IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

MISCELLANEOUS LAND APPLICATION NO. 30 OF 2020

(Arising from the judgment of the High Court of Tanzania at Mtwara in Land Case Appeal No. 19 of 2019. Original Land Application No. 11 of 2019 of Lindi District Land and Housing Tribunal.

THE BOARD OF TRUSTEES OF THE FREE

PENTECOSTAL CHURCH OF TANZANIA.....APPLICANT

VERSUS

ASHA SELEMANI CHAMBANDA.....1ST RESPONDENT

RASHID SELEMANI CHAMBANDA.....2ND RESPONDENT

RULING

14th & 29th September, 2021

DYANSOBERA, J:

The applicant herein is applying for leave to appeal to the Court of Appeal of Tanzania against the decision of this court (Hon. Ngwembe, J.) in Land Appeal No. 19 of 2019 between the same parties. The application is made under Section 47(2) of the Land Disputes Courts Act [Cap.216 R.E.2019], rule 45 (a) of the

Tanzania Court of Appeal Rules, 2009, GN No. 368 of 2009 as amended by the Tanzania Court of Appeal (Amendment) Rules, 2017, GN. No. 362 of 2017 as further amended by the Tanzania Court of Appeal (Amendment) Rules, 2019, GN. No. 344 of 2019.

The Chamber Summons of the applicant is supported by an affidavit sworn by Peter Nyangi, learned Advocate on 28th day of December, 2020. The affidavit is, however, not clear which points the applicant wishes to be determined by the Court of Appeal if leave is granted.

The application was argued by way of written submission.

Supporting the application, Counsel for the applicant Mr. Peter Nyangi at first reviewed the guiding principles for leave to appeal to the Court of Appeal. Citing the cases of **Loyce Butto Shushu Macdougal v. Studi Bakers Tanzania Ltd & Khalid Shaban Mtwangi**, Misc. Land Application No. 392 of 2016 quoted with approval the case of **Gaudensia Mzungu v. the I.D.M Mzumbe**, Civil Application No. 94 of 1999, learned Counsel enumerated the principles to be: if the proceedings as a whole revealed such disturbing features as to require the guidance of the Court of Appeal and whether there are prima facie grounds meriting an appeal to the Court of Appeal.

He then submitted that the question for determination by the Court of Appeal of Tanzania is whether, given the fact that the applicant did not implead/join the Commissioner for Land, the Director of Lands and Survey and the Attorney

General, then it is right to deny them the right to be heard.

According to Mr. Peter Nyangi, the right to be heard is so fundamental to a person irrespective of whether he was supposed to be joined by the applicant or by the respondent. Reliance was placed on Article 13 (6) (a) of the Constitution of the Untied Republic of Tanzania, 1977 as amended from time to time and the case of **Shaibu Salim Hoza v. Helena Mhacha as legal representative of Merina Mhacha (Deceased)**, Civil Appeal No. 7 of 2012, CAT- Dar es Salaam.

In his submission, learned Counsel enumerated nine issues for determination by the Court of Appeal and also asserted that there was a case already declared the applicant has (sic) he lawful owner of the disputed land, thus the Tribunal was not having power to revoke the decision of the High Court as stated in paragraph 15 of the applicant's affidavit. Further that the judgment of the High Court was delivered on 27th day of March, 2015 by Honourable Judge Mzuna, J over the wholly disputed land and the same land Farm No. 31 located at Ruo Village, Kiwalala Ward in Lindi District as evidenced to page 1, paragraph 1 of the Judgment of the trial Tribunal attached in the applicant's affidavit as Annexture "A".

Resisting the application, the respondents maintained that it was the applicant who instituted the suits at both Kiwalala Ward Tribunal (Land Application No. 32 of 2018) and Lindi District Land and Housing Tribunal (Land Application No. 11 of 2019) and, therefore, it was their duty to know who were necessary parties to

the case and that the respondents bore no duty to include necessary party to sue them.

On whether or not the suit could be defeated by the misjoinder or non-joinder of the parties, the respondents pointed out that the general rule on misjoinder or non-joinder of the of the parties to the case as stipulated under rule 9 of Order I of the Civil Procedure Code [Cap. 33 R.E.2019] is that no suit shall be defeated by reason of the misjoinder or non-joinder of parties and the court may in every suit deal with the matter in controversy so far as regards the right and interest of the parties actually before it.

