

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
BUKOBA DISTRICT REGISTRY
AT BUKOBA

MISC. LAND APPLICATION NO. 66 OF 2021

(Arising from Misc. Land Appeal No. 5 of 2020 of the High court of Tanzania, Bukoba District Registry, Misc. Land Case Appeal No. 13 of 2015 in the High Court, Land Application No. 67 of 2018 and originating from the Application No. 45 of 2014 of the District Land and Housing Tribunal).

FREDRICK FELICIAN APPLICANT

VERSUS

GELARDINA BENEDICTO RESPONDENT

RULING

22/10/ 2021 & 03/12 /2021

NGIGWANA, J.

The applicant is seeking a grant of leave to appeal to the Court of Appeal of Tanzania (CAT) against the decision of this court handed down on 11th day of June, 2021 in Misc. Land application No. 5 of 2020. The application is lodged by way of chamber summons made under the provisions of section 47 (2) of the Land Disputes Courts Act Cap. 216 R: E 2019 the same is supported by an affidavit deposed by the applicant Fredrick Felician.

Briefly, the relevant facts leading to the present application are that; the applicant alleged that his father purchased a piece of land on his behalf at Ibwera in 1979. That, following the death of applicant's father, the said land remained under care of the respondent, and upon attaining maturity age, the applicant asked the respondent to handover the said land to him but in vain. That, the applicant successfully sued the respondent at the District Land and

Housing tribunal (DLHT) for Kagera at Bukoba, Land Application No. 45 of 2014 claiming ownership of the said land. Aggrieved by the decision of the DLHT, the respondent **Geraldina Benedicto**, after being granted leave to lodge appeal out of time vide Misc. Application No. 13 of 2015, successfully appealed to this court vide Misc. Land Appeal No. 5 of 2020. The respondent was declared the lawful owner of the suit land. It was further ordered that, applicant Fredrick Felician should vacate from the said land as soon as practicable.

Dissatisfied by the said decision, the applicant lodged the present application seeking for leave to appeal to the Court of Appeal of Tanzania to impugn the judgment of this court. The notice of appeal to the Court of Appeal was lodged on 11/06/2021.

When the matter was called on for hearing, the applicant had the legal services of Ms. Erieth Barnabas, learned advocate while the respondent had the legal services of Mr. Gerase Reuben, learned advocate.

The respondent opposed the application as reflected in paragraph four (4) of the counter affidavit to the effect that there is no strong point that needs the intervention of the Court of Appeal of Tanzania as the same was legally made by the High Court after finding that the tribunal's decision would by no means be capable of being maintained.

In support of the application, Ms. Erieth Barnabas submitted that it is a requirement of the law that before stepping to the Court of Appeal and before lodging an appeal to the Court of Appeal of Tanzania, leave must be sought

and obtained. Ms. Erieth made reference to the case of **Lalawino versus Kariam District Counsel and Application No. 132/02/2018** (CAT) (unreported) where the Court insisted that 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.

Barnabas further relied on paragraph 4 of the applicant's affidavit that the leave sought seeks for intervention of the Court of Appeal over the interpretation of the law where the proceedings and judgment are quashed and set aside, whether the court could proceed to deliver the holding on merits. Expressing what transpired in this court, Barnabas made reference to page 5, 6 and 7 of the typed judgment of this court.

On the other hand, Mr. Reuben strongly resisted the application and argued that an applicant has the right to appeal to the Court of Appeal but he must have strong reasons to do so. Mr. Reuben further argued that the High Court having quashed the proceedings and set aside the decision of the DLHT, correctly went a step further to determine whether in 1979, the applicant had the capacity to contract pursuant to section 11 of the Law of contract. He further argued that, the learned counsel for the Applicant has not cited any law or case law to the effect that where the proceedings are quashed, the appellate court cannot go a step ahead to grant ownership.

In her brief rejoinder, Ms. Barnabas stated that, the major issue here is whether the procedure was observed, and that according to her, the proper order under the circumstances was a re-trial and not the approach taken by this court.

