

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF SONGEA

AT SONGEA

MISCELENEOUS LAND CASE APPLICATION NO.08 OF 2021

(Arising from Land case Appeal No. 11 of 2008)

CHRISTIAN HAULE APPLICANT

Versus

**MARIANUS MSELEWA (AS ADMINISTRATOR OF
THE ESTATE OF OCTAVIAN MSELEWA) RESPONDENT**

RULING

Date of Last Order: 19/10/2021.

Date of Judgment: 02/11/2021.

BEFORE: S.C. MOSHI, J.

The application has two limbs, firstly it is for prayers for an order granting leave to the applicant which will enable him to appeal to the Court of Appeal against the judgment of the High Court in Land Appeal case No. 11 of 2008, and secondly it is for an order certifying that there is a point of law involved in the appeal. The application is made under section 5(1) (c) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019 and section 47 (2) (3) of the Land Dispute Courts Act, Cap. 216 R.E. 2019. The application is supported by an affidavit deposed by Edson Mbogoro (the applicant's advocate). The respondent resisted the application; hence he filed a counter affidavit to that effect.

During hearing of the application, the applicant was represented by Mr. Edson Mbogoro learned advocate whereas the respondent appeared in person.

Mr. Mbogoro submitted among other things that, section 47(2) of the Land Disputes Courts Act, Cap. 216 requires a person who is aggrieved by the decision of the High Court in exercised of its revisional or appellate jurisdiction to obtain leave of the High Court or Court of Appeal which will enable him to appeal to the Court of Appeal. He said that, granting or refusing to grant leave to appeal to the Court of Appeal is upon the discretion of the court. However, in exercising such discretion there is a threshold set by the Court of Appeal in the case of **Jireys Nestory Mutalemwa Vs. Ngorongoro** Conservation Area Authority, Civil Application no. 154 of 2016 Court of Appeal sitting at Arusha (Unreported), and **British Broadcasting Corporation Vs. Eric Sikujua Ng'maryo**, Civil Application No. 138 of 2004 (Unreported) where it was held that:-

"As a matter of general principle, leave to appeal will be granted where the intended grounds of appeal raise issues of general importance or a novel point of law where the grounds show prima facie or arguable appeal."

He said that, the intended appeal for which leave is being sought meet the conditions to appeal to the Court of Appeal as set in **Erick Sikujua Ng'maryo** case and is vivid in submission on the second prayer that this court be pleased to grant a certificate that there is a point of law involved in the intended appeal.

He argued that section 47(3) of the Land Courts Act Cap. 216 R.E 2019 states that, where an appeal to the Court of Appeal originates from the Ward Tribunal, the appellant is required to seek for certificate from the High Court certifying that there is a point of law involved in the appeal. He said that, paragraph nine of the applicant's affidavit listed two points to be considered by the Court of Appeal hence warranting the grant of certificate that there is a point of law involved in the intended appeal.

He argued that, the first point of law is whether after being codified and becoming a constituent part of the local customary law declaration no. 4 GN 279 of 1963, Ngoni customary law is still separately in existence and applicable. He said that in allowing the respondent's appeal in Land case No. 11 of 2008 (annexture CH1) this court relied heavily on Ngoni Customary law which is to the effect that a descendant from the maternal side like the applicant cannot inherit clan land. It was his submission that customary law perse ceased to exist since 1963

when it was codified, subsumed and became a constituent part of the local customary order (declaration) order G.N 279 of 1963 from then it became a subsidiary law known as the law of persons, its Parent Act being the Judicature and Application of laws Acts Cap. 358 R.E 2019. He said that, under it, there are customary law declaration orders, relevant being order four Rule two which provides thus: -

"The declarations set out in the first, second and third schedule to this order are hereby directed to be the local customary law in respect of the subjects contained therein in the areas subject to the jurisdiction of the Chunya, Dodoma, Kasulu, Kibondo, Kigoma, Kondoa, Manyoni, Maswa, Mbeya, Mtwara, Ngara, Njombe, Shinyanga, Singida, Songea , Ufipa, Ukerewe, and Pangani District councils."

