

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(BUKOB DISTRICT REGISTRY)**

**AT BUKOBA**

**MISC. LAND APPLICATION NO. 63 OF 2021**

**DIOCLES KAMUHABWA.....APPLICANT**

**VERSUS**

**THEONEST KAMUHABWA.....RESPONDENT**

**RULING**

**Date of Last Order: 06/10/2021**

**Date of Ruling: 15/10/2021**

**A.E. Mwipopo, J.**

This is an application for leave to appeal to the Court of Appeal against the decision of this Court dated 11<sup>th</sup> June, 2021 in the Land Case Appeal No. 4 of 2020. The Applicant namely Diocles Kamuhabwa filed this application praying for the Court to grant leave to appeal to the Court of Appeal against the above cited decision. The application is made by Chamber Summons supported by Affidavit of Alli Chamani, Advocate of the Applicant. On the other hand, the Respondent namely Theonest Kamuhabwa opposed the application through Counter Affidavit of Eliphazi Bengezi, Respondent's Advocate.

In brief, Mr. Alli Chamani, Advocate who appeared for the Applicant, submitted that in principle leave is granted where the proposed appeal stands reasonable chances of success or where, but not necessary, the proceedings as a whole reveal such disturbing features as to require the guidance of the Court of Appeal of Tanzania (CAT) as it was stated in the case of **British Broadcasting Corporation V. Eric Sikujua Ng'maryo, Civil; Application No. 138 of 2004, CAT at Dar Es Salaam**, (unreported). Also the leave is not granted where application is frivolous, vexatious or useless. In the case of **Jebra Kambole V. A.G., Misc. Civil Cause No. 27 of 2017, High Court, at Dar Es Salaam** main Registry, (unreported) where at page 14 the High Court quoted the case of **Wangai V. Mugambi and Another [2013] 2 EA 474** explained the phrases "*frivolous and vexatious*".

Also, the High Court in the Case of **Joseph Ndyamukama V. NIC Bank and 2 Others, Misc. Land Application No. 10 of 2014, High Court, Mwanza District Registry, at Mwanza** (unreported), at page 3 of the judgment it held that:

*"the function of leave is to sieve appeals and leave desiring ones for the Court of Appeal. In so doing, the court may not look at the merits as this is not within the parlance of the court which made the decision to decide applications on the merits. It is for the Court of*

*Appeal to do so. This court can only look at the application and if it is not vexatious or frivolous then it will allow the application”.*

The Counsel said that their first ground of appeal is whether the application No. 42 of 2016 before the Tribunal was res-Judicata to Karabagaine Primary Court Civil Case No. 8 of 1993 and Bukoba District Court Civil Appeal Case No, 16 of 1995. That, the Trial tribunal in application No. 42 of 2016 held that the suit was not res Judicata because the parties were not the same. But in its decision, this court in Land Case Appeal No. 4 of 2020 held that the suit was res Judicata by relying on the attached documents which were not part of the record of the trial tribunal. He said that annexures attached along with either plaint or written statement of defence are not evidence and he cited in support the case of **Godbless Jonathan Lema V. Musa Hamis Mkenga and 2 Others, Civil Appeal No. 47 of 2012, CAT at Arusha**, (unreported), at page No. 7. He is of the opinion that this court considered extraneous matter in its judgment hence arrived to a wrong decision.

He said the fact that the property involved is one and the same does not necessary render the causes of action identical or convert the matter directly and substantially in issue in the two suits to be the same as it was held in the **Registered Trustees of Chama cha Mapinduzi V. Mohamed Ibrahim Versi Sons and Another, Civil Appeal No. 16 of 2008, CAT, at Zanzibar**,

(unreported) at page 15 and 16. The relief has also to be considered in determining whether the case is res-Judicata. He argued that the parties in the Primary Court case and the parties in the application before the Tribunal were different. Also, the relief were not the same between the two cases. The first matter to be referred to the Court of Appeal is not frivolous or vexatious and it need to be determine by the Court of Appeal.

On the second point to be referred to the Court of Appeal that whether the Bukoba District Court Civil Appeal Case No. 16 of 1995 invested the title to the Respondent after reversing the Karabagaine Primary Court judgment in Civil Case No. 8 of 1993, the Counsel said that the District Court in its decision it reversed the judgment of the Primary Court only. The decision of the District Court did not invest the title of the land in dispute to the Applicant. Also, the Respondent did not pray for the relief to be invested with title as result the District Court did not grant him that relief. In **Maulid Makame Ali V. Kesi Khamis Vuai , Civil Appeal No. 100 of 2004, CAT at Zanzibar**, (unreported), at page No. 5 the court held that generally speaking a court will only grant a relief which has been applied for. The decision of the District Court left the issued of title of the land in dispute hanging. This ground have to be sealed to be determined by the Court of Appeal.

