

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF DAR ES SALAAM)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 539 OF 2019

(Arising from Civil Appeal No. 85 of 2010)

RICHARD MLAGALA 1ST APPLICANT
SIFA NANYARO 2ND APPLICANT
AIDAN KUNYANJA 3RD APPLICANT
JULIANA PALANGYO 4TH APPLICANT
JOHN SANDE 5TH APPLICANT
EMIL LAGATE 6TH APPLICANT
ROGASIAN LASWAI 7TH APPLICANT
ERNEST MAEMBE 8TH APPLICANT
LUPAKISYO MWANG'ONDA 9TH APPLICANT
SAMWEL NDIRANGE 10TH APPLICANT

VERSUS

AIKAEL MINJA 1ST APPLICANT
HAMISI MSUYA 2ND APPLICANT
A.RUMAYA 3RD APPLICANT
A. MAGOTI 4TH APPLICANT

RULING

10th, & 22nd March, 2021

ISMAIL, J.

This ruling is on an application for leave to appeal to the Court of Appeal of Tanzania, against the judgment of the Court in Civil Appeal No. 85 of 2010. The impugned decision was delivered on 8th February, 2011 and the applicants were on the losing end. Feeling hard done by the decision, they have taken some steps to challenge the decision. This began with the institution of a notice of their intention to appeal against the decision. The instant application is a step closer to realization of their quest to gain entry into the superior Court.

The application is supported by an affidavit sworn by David Alexander Ntonge, counsel then representing the applicants, and it sets out grounds on which the prayers in the chamber summons are sought. The applicants have come up with five issues that they propose to ask the Court of Appeal to deliberate on in the impending appeal. These are:

- (i) Whether a lawful occupier of unsurveyed land did not have the power to transfer it to another person.

- (ii) Whether the Tanzania People's Defence Forces, being a Government Department, had to hold its land through the Tegeta Village Council.
- (iii) Whether the 1st respondent could have better title to the land in view of the fact that the intended revocation of the Right of Occupancy granted to some appellants had been blocked the decision of the High Court in Civil Appeal No. 112 of 1999.
- (iv) Whether the Ministry of Lands, Housing and Urban Development could grant Rights of Occupancy to the Appellants without being satisfied that the appellants had complied with all procedures for the said grants.
- (v) Whether the 1st Respondent who purports to hold the disputed plots under customary law, her remedy after the area has been declared a planning area, and whether these remedies could affect any allocation made to the applicants.

The respondents are opposed to the grant of leave, though they did not prefer any deposition in reply to the affidavit sworn in support.

When the parties appeared before me, an order was issued to the effect that disposal of the application should take the form of written submissions, whose filing conformed to the schedule drawn by the Court.

Ms. Marry Masumbuko Lamwai, learned counsel for the applicants, kicked the first ball. She submitted that paragraphs 2, 3, 6 and 7 of the supporting affidavit have laid the ground for orders sought in the application. Learned counsel reproduced areas of consternation that she considers to be points of law and fact which are likely to engage the mind of the Court of Appeal through the impending appeal.

While acknowledging that leave to appeal is not an automatic right of a party, Ms. Lamwai contended that the instant application has shown the reason as to why the matter merits the attention of the superior Court and that, on account of the reasons stated in the said application, the intended appeal stands a good chance of success. She argued that this is consistent with the requirements set in the case of ***British Broadcasting Corporation v. Eric Sikujua Ng'maryo***, CAT-Civil Application No. 138 of 2014 (unreported), in which it was held that an intended appeal must show disturbing features as to require the guidance of the Court of Appeal of Tanzania.

Submitting on the respondents' decision not to file sworn deposition in reply, Ms. Lamwai implored the Court to be inspired by the decision of the Court in ***Togolani Mbusso v. Dainess Mhagama***, CAT-Civil Application No. 182 of 2004 (unreported), in which an undisputed application was

granted. It was Ms. Lamwai's prayer that the application be granted with costs.

The respondents' rebuttal submission was preferred by Mr. Ambroce Menance Nkwera, learned advocate. He began by castigating the applicants for including issues which do not emanate from the decree sought to be appealed against. He, especially, singled out grounds (i), (ii), (iv) and (v) as being new grounds which were not part of the Court's deliberations. Mr. Nkwera contended that these grounds, as stated in paragraph 6, have the potential of turning the Court of Appeal into a court of first instance, a practice which was abhorred in the decision of ***The Attorney General & Another v. Fatuma Amani Karume***, HC-Misc. Civil Application No. 8 of 2021 (unreported).

Learned counsel took the view that leave would not be granted where the intended grounds of appeal are frivolous, vexatious or useless or hypothetical. He further argued that having an arguable case alone would not be enough if there is no prima facie case meriting an appeal to the Court of Appeal. He bolstered his position by citing the decisions in ***British Broadcasting Corporation v. Eric Sikujua Ng'maryo*** (supra); ***i) Harban Haji Mosi (ii) Shauri Haji Mosi v. (i) Omar Hllal Self (ii) Seif***

Omar, CAT-Civil Reference No. 19 of 1999; and **Gaudensia Mzungu v. I.D.M. Mzumbe**, CAT-Civil Application No. 94 of 1999 (both unreported).

On the respondents' decision not to file a counter-affidavit, Mr. Nkwera's contention is that a party who chooses not to file a counter-affidavit can only be precluded from challenging matters of fact. He is not taken to have conceded to the application. He argued that this is the position as was held in **Ludovick Michael Masawe v. Samson Herman**, CAT-Civil Application No. 259/08 of 2021 (unreported). In the learned advocate's view, there was an express instruction from Hon. Itemba, J to the effect that need did not arise for the filing of an amended deposition after the applicants had been allowed to amend their application.

The critical issue for determination in this application is whether the application carries some merit to warrant its grant. As unanimously held counsel, demonstration, by the applicant, that the intended appeal contains an arguable case, sufficient enough to merit the attention of the Court of Appeal, constitutes the basis for granting. It implies, therefore, that leave to appeal will only be granted where there are solid grounds and weighty enough to engage the minds of the Court of Appeal. The grounds of appeal must constitute serious points of law, or law and fact (See: **National Bank of Commerce v. Maisha Mussa Uledi (Life Business Centre)**, CAT-Civil

Application No. 410/07 of 2019; **Abubakari Ally Himid v. Edward Nyalusye**, CAT-Civil Application No. 51 of 2007; and **Junaco (T) Ltd and Justin Lambert v. Harel Mallac Tanzania Limited**, CAT-Civil Application No. 473/16 of 2016 (all unreported); and **British Broadcasting Corporation (BBC) v. Eric Sikujua Ng'maryo** (supra)

Needless to say, the intended appeal must carry with it issues of general importance; a novel point of law, and that the same should arguable or or bear a prima facie case. Thus, in **(i) Harban Haji Mosi (ii) Shauri Haji Mosi v. (i) Omar Hilal Seif (ii) Seif Omar** (supra), cited by the respondents, the upper Bench held:

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

It means, therefore, that an application that falls short of these prerequisites must fall through (See: **Saidi Ramadwani Mnyanga v. Abdallah Salehe** [1996] TLR 74); and **Nurbhain Rattansi v. Ministry of**

Water Construction Energy Land and