judicata* to Application No. 68 of 1999. The other major concern put forth by the Applicant regards Land Appeal No. 3 of 2019, in which he complained that his rejoinder

submission was not considered despite the fact that he filed the same and he paid the requisite Court fees. He concluded that he was therefore denied the right of fair hearing.

Before a Court grants an applications for leave to appeal to the Court of Appeal, the paramount consideration is whether the grounds of appeal before it raise issues of general importance or a novel point of law or a prima facie or arguable appeal. Leave is not granted where the grounds of appeal are frivolous, vexatious, useless or hypothetical. This has been reiterated by Courts in numerous decisions including ***Harban Haji Mosi and Another Vs. Omar Hilal Seif and Another***, Civil Reference No. 19 of 1997 (unreported), where the Court of Appeal held:

"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."

In a subsequent decision of ***British Broadcasting Corporation Vs. Eric Sikujua Ng'maryo***, Civil Application No. 138 of 2004 (unreported), the Court observed:

"Speaking for myself, the issues raised by the applicant cannot be labelled as frivolous, vexatious or useless. I think there is need for this Court to resolve the rival contentions of the parties and have an authoritative interpretation by this Court on the disputed provisions of the Advocates Remuneration and Taxation of Costs Rules, 1991."

Applying the above principles in the instant application, the Applicant faults the judgment of this Court for erroneously invoking the principle of *res judicata* without properly scrutinizing the evidence of the parties. He strenuously insisted that the cause of action and the suit land in Application No. 68 of 1999 and that of 45 of

2018, subject to Land Appeal No. 3 of 2019, are not one and the same. He further contends that in Land Appeal No. 3 of 2019, he filed rejoinder submission but it was not considered. I have also noted that the judgment in Land Appeal No. 3 of 2019, his rejoinder submission was not considered. Whether it was filed but not considered, that determination can only be made in an appropriate for a; in this case, the Court of Appeal. I therefore find that the grounds raised by the Applicant are worth consideration and determination by the Court of Appeal

I find it necessary to state that I do not agree with the Respondent's contention that the Applicant's application is misconceived for failure to serve the Respondent with the necessary documents and the Notice of Appeal because that can only be dealt with by the Court of Appeal. The reasons advanced by the Applicant sufficiently persuaded this Court that there is an arguable appeal, compelling this Court to grant leave so that the Parties herein may have their claim addressed by the Court of Appeal for the sake of justice.

From what I have endeavored to discuss above and the authorities cited, I find merits in the application. The application is allowed. The Applicant is granted 30 days within which to file his intended appeal to the Court of Appeal. Costs shall abide to the outcome of the intended appeal.

Order accordingly.




Y. B. Masara

JUDGE

9th July, 2021.