IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KIGOMA

(APPELLATE JURISDICTION)

LAND DIVISION

MISC. LAND APPLICATION NO. 31 OF 2021

(Arising from the Land Appeal No. 4 of 2021 of the High Court at Kigoma and originating from Land Application No. 41 of 2016 of the District Land and Housing Tribunal for Kigoma)

INNOCENT BISUSA..... APPLICANT

VERSUS

RAJABU RASHID MGOZI.....RESPONDENT

R U L I N G

17th Sep.& 26th October, 2021

A. MATUMA, J.

The Applicant herein Innocent Bisusa is seeking leave to appeal to the court of Appeal of Tanzania against the judgment of this court (Mugeta,J) in Land Appeal No. 4 of 2021.

Before embarking into the grounds upon which leave is sought in this application, let me demonstrate briefly the facts leading to this application.

The parties herein are relatives whose fathers (parents) owned adjacent lands within Heru juu village in Kasulu District. The parties were living with their parents when they were both minors until when they were shifted from that area during operation vijiji.

The respondent during trial testified that despite the relocation during operation vijiji, the owners of shambas at Heru juu continued to cultivate in their respective shambas as their relocation was just to go and start or establish a new village but their shambas were not reallocated to any person. Therefore, they continued to own their shambas, cultivate them until when his father died and he inherited customarily that shamba measuring five acres.

On the other hand, the applicant maintained that after the reallocation of the respondent's father from the dispute area/shamba, he was personally reallocated that shamba by the village authority.

It is upon this claim of ownership he successfully sued the respondent in the District Land and Housing Tribunal for Kigoma.

The Respondent successfully appealed in this court which declared him lawful owner having observed that there was no sufficient evidence to the effect that there was any re-allocation of the dispute shamba to the applicant during operation vijiji.

The Applicant is aggrieved with such finding and intends to appeal to the court of appeal of Tanzania upon which leave is sought as the law requires.

The Applicant is advancing two grounds which he considers worth to the determined by the court of Appeal, and thus leave be granted. These are;

i. *Whether, pursuant to the Respondent's own evidence on record of the trial District Land and Housing Tribunal that the Respondent and his parents had shifted to Kasulu from the suit land during the "Operation vijiji" the Respondent could then legally retain the claimed ownership of the shifted suit land pursuant to Regulation of Land Tenure (Established Villages) Act, 1992.*

ii. *Whether, on account of the evidence on record, the decision of this Honourable Court that the Respondent's evidence was more credible than the evidence I adduced regarding the re-allocation of the Suitland to me by Heru juu village after the same had been abandoned by the Respondent is legally justifiable.*

At the hearing of this application both parties were present in person.

The applicant was also represented by Mr. Method Kabuguzi learned advocate.

Mr. Kabuguzi learned advocate submitting on these grounds for the purposes of obtaining leave, argued that according to the law named in the first ground and the case of ***Simon Gulanwa versus Zimbwe Milembe, PC Civil Appeal No. 59 of 2000,*** (HC) at Tabora, it is improper for the land re-allocated during operation Vijiji to be reclaimed

back or restored to its previous owners. In that regard the court of Appeal should be availed opportunity to determine the decision of this court which had effect of restoration of the land to its previous owner after it was re-allocated to another person.

He further argued that in the circumstances of the law (supra), the evidence of the Respondent could have not been regarded as heavier, credible and reliable than that of the applicant. Therefore, leave be granted so that the Applicant appeals to the court of Appeal to put things clear and on order.

Responding to the submission of the learned advocate, the Respondent submitted that during operation vijiji both families, that of his and that of the Applicant shifted from their respective lands to start a new village but they each continued to own and cultivate their respective shambas (mahame). That there was no re-allocation of their land to any other person.

He further submitted that after the death of their respective fathers he inherited from his father the dispute land while the Applicant who is his paternal uncle (baba mdogo) inherited that of his father (the respondent's grandfather).

He thus called this court to refuse granting leave because the issue was that there was no evidence of the alleged re-allocation;

'Tulihamishwa kwenda kutengeneza vijiji tu na wala hakuna mtu aliyenyang'anywa sehemu yake. Kila mtu aliendelea kutumia sehemu yake'.