The respondents further submit that the objection on misjoinder or non-joinder has been taken rather too late in a day. They relied on the case of **Ramadhan Kisuda & Ujamaa Village v. Adam Nyalandu, Rajabu Ng'olo, Said Ng'ui and Shaban Said** [1998] to support their argument.

According to the respondents, what should be taken to the Court of Appeal are points of law and not points of facts or evidence.

In his rejoinder, the applicant reiterated what he had submitted in chief.

After the written submissions were in place I, on 28th day of September, 2021, invited the parties to address me on the competence of the present application particularly on the compliance or otherwise, of the legal requirements of sub-rule (3) of rule 49 of the Court of Appeal Rules, 2009.

Addressing on this issue, Mr. Peter Nyangi, learned Counsel for the applicant submitted that rule 45(a) and (b) of the Court of Appeal Rules, 2009.

as revised in 2019 provides for a concurrent jurisdiction of the High Court and the Court of Appeal to hear and determine the application for leave to appeal to the Court of Appeal and further that Rule 48(1) on how to file and application to the Court of Appeal which is by way of Notice of Motion supported by affidavit, a mode which is different from that used in the High Court.

According to learned Counsel, Rule 49 (3) of the Court of Appeal Rules does not apply to the application for leave made to the High Court. In his view, this position is also supported under rule 45 (b) of the Court of Appeal Rules. Mr. Peter Nyangi maintained that rule 49(3) applies only where the application for leave to appeal is made to the court of Appeal and not to the High Court.

It was his further submission that according to rule 3 of the Court of Appeal Rules, the Court means the Court of Appeal of the United Republic of Tanzania established by the Constitution and includes any division of that court and a single judge exercising any power vested in him sitting alone. In support of his argument, learned Advocate cited the case of **Alex Maganga v. Director Msimbazi Centre** [2004] TLR 212.

With that submission, Counsel for the applicant concluded that it is not necessary to attach a copy of the order of the High Court in the application for leave made to the High Court.

The response of the 1st and 2nd respondents who are not lawyers was not of assistance to this court. They admitted that they being lay persons have not understood what Counsel for the applicant has submitted in court.

There is no gainsaying that the applicant, before accessing the Court of Appeal, is enjoined by the law, among other things, to get leave of this court. These are statutory requirements under our law.

The issue for determination is whether it is necessary to attach a copy of the order of the High Court in an application filed before the High Court seeking leave to appeal to the Court of Appeal.

The Tanzania Court of Appeal Rules, G.N. No. 368 of 2009 as amended from time to time, rule 45 (a) of the Rules, in particular, provides two ways on how leave may be obtained by an aggrieved party to the suit. The first way is through informal application when the decision against which it is desired to appeal is given. Through this mode, no attachments are required. Indeed, that is

the gist of the decision of the Court in the case of **Alex Maganga v. Director Msimbazi Centre** cited to me by learned counsel.

The second way is through Chamber Summons and the application must be done in accordance with the practice of the High Court and within thirty days from the decision. The said provisions run as follows:

> "where an appeal lies with the leave of the High Court, application for leave may be made informally, when the decision against which it is desired to appeal is given, or by chamber summons according to the practice of the High Court, within thirty days of the decision".

The applicant has decided to use this second avenue. This means that the cited case of **Alex Maganga v. Director Msimbazi Centre** does not apply in the circumstances of this case. It was, therefore, cited out of context.

Going by the law, sub-rule (3) of rule 49 of the Court of Appeal Rules provides as hereunder:

> "Every application for leave to appeal shall be accompanied by a copy of the decision against which it is desired to appeal and where application has been made to the High Court for leave to appeal by a copy of the order of the High Court"

According to the above provisions, the applicant making an application for leave to appeal to the Court of Appeal need not attach a copy of the decision. This is so because, the High Court already has the record. However, the law is clear that the said applicant must attach the order of the High Court because this is the supporting document.

In the instant application, the record does not show that the applicant attached the order of the High Court as per the law requires. This, the applicant has admitted. The application has, therefore, not met the legal requirement. And is to that extent, incurably defective.

In resume, the application having not been accompanied with a copy of the order of the High court, the same is incompetent before this court.

Consequently, the application is struck out with costs to the respondents.

Order accordingly.

W.P. Dyansobera

Judge

29.9.2021

This ruling is delivered under my hand and the seal of this Court on this 29th day of September, 2021 in the presence of Mr. Peter Nyangi, learned Counsel for the applicant and in the presence of both respondents.

Rights of appeal to the Court of Appeal of Tanzania explained.

W.P. Dyansobera

Judge

29.9.2021