IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA DISTRICT REGISTRY

AT BUKOBA

MISC. LAND APPLICATION NO. 28 0F 2021

(Arising from Land Case Appeal No. 5 of 2019)

FRANKLIN FRANCIS KASHAIJA ..... 1ST APPLICANT

AMANI KYONABOINE MILANGA.....2ND APPLICANT

HASSAN RAMADHANI MILANGA.....3RD APPLICANT

VERSUS

YUSUPH KASHAIJA (Administrator of the estate of the late Francis Joseph Kashaija) ..... RESPONDENT

RULING

24/08/2021 & 05/10 /2021

NGIGWANA, J

This is an application for leave to appeal to the Court of Appeal. It is made under section 47 (1) of the Land Disputes Courts Act Cap 216 R: E 2019 The applicant is asking this court to grant leave to appeal to the Court of Appeal against the order of this court in Land Case Appeal No.5 of 2019 which was delivered on 25/02/2021 (Hon. Mtulya, J.) This

application is supported by the affidavit drawn, sworn and filed by A.K. Nasimire, learned advocate. The application is opposed by the respondent. A brief background of this matter is to the effect that, the respondent (Applicant before the DLHT) who is the administrator of the estate of the late Francis Joseph Kashaija filed Land case No.20 of 2018 before the District Land and Housing Tribunal for Muleba at Muleba against the respondents for encroachment of the disputed land situated at Kagabiro Village within Muleba District whose value is estimated to be TZS 85,000,000/= Upon being served with the complaint, the respondents (Now applicants) filed the Joint Written Statement of Defense and notice of preliminary objections on point of law; **one, that** the application is res-judicata and, **two**, that the application is an abuse of court process. The objections were argued by way of written submissions. At the end, both preliminary objections were overruled and dismissed for want of merit.

The applicants were aggrieved by the decision of the DLHT hence appealed to this court, vide Land Case Appeal No.5 of 2019. This court, upon perusal of the record found that the complaint registered before it was the interlocutory order, hence proceeded to strike the appeal with

costs for want of competence. The court further ordered that the case file be remitted to the trial tribunal to proceed from where it has ended.

The respondents who are the applicants in this application were dissatisfied by the said decision, hence lodged this application seeking for leave to appeal to the Court of Appeal of Tanzania to impugn the same

When the application was called on for hearing, the applicant had the services of Mr. Mathias Rweyemamu, learned advocate while the respondent appeared in person and unrepresented.

In support of the application, Mr. Rweyemamu submitted that Land case No.20 of 2018 is res-judicata to Land case No.8 of 2012.He added that the order of this court is tainted with illegality which require the intervention of the Court of Appeal. He made reference to the case of **Stanbic Bank Tanzania Ltd versus Kagera Sugar Ltd**, Civil Application No.57 of 2007

On his side the respondent stated that this application has no merit hence urged the court to dismiss it with costs

In brief rejoinder, Mr. Rweyemamu urged the court to grant the application for the interest of justice

Having heard the submissions for and against the application, I will determine whether the application is meritorious.

It is trite that in application proceedings the affidavits constitute not only the pleadings but also the evidence. Equally straight that the applicant must make out his case in his founding affidavit and that he must stand or fall by the allegations contained therein. It follows therefore that the applicant must set out sufficient facts in his founding affidavit which will entitle him to the relief sought. Again, the applicant should not be permitted to raise a case in reply where no case at all was made out in the founding affidavit. See the case of **Business Partners Ltd versus World Focus 754** CC 2015 (5) SA 525 (KZD)

The founding affidavit in this application was drawn, sworn and filed by Anthony Karaba Nasmire, leaned advocate. The same has five paragraphs, and for easy reference I would like to reproduce them;

1. *That I am an advocate of the High Court of Tanzania and Courts subordinate thereto.*

2. *That I have the conduct of this application.*

3. That on 25th day February 2021 this Honorable Court struck out the above-mentioned appeal and ordered application No.20 of 2018 before the Muleba District Land and Housing Tribunal to be remitted to the said Tribunal and proceed where it ended. (A copy of the said order is appended hereto and marked as annexture "A"

4.That the applicants herein having been aggrieved by the said order have filed a notice of appeal and made an application to be supplied with certified copies of the proceedings, ruling and drawn order for appeal purposes.

5. That I swear and state that since the matter before the District Land and Housing Tribunal for Muleba at Muleba was res-judicata, there was no justification for striking out the above-mentioned appeal

Reading this founding affidavit between lines, it is very easy to note that applicant has not set out sufficient facts which will entitle him to the relief sought.

Moreover, this application was brought under section 47 (1) of the Land Disputes Courts Act Cap 216 R: E 2019 which provides that; -

"A person who is aggrieved by ***the decision of the High Court in the exercise of its original jurisdiction may appeal to the Court of Appeal in accordance with the provisions of the Appellate Jurisdiction Act"***

However, it is apparent that the applicant was aggrieved by the decision/order of this court issued on 25/02/2021 in Land Appeal No.5 of 2019 while exercising its appellate jurisdiction therefore, the here in above provision was wrongly cited.