Having heard the parties, I find that this application has been brought without any sufficient cause.

This is because the grounds upon which leave is sought are trying to establish that a person's land re-allocated during operation vijiji seized to be owned by its previous owner. The applicant is seeking leave for the court of Appeal to determine as such.

In my view that is not a question of law to be determined by the court of Appeal in this matter because it is the law already in place nor this court in the impugned judgment contravened such law.

As rightly argued by Mr. Kabuguzi learned advocate, the Regulation of Lang Tenure (Established Villages) Act,1992 provides clear under regulation 3 (1) that the rights to occupy or use land which was owned prior to operation vijiji was extinguished.

But for such right to be extinguished, it must be established that the land in question was re- allocated to another person. That is in accordance to the village Land Act which provides under section 15 (1);

*'**An allocation of land made to a person** or group of persons residing in or required to move to and reside **in a village at any time between first day of January, 1970***

and thirty first day of December, 1977, *whether made under and in pursuance of a law or contrary to or in disregard of any law,* ***is hereby confirmed to be and to have been a valid allocation*** *capable of and in law giving rise to rights and obligations in the party to whom the allocation was made* ***and extinguishing any rights and obligations vested in any person under any law which may have existed in that land prior to that allocation'.***

In the circumstances, the law is settled on the rights and obligations on land allocated and or re-allocated during operation vijiji. That needs not to disturb the court of Appeal to repeat stating as such unless any court below it has adjudged to the contrary thereof.

In the instant case, the impugned judgment with its nine pages did not even in a single line or word rule out that such re-allocations or allocations during operation vijiji was unlawful. It adjudged that there was no evidence of the alleged re-allocation to the Applicant by the village Authority. The honourable judge had two reasons to such holding;

First, that the Applicant had evidence contradicting his own pleading (The Application/Plaint). This was because in his pleading he had pleaded that he inherited the suit shamba from his late father one Nsabha Bisusa who was also given it by Heru juu Village council but during trial he testified that he was personally allocated such Suitland in 1974 by the village Authority in 1974 during operation vijiji.

This court found that by that time the Applicant was a minor (16 years old) and could have not been allocated land by the village land Authority.

The court further found that the Applicant had no any supporting evidence of the alleged re-allocation.

Two, that the respondent's evidence was heavier, credible and reliable for he had independent corroborative evidence from his neighbours including Elisha Mhogoza Bakungu (80 years old) who testified to own land adjacent to the Suitland and testified that despite of their shift therefrom during operation vijiji they continued to own their lands. The determination of the dispute between the parties was thus on the strength or otherwise of the evidence between the parties whether or not there was a **re-allocation** of the Suitland during operation vijiji. It was not a question of law whether or not it was lawful to re-allocate the land owned by another during operation vijiji.

In the advanced grounds; the Applicant is not challenging the determination of this court on the evidence on record particularly whether or not there was any reallocation of the suitland during Operation Vijiji, rather he is raising legal issue which was not subject to determination by this Court in the impugned judgment.

Even during the hearing of this Application Mr. Kabuguzi conceded that his client was a minor during operation vijiji and that it was his father who

was allocated the land in dispute whereas the Applicant inherited it from him. In that respect he conceded that the Applicant was not allocated the suitland as he was a minor just like it was found by this court. The Applicant did not give evidence on record that his late father was the one who was allocated the suitland and he inherited it from him. That was only reflected in his pleadings. It is from that basis, my learned bother, Justice Mugeta found that the Applicant contradicted his own pleadings. There is therefore, no material evidence wrongly adjudged by this Court worth to be considered by the Court of Appeal.

Therefore, it is not a question of the law but of facts and evidence which have been conclusively determined and undisputed by the parties.

The re-allocation or allocation of the Suitland was the subject matter and it is settled both during the hearing of the appeal and in this application that the Applicant was not allocated the Suitland by the village council during operation vijiji for he was a minor. He who is alleged to have been allocated was his father and the Applicant inherited from him. On record there is no evidence that the Applicant's father was allocated such land as I have reflected herein above. Even the Applicant himself did not give such evidence. Only his pleadings stated as such without any evidence.

