

**IN THE HIGH COURT OF TANZANIA**

**IN THE DISTRICT REGISTRY**

**AT MWANZA**

**MISC. LAND APPLICATION No. 36 OF 2021**

(Arising from Land Appeal No. 02 of 2007, originating from the decision of the DLHT for Mwanza in Application No. 170 of 2005)

**PASCHAL SATO.....APPLICANT**

**VERSUS**

**MARIAM EDWARD MRAKALA.....RESPONDENT**

**RULING**

09<sup>th</sup> & 30<sup>th</sup> August, 2021

**TIGANGA, J.**

The applicant, Paschal Sato brought this application seeking to be granted leave to file an appeal to the Court of Appeal against the judgment of this court (Ngwala, J.) dated 07/02/2017 in Land Appeal No. 02 of 2007. The application is supported by an affidavit sworn by Mr. Kamaliza Kamoga Kayaga, the applicant's counsel. The application is shown to have been made under the provision of section 47(2) of the Land Disputes Courts Act [Cap 216 R.E 2019]. According to the affidavit that was filed in support of the application, the following issues were raised by the applicant's counsel through which he intends to challenge the impugned decision;

- i. The judgment of the High Court wrongly upheld the respondent's denial of the authenticity of documentary exhibits which were not objected before the trial Tribunal.
- ii. The judgment of the High Court wrongly upheld that the sale transaction of the disputed plot between the applicant and the respondent was tainted with fraud, an allegation that had not been raised at the trial tribunal.
- iii. The judgment of the High Court overlooked a basic principle of natural justice when it simply declared that the plot in dispute was the property of the respondent without taking into account the extent of unexhausted improvements effected on the suit premises by the applicant and the need for compensation in respect of such improvements.
- iv. The judgment of the High Court overlooked an apparent illegality in the proceedings before the DLHT where the Tribunal and Assessors cross examined the witnesses who testified before the said Tribunal.

The respondent opposed the application through her dully sworn counter affidavit in which she contested all the issues raised by the applicant. When the matter was called on for hearing on 30/06/2021,

Mr. Kamaliza Kamoga Kayaga, learned counsel for the applicant made a prayer to argue the application by way of written submission which was not opposed by the respondent. The prayer was thus granted and a schedule was given according to which the parties were required to file their respective submissions.

In the submissions in support of the application, counsel for the applicant began by praying to adopt what was stated in the affidavit filed in support of this application. He also admitted being aware of the fact that the grant of an application for leave is not automatic but it is within the discretion of the court before which such an application is made basing on materials laid before it for consideration. He stated that the general principle is that where there is merit in the proposed grounds then leave would be granted.

To buttress his contention, he referred this court to the authorities in **Said Ramadhani Mnyanga vs Abdallah Salehe** (1996) T.L.R 74, **Nurbhai N. Rattansi vs Ministry of Water, Construction, Energy and Environment & Another** (2005) TLR 220, **British Broadcasting Corporation vs Eric Sikujua Ng'maryo**, Civil Application No. 138 of 2004, CAT- DSM (unreported) and **Hamisi Mdida & Another vs The Registered Trustees of Islamic Foundation**, Civil Appeal No. 232 of

2008, CAT-Tabora (unreported). He concluded his submission in chief by making a prayer that the application be granted.

The reply by the respondent was to the effect that, although this court has discretion to grant the application, the same has to be exercised only where there are points of law involved which require serious judicial consideration by the Court of Appeal. She cited the case of **Sango Bay Estate Ltd & Others vs Dresdner Bank** (1971) EA 17 to that effect. As for the points raised by the applicant, the respondent was of the strong view that they do not meet the requirements in the above cited case of **Sango Bay Estate** because they are not based on the grounds of appeal presented before and decided by the Honourable Ngwala, J.

Citing the cases of **Amirali Ismail vs Regina**, 1 TLR 370, **Willy John vs R** (1956) 23 EACA 509 and **Lutter Symphorian Nelson vs The Hon. Attorney General and Ibrahim Msabaha**, Civil Appeal No. 24 of 1999 (unreported), the respondent submitted that Honourable Ngwala, J in the impugned judgment directed her mind to the issues raised in the grounds of appeal and evaluated both documentary and oral evidence to see the whether or not the findings of the lower Tribunal were correct, thus there can not be any illegalities or

irregularities in the impugned decision which require reversal by the Court of Appeal. She concluded her reply by stating that the application is unmeritorious thus the same must be dismissed with costs.

In the rejoinder submission, counsel for the applicant stated regarding the issues of law raised, that they do meet the requirements needed to warrant consideration by the Court of Appeal. Issues like failure to afford parties right to be heard and questioning the authenticity of the documents that were tendered and admitted without objection makes this a fit case where leave of this court should be granted to enable the raised grounds be determined by the Court of Appeal.

That being a summary of the record, the content of the application and argument advanced for and against the application, I should right away agree and subscribe on the case authorities cited above, as they are portraying the trues and correct position of the law is as far as the grant or refusal of the leave to appeal to the Court of Appeal is concerned. However, in application I chose to be guided by the principle as propounded in the case of **Harban Haji Mosi and Another vrs Omar Hilal Seif and Another**, Civil Reference No. 19 of 1997 CAT, is that;

*"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"*

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 vrs 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 in the Court of Appeal must be shown by the applicant both in his affidavit and the submissions.

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?

I am aware that my authority in considering granting leave to appeal is limited on just assessing the intended grounds of appeal and whether there are disturbing features from the complaint of the applicant which merits consideration of the Court of Appeal. I am not supposed to step into the shoes of the Court of Appeal and discuss on the merit or demerit of the intended grounds of appeal.

I have carefully considered the application, the supporting affidavit and counter affidavit together with the submissions by the parties in support and opposition of the application in line with the guiding principle as enunciated in the case authorities cited above.

Without going into the merits of the proposed issues, the gist of the applicant's application mainly challenges, among other things, the

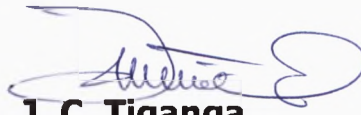
failure to afford parties the right to be heard and questioning the authenticity of the documents that were tendered and admitted without objection by the trial Tribunal.

Although the respondent has raised an argument that the said grounds lack merits, as the Honourable Judge analysed the evidence and decided on the grounds of appeal raised thus no illegalities or irregularities can be found, I must state again that this court is not in any position to question whether or not the Honourable Judge was right or wrong to decide as she did.

It is only sufficient to state that I am satisfied that the grounds of complaints raised and intended to be used in appeal are raising disturbing features worthy of consideration by the court of appeal they therefore qualify to be termed as the points worthy of consideration by the Court of Appeal. Having said as above, the application for leave to appeal to the Court of Appeal is hereby granted. Cost to be in due course.

It is accordingly ordered

**DATED** at **MWANZA**, this 30<sup>th</sup> August, 2021



**J. C. Tiganga**

**Judge**

**30/08/2021**



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