The Applicant's Counsel argued matters to be referred to the Court of Appeal No. 3, 4 and 5 together that the 1<sup>st</sup> appellate court failed to re-asses and re-evaluate the evidence. He said that the first Appellate Court was supposed to re-asses and re-evaluate evidence before the trial court and to find its conclusion as it was held in the case of **Martha Michael Wega V. Ag, [1982] TLR** 35 at page 43. The first appellate did not do its duty properly as result it failed to see who between the Applicant and the Respondent has heavier evidence than the other. He prayed for the court to grant leave for those three matters to be referred to the Court of Appeal for determination.

In response, Mr. Eliphazi Bengesi, Advocate who represent the Respondent, submitted that the Applicant has no legal matter or issue which he is praying to be granted leave to appeal to the Court of Appeal. All the cases cited by the Applicant are distinguished to the present case save only for the case of **Reniel Lotta V. Gabriel Tanaka and Others [2003] T.L.R.** 312. He said that the Applicant's intended appeal to the Court of Appeal is frivolous and vexatious as the land in dispute is owned by the Respondent not by the Applicant. The Primary Court decision was reversed by the District Court which makes the status quo to remain as it was before the Case was instituted in the Primary Court. The land in dispute is in the hands of the Respondent. The Applicant has tried to reverse the status quo several times and ended to withdraw them. It is true that the District

Court did not give the title to the parties but it maintained the status quo. The matter has already been executed by this court.

The Respondent's Counsel said on the 3<sup>rd</sup> matter to be referred to the Court of Appeal that the same is frivolous and vexatious since this court properly assessed and evaluated the evidence in record and it arrived to the right decision.

In his rejoinder, Mr. Chamani said that in application for leave there is no duty to have point of Law. Both point of law and fact may be appealed to the Court of Appeal from the decision which originated from the District Land and Housing Tribunal. That the Respondent did not dispute that there are contentious matters to be referred to the Court of Appeal.

Having gone through affidavits, parties' submissions and the evidence available in records, the issue for determination is whether the application for leave to appeal to the Court of Appeal has merits.

It is a settled law that the Court has discretion to grant or refuse application for leave. The leave is granted where the Applicant has provided good reason. In **Rutagatina C.L. V. The Advocates Committee and Another**, Civil Application No. 98 of 2010, Court of Appeal of Tanzania, at Dar Es Salaam, (Unreported), the Court held that:-

*"An application for leave is usually granted if there is good reason, normally on appoint of law or a point of public importance that calls for Court's intervention."*

As a 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. Leave will not be granted where the grounds of appeal are frivolous, vexatious or useless or hypothetical as it was held by the Court of Appeal in the cited case of **British Broadcasting Corporation (BBC) V. Eric Sikujua Ngamaryo**, (Supra).

In the present application, the Applicant attached in his affidavit a total of 5 matters to be referred to the Court of Appeal. But, in his submission he argued on three matters to be referred to the Court of Appeal after jointly submitted on 3 matters to be referred regarding the evaluation of the evidence by the 1<sup>st</sup> Appellate Court. The said points to be referred to the Court of Appeal submitted by the Applicant are as follows hereunder:-

- 1. Whether the application No. 42 of 2016 before the Tribunal was res-Judicata to Karabagaine Primary Court Civil Case No. 8 of 1993 and Bukoba District Court Civil Appeal Case No, 16 of 1995.*

2. *Whether the Bukoba District Court Civil Appeal Case No. 16 of 1995 invested the title to the Respondent after reversing the Karabagaine Primary Court judgment in Civil Case No. 8 of 1993.*
3. *The 1<sup>st</sup> appellate court failed to re-asses and re-evaluate the evidence.*

The above mentioned points to be referred to the Court of Appeal appears to be arguable. Also, it cannot be said that the points are frivolous, vexatious or useless as it was argued by the Counsel for the Respondent. These points raises issues of law and facts which need to be determined by the Court of Appeal as the Applicant explained in his submission.

For that reason, the application is allowed. The leave to appeal to the Court of appeal is granted as sought.



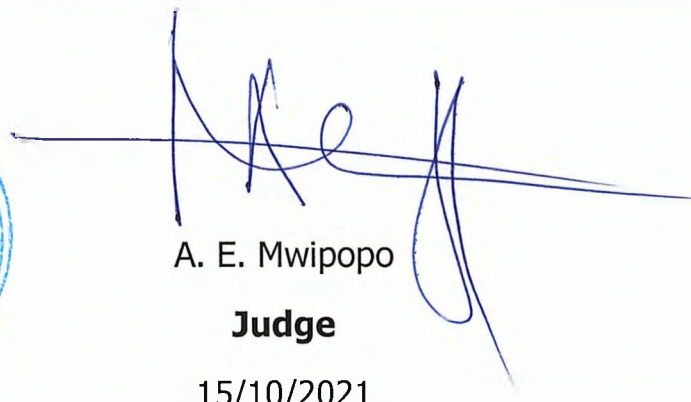
A. E. Mwipopo

**Judge**

15/10/2021



**Court:** The Ruling was delivered today this 15.10.2021 in chamber under the seal of this court in the presence of the Applicant and the Respondent. Right of Appeal explained.



A. E. Mwipopo  
**Judge**  
15/10/2021