He said that, in 2008 when the judgement was delivered, the court was supposed to apply Local Customary Declaration Order GN. 279 of 1963 and not Ngoni Customary law which was non-existence. He said that, the suit land giving rise to the intended appeal is situated at Mgazini village, Kilagano Ward within Songea District; hence it is covered under the said local customary law declaration order. Thus, the intended appeal involves a point of law which deserves the attention and consideration of the Court of Appeal.

On the second point of law, he said that, the applicant in reply to respondents appeal in this court relied on long prescription on the suit land, that he was born there, he grew there while the suit land was being cultivated by his late father and which was in turn bequeathed to him. In this regard he cited the case of **Joseph Mwakamola vs. Fubile Mwakatoga** LCCA (1966) reported at page 550 of a book, Customary Land Law of Tanzania a source book by R.W James and G.M Fimbo. He said therefore that, the Court of Appeal will be invited to consider whether the High Court was correct in disregarding the said principle of the law. He also said that, factors to consider in granting or refusing to grant certificate that there is a point of law involved in the appeal were discussed in the case of **Yakobo Magoiga Gichere vs. Penina Yusuph**, Civil Appeal No. 55 of 2017 Court of Appeal sitting at Mwanza (unreported).

In reply the respondent stated that there is nowhere in the decision of the Land Appeal No. 11 of 2008 where this court heavily relied on Ngoni Customary Law to the extent that needs the attention of the court of Appeal. He said that the case of **Joseph Mwakamola vs. Fubile Mwakatoga** (supra) cited by the appellant over the long prescription on the suit land is irrelevant and should not be considered and given any weight by this court as the suit land at all time was in

possession of the respondent until 2008 when the applicant interfered and claimed to be his land. He argued that the respondent never presented evidence in court proving his long persistence of ownership of the suit land over years to the extent that the applicant be granted it under adverse possession.

He said that the case of **Yakobo Magoiga Gichere** (supra) still emphasize on the requirement of the law that the High Court has to certify over land matter originating from Ward Tribunal that there is a point of law involved which need to be determined by the Court of Appeal.

He ended by stating that the application should not be granted as it increases hardship and costs to the respondent who all the time has been suffering the consequences of unnecessary delays for reasons best known to the applicant himself.

I have considered the relevant laws, the record and submissions. The issue to be determined is whether the applicant has advanced points worthy to be considered by the Court of Appeal and which constitutes a point of law which may be determined by Court of Appeal. In **Gaudensia Mzungu Vs the I.D.M Mzumbe**, Civil Application No. 94 of 1999 Court of Appeal (Unreported), the court held among other things that,

".....leave is not grantable because there is an arguable appeal. There is always an arguable appeal. What is crucially important is whether there is a prima facie ground meriting an appeal to this court".

Similarly, in the case of **British Broadcasting Corporation Vs Erick Sikujua Ng'maryo**, Civil Application No. 138 of 2004 (Unreported), it was held thus: -

"Leave is grantable where the proposed appeal stands reasonable chances of success or where but not necessarily, the proceedings as a whole revealed such disturbing features as to 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 enable it to give adequate attention to cases of true public importance.

I am of the view that two points contained in paragraph 9(i) and (ii) of the affidavit do suffice, I grant leave to the applicant for appealing to Court of Appeal, and I do certify that there are points of law to be determined by the Court of Appeal, they read thus: -

(i). Whether after being codified and becoming a constituent part of the Local Customary Law

Declaration No. 04 GN 279 of 1963 Ngoni Customary law is still separately in existence and applicable.


(ii) Whether long prescription on land by the applicant of almost fifty years did not have adverse effects in law on claim of ownership by the respondent.


Wherefore the Application is granted.

Each party to bear its own costs.

It is so ordered

Right of Appeal Explained.




S.C. MOSHI
JUDGE
02/11/2021