So long us there is no express evidence to the re-allocation which was ignored by this court and provided that the legal question to the validity

of the re-allocations of land during operation vijiji was not a matter subject to discussion and determination by this court in the impugned judgment, leave to appeal to the court of Appeal is uncalled for.

In the case of ***British Broadcasting Corporation versus Erick Sikujua Ng'amaryo, Civil Application No. 138 of 2004 (CAT),*** it was held that leave to appeal is granted at the discretion of the court **upon being satisfied that the grounds of appeal upon which leave is sought raises issues of general importance or noval point of law or where the grounds show prima facie or arguable appeal.**

In the instant matter the two grounds do not in any manner raise any issue of general importance or an arguable appeal in the court of Appeal. Allowing this application would be subjecting the court of Appeal into an academic exercise for determination of a legal issue on the validity of re-allocation of land during operation vijiji which is in fact undisputed by either party, nor it was adjudged by this court contrary to the law itself.

On the other hand, allowing this application would cause the Applicant to manufacture further grounds of appeal upon whose leave has not been sought for, particularly on whether there was sufficient evidence on record but ignored by this court; for the re-allocation of the Suitland either to the Applicant or to his father.

In the case of ***Yunus Seif Kaduguda (Administrator of the late Seif Kaduguda) versus Razak Seif Kaduguda and Another, Misc. Land Application No. 27 of 2020*** High Court at Kigoma I had time to observe and rule out that;

> *'Contentious legal issues to be brought to the attention of the court of Appeal are only those which in one way or another affected substantive rights of the parties'.*

In the instant matter validity or otherwise of the re-allocation of land during operation vijiji did not affect the rights of either party because it was not a contentious matter in the impugned judgment.

Bringing this issue to the court of Appeal would be nothing but to call it into an academic exercise, the exercise of which the court itself refused in the case of ***Gobanya F. Hezwa versus The Commissioner General Tanzania Revenue Authority, Criminal Appeal No. 26 of 2011.***

In the case of Yunus Seif Kaduguda (supra), I also held;

> *'When leave to appeal is sought on grounds which even if are found in favour of the intended appellant by the court of Appeal would by themselves not change the substantive decision of the lower court on the substantive rights of the parties, such application for leave must fail in its entirety'.*

In the instant matter, even if the court of Appeal would determine that it is bad in law for one to reclaim back his previous land which has already

been re-allocated to another person during operation vijiji, such determination would not change the substantive rights of the parties because the issue of "re-allocation" which was conclusively determined to the effect that there was no evidence to that effect is not further in dispute by the parties as I have stated earlier that this court found that the Applicant contradicted his own pleading on how he became to own the Suitland, and before me through his advocate he has conceded to have not allocated the Suitland but his late father but again there was no evidence to that effect which was ignored by this court.

In that respect, upon which ground herein would the court of Appeal go further to determine whether or not there was a re-allocation. There is none.

In the absence of the evidence of re-allocation of lands during operation vijiji, the Land Tenure (Established Villages) Act, 1992 under rule 3 (2) (b), it is well settled that the land which was not re-allocated or established as a result of operation vijiji, the rights of owners thereof to occupy or use it was not extinguished by merely because there was operation vijiji. The same provides;

> *'For the avoidance of doubt the extinction of rights under subsection (1) of this section shall not effect:-*
>
> *(a) Not relevant*

(b) Any right to use or to occupy any land in accordance with any custom or rule of customary law existing in village which was not established as a result of operation vijiji'.

In the instant matter there is no evidence that there was reallocation of land in that village during operation vijiji nor that the same was established as a result of operation vijiji.

Therefore, the rights of villagers thereon to use or occupy land was not extinguished and it would serve no useful purpose to allow this application. I accordingly dismiss it with cost.

It is so ordered.

A. MATUMA

JUDGE

26/10/2021

Court: Ruling delivered this 26th day of October, 2021 in the presence of the Applicant in person and his advocate Mr. Method R.G. Kabuguzi and in the presence of the Respondent in person.

Sgd: A. MATUMA

JUDGE

26/10/2021