

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

IN THE DISTRICT REGISTRY OF TANGA

AT TANGA

Misc. LAND CASE APPLICATION No. 24 OF 2021

(Arising from the High Court (Tanga District Registry) in Land Appeal No. 2 of 2020 & District Land and Housing Tribunal for Korogwe at Korogwe in Land Appeal No.60 of 2018 & Originating from Kabuku Ndani Ward Tribunal of Handeni District in Land Case No. 16 of 2018)

1. LUKA ELISA

2. HASSAN LUGAZO

3. DOUGLAS SHENYAGWA

4. IDD MRISHO &

5. JOHNSON SWAI

----- **APPLICANTS**

Versus

1. JUMA MRISHO

2. MRISHO ATHUMANI SOWA

3. ATHUMANI ALLY

4. GILBATI MOZES &

5. DR. NNKO

----- **RESPONDENTS**

RULING

21.09.2021 & 22.09.2021

F.H. Mtulya, J.:

This court was invited on 5th May 2021 to determine a dispute in **Land Appeal No. 2 of 2020** and accordingly resolved at page 7 of the decision that: *it is not in dispute that the ownership was not by the way of grant as the land is owned under customary rites in*

which case size of the respective parts of lands could not be an issue. With regard to complaints on *res judicata* of the decision of the **Kabuku Ndani Ward Tribunal of Handeni District** (the Ward Tribunal) in **Land Case No. 16 of 2018** (the case) previously filed and determined in this court as **Land Case Appeal No. 13 of 2013**, this court stated at page 4 of the judgment, that: *the tribunal found that the land which was the subject matter in the Land Appeal Case was different from that in the case at hand. This was confirmed by the District Land and Housing Tribunal and in my view, the decision was justified.*

Finally, this court at page 5 of the judgment stated that: *the appellants cannot be heard denying a point to the effect that the land under dispute in the previous appeal case is the same in dispute in the case at hand.* It is from the above quoted statements of this court, a complaint was registered in this court attached with three intended grounds of appeal praying for leave and certification on point of law for the applicants to access the Court of Appeal.

According to the Applicants, the three (3) raised grounds show uncertainties which need to be resolved by the Court of Appeal and prayed before this court to grant the application on two (2) levels, viz. leave and certification on point of law to access the Court of

Appeal as per directives of the Court of Appeal in the precedent in **Jerome Michael v. Joshua Okanda**, Civil Appeal No. 19 of 2014. When the application was scheduled for hearing on 21st September 2021, the parties decided to invite learned minds in Ms. Noelina Bippa and Mr. Justus Josephat to argue the application on their behalf.

In the course of hearing, Ms. Bippa cited 8th paragraph of the Affidavit duly sworn by the applicant's learned counsel, Ms. Elisia Paul. In the cited paragraphs, three issues were raised to persuade this court to grant the application in favour of the intended appeal in the Court of Appeal, namely, in brief: first, whether it was right for this court to dismiss the appeal while agreeing with the second and fourth grounds of appeal; second, whether this court failed to consider evidence of long stay in the land by the appellants; and finally, whether it was proper for this court to grant ownership in land without land specifications in terms of size to each individual person among the respondents.

In substantiating her arguments, Ms. Bippa briefly stated that the land in dispute was already granted to appellants in **Land Appeal Case No. 13 of 2013** decided by this court hence the land cannot be granted or divided to the respondents in another dispute

in **Land Appeal Case No. 2 of 2020**. Ms. Bippa stated further that there are evidences that the appellants had stayed in the disputed land since 1991 hence are protected by the law of limitation and finally, she submitted that this court granted uncertainty land sizes.

In protesting the submission of Ms. Bippa, Mr. Josephat, who appeared for the respondent, argued that the appellants have no good reasons to be granted the application as: first, the land is not the same and that the parties in **Land Case Appeal No. 13 of 2013** are different hence the case does not fall within the ambit of section 9 of the **Civil Procedure Code** [Cap. 33 R.E. 2019] (the Code); second, there are evidences of land disputes since 1991 hence the appellants cannot enjoy the principle of adverse possession; and finally, land size is ascertained in pleadings filed in the tribunal.

In a brief rejoinder, Ms. Bippa contended that Mr. Josephat is asking this court to determine substantive matters which are supposed to be resolved by the Court of Appeal as the issues raised need to be decided by superior court as this court's hands have already been tied by its previous decision in **Land Appeal No. 2 of 2020**. To substantiate her argument, Ms. Bippa cited page 6 of the decision of the Court of Appeal in **Jireys Nestory Mutalemwa v.**

Ngorongoro Conservation Area Authority, Civil Application No. 154 of 2016.