Now, the duty of this court is to determine whether the applicant has demonstrated a serious and contentions issue of law or fact for consideration by the Court of Appeal 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".

It follows therefore that, the right to appeal to the Court of Appeal of Tanzania is not automatic. Leave must first be sought and obtained. However, it should also be noted that grant or refusal of leave is in the discretion of the court, which of course is to be exercised judiciously. For leave to appeal to be granted, the applicant must raise contentions issues of law or fact fit for consideration by the court of appeal. In **Lazaro Mabinaza versus the General manager, Mbeya Cement Co. Ltd**, Civil application No. 1 of 1999 CAT (unreported).

It was held that;

"Leave to appeal should be granted in matters of public importance and serious issues of misdirection or non-direction likely to result in a failure of justice".

In **British Broadcasting Corporation vrs Eric Sikujua Ng'ymaro**, Civil Application No.133 of 2004 CAT (Unreported) the court stated that;

"Needless to say, leave to appeal is not automatic. It is within the discretion of the court to grant or refuse leave. The discretion must, however judiciously exercised and on the materials before the court. As a matter of general

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

Furthermore, in the same case of **British Broadcasting Corporation** (Supra) 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) 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."

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"

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.

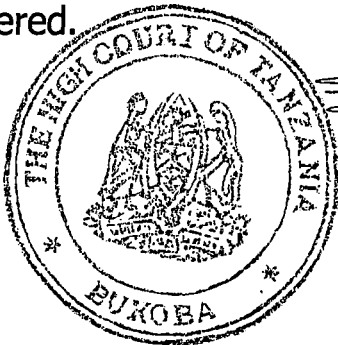
However, at the outset, I would like to state that I have no mandate to go into the merits or deficiencies of the judgment or orders of my learned brother because this is not the Court of appeal, and an application of this nature does not mean re-hearing. All what I am duty bound to do is to consider whether there are arguable issues, or compelling reasons, or disturbing features, or point of law or point of public importance which require the Court of appeal intervention.

In Misc. Land appeal No. 5 of 2021, which is the subject of this application, the proceedings and judgment of the DLHT in Land application No. 45 of 2014 were declared a nullity and as a result, the proceedings were quashed and the judgment was set aside on the grounds among others that, the Hon. Chairman sat with assessors but assessors did not give their opinions, that the pieces of evidence adduced before the trial tribunal were not adduced under oath/affirmation, and that the judgment was not the judgment in the eyes of the law.

The court after it had done so, went on and declared the appellant (respondent in this application) as a lawful owner of the land in dispute and ordered the applicant to vacate the suit land as soon as possible.

Reading carefully the reason for the leave sought as stated under paragraph 4 of the applicant's founding affidavit in support of the application as I have already pointed out, as well as the judgment of this court as a whole, it is my considered opinion that there are disturbing features requiring the Court of

Appeal intervention and provision of guidance as to whether after declaring that the proceedings and the judgment of the lower tribunal were a nullity, and then quashed the proceedings and set aside the judgment, whether the appellate court can proceed to determine the matter on merit. For that reason, I find the application meritorious. The application is hereby granted. Given to the nature of the application, I order no order as to costs. It is so ordered.

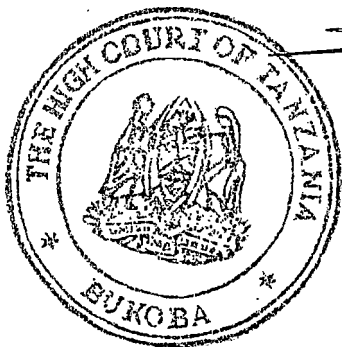



E. L. NGIGWANA

JUDGE

03/12/2021

Ruling delivered this 3rd day of December, 2021 in the presence of the applicant in person and represented by Lameck Erasto, learned Advocate, the respondent in person, and Mr. E. M. Kamaleki, Judges' Law Assistant.




E. L. NGIGWANA

JUDGE

03/12/2021