The proper provisions were section 47 (2) of the Lands Disputes Act Cap 216 R: E 2019 and Section 5 (1) (c) of the Appellate Jurisdiction Cap 141 R: E 2019

Section 47 (2) of the Land Disputes Courts Act Cap 216 R: E 2019 provides;

"A person who is aggrieved by the ***decision of the High Court in the exercise of its*** *revisional or* ***appellate jurisdiction may, with leave of the High Court or Court of Appeal, appeal to the Court of Appeal"***

Section 5 (1) (c) of the Appellate Jurisdiction Cap 141 R: E 2019 provides that;

"In civil proceedings, except where any other written law for the time being in force provides otherwise, ***an appeal shall lie to the Court of Appeal with the leave of the High Court or of the Court of Appeal, against every other decree, order, judgment, decision or finding of the High Court'***

This court is alive of the current position of law that with the advent of the Principle of Overriding Objective, wrong and /or no-citation of any specific provision of the law is curable so far as the jurisdiction of the court to entertain the matter has not been ousted. On account of that reason, I will proceed to determine the application on merit.

The appeal to the Court of Appeal is not automatic. It is within the discretion of the Court to grant or refuse leave. However, such discretion must be exercised judiciously.

In the case of **Ramadhani Mnyanga versus Abdala Selehe** [1996] it was held that

"For leave to be granted, the application must demonstrate that there are serious and contentious issues of law or fact fit for consideration of appeal"

Furthermore, in the case of **British Broadcasting Corporation versus Erick Sikujua Ng'amaryo,** Civil Application No.133 of 2004 which at page 7 the Court of Appeal quoted the holding in the case of **Harban Haji Mosi and Another versus Omar Hilal and another**, Civil reference No.19 of 1997 (Unreported) where it was held that:

"Leave is granted where the proposed appeal stands reasonable chances of success or where but not necessarily, the proceedings as a whole reveal such disturbing features as require the guidance of the Court of Appeal. The purpose of the provision is, therefore, to spare the Court the specter of unmeriting matters and to enable it to give adequate attention to cases of true public importance."

From the above authorities, we can learn that there are conditions to be met for the grant of leave to appeal to the Court of Appeal, amongst them being that; the appeal would have reasonable prospect of success, there are compelling reasons why the appeal should be heard, including conflicting judgments on the matter under consideration, the decision

sought to be appealed did not dispose of all the issues in the case, the proceedings as a whole reveal disturbing features requiring the Court of Appeal intervention and provision of guidance, there is point of law or point of public importance detected from the appealed decision and that there are arguable issues fit for the consideration of the Court of Appeal.

At this juncture, I would like to state very clearly that I have no mandate to go into the merits or deficiencies of the order of the Hon. Judge because this is not the Court of Appeal. All what I am duty bound to do is to consider whether there is real prospect of success, or arguable issues or compelling reasons, or disturbing features, or point of law or point of public importance requiring the court of appeal intervention.

I have carefully gone through the proceedings of this court as a whole to see whether the same reveal disturbing features requiring the Court of Appeal intervention and provision of guidance but found no disturbing features.

It is trite law that a decision or order of interlocutory nature is not appealable unless it has the effect of final determining of the suit. Section 74(2) of the Civil Procedure Code Cap 33 R: E 2019 provides;

"Notwithstanding the provisions of subsection (1), and subject to subsection (3), no appeal shall lie against or be made in respect of any preliminary or interlocutory decision or order of the District Court, Resident Magistrate's Court or any other tribunal, ***unless such decision or order has effect of finally determining the suit."***
(Emphasize supplied)

It can be learned from this provision that generally, any decision made by a court while a case is still pending or before the court enters a final judgment is an interlocutory decision therefore not appealable unless it disposes of the rights of the parties.

The test for determining whether the order/decision is interlocutory or not is whether the decision or order made, finally dispose of the rights of the parties? If it does, then it ought to be treated as final order, if does not, it will be treated as an interlocutory order. See the case of **Vodacom Tanzania Public Ltd Co. versus Planetel Communications Ltd**, Civil Appeal No.43 of 2018 and **Bozson versus Artincham Urban District Council [1903]1KB547 Cited in the case of Peter Noel Kingamkono**

versus Tropical Pesticides Research, Civil Application No.2 of 2009(Unreported)

In Land case Appeal No.5 of 2019, this court (Mulya, J) found the ruling sought to be challenged was an interlocutory in nature for obvious reason that it had no effect of finally determining the dispute between the parties. It is trite law that the order which is an interlocutory in nature is not appealable. This was emphasized by the Court of Appeal in the case of Stanbic **Tanzania Ltd** (supra) referred to this court by the applicants' advocate Mr.Rweyemamu.

In this application the applicant is bound by Paragraphs 1- 5 of affidavit sworn by A K. Nasmire, learned advocate. From the same, and submission made by the applicant's counsel, I find nothing contentious neither legal nor factual exhibited that is worthy of consideration by the Court of Appeal.

Consequently, the application is hereby dismissed with costs.

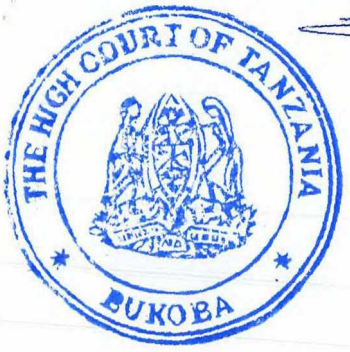
E. L. NGIGWANA

JUDGE

05/10/2021

THE HIGH COURT OF TANZANIA
BUKOBA

Ruling delivered this 5th day of October 2021 in the presence of the 1st & 3rd applicants, respondent in person, Mr. E.M. Kamaleki, Judges' Law Assistant and Mr. Gosbert Rugaika-B/C but in the absence of the 2nd applicant.



E. L. NGIGWANA

JUDGE

05/10/2021