I have had an opportunity to visit the decision in **Jireys Nestory Mutalemwa v. Ngorongoro Conservation Area Authority** (supra) and found the following statement, at page 6 of the Ruling:

...in applications of this nature, it is a well-established principle of law that that the court is not expected to determine the merit or otherwise of the substantive issues before the appeal itself is heard.

To enforce its position, the Court invited the decision in the **Regional Manager-TANROADS Lindi v. D.B Shapriya & Company Ltd**, Civil Application No. 29 of 2012, where it was stated that: *it is now settled that a court hearing an application should restrain from considering substantive issues that are to be dealt with by the appellate court. This is in order to avoid making decisions on substantive issues before the appeal is itself heard.*

I have gone through the submissions of the parties and noted that they are asking me to test the prohibition of our superior court into going to the merit of the matter. In short, I am not allowed to determine the merit of the case from the submissions registered by learned minds. My role is well established in common law case of

Buckle v. Holmes [1926] All E.R. 90. It is fortunate that the case was imported in this country in the decision of our superior court in the precedent of **British Broadcasting Corporation v. Eric Sikujua Ng'maryo**, Civil Application No. 138 of 2004 followed in the course by the precedent in **Rutagatina C.L. v. The Advocates Committee & Another**, Civil Application No. 98 of 2010. The commonly cited statement from the above cited precedent is: *it is within the discretion of the court to grant or refuse leave. The discretion must, however, judiciously exercised and on the materials before the court.*

The materials registered in the present application show that there are three issues which the parties are contesting, and some of them need the records, which are currently not attached in the present bundle of the record, such as the **Land Case Appeal No. 13 of 2013**. However, the above cited precedents display that this court is prohibited to test the substantive matters or merit of the case. What then the role of this court in the circumstances like the present one. The reply is found at page 7 in the precedent of **Jireys Nestory Mutalemwa v. Ngorongoro Conservation Area Authority** (supra), where the Court of Appeal stated that: *there is no law expressly states factors to be considered for grant of leave to appeal to the*

Court. However, the court can grant leave to appeal only where grounds of intended appeal raise arguable issues for the attention of the Court.

I understand that for the application be considered it must raise grounds which have merit for consideration in the precious time of our superior court (see: **Harban Haji Mosi v. Omar Hilal Seif**, Civil Reference No. 19 of 2017 and **British Broadcasting Corporation v. Eric Sikujua Ng'maryo** (supra). In the present application three grounds were registered and one relates to the size of the land occupied by each individual respondent and reply of this court on the subject, that: *it is not in dispute that the ownership was not by the way of grant as the land is owned under customary rites in which case size of the respective parts of lands could not be an issue.* The issue before me is whether this complaint raises serious question which may invite our superior court in judicial hierarchy to schedule off its precious time to determine the matter.

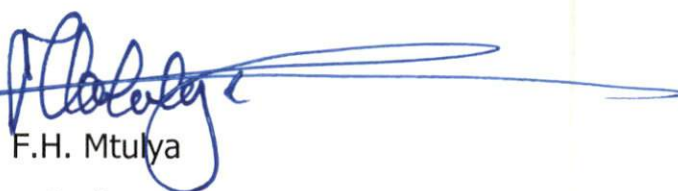
Reading the same dispute, it is obvious that it goes into the interpretation of the law regulating occupation of lands in terms of size and location. I think, in my opinion, the applicants have genuine complaint to be decided by the Court of Appeal. They have raised an issue of importance and important point of law calling for judicial

consideration by the Court of Appeal and I am persuaded to allow investigation be conducted by our superior court, the Court of Appeal, on the subject. I understand Mr. Josephat raised several issues, which go to the merit of the matter. However, the issues will be invited and adjudicated by the Court of Appeal. I advise him to reserve them for such momentous opportunity.

Having said so, and noting the requirement of the law in applications like the present one, I grant leave to the applicants to appeal to the Court of Appeal so that the raised issues may be considered and determined. Cost to follow the event in the appeal.

It is so ordered.




F.H. Mtulya

Judge

22.09.2021

This Ruling is delivered in Chambers under the seal of this court in the presence of Ms. Noelina Bippa, learned counsel for the applicants, and in the absence of the respondents.




F.H. Mtulya

Judge

22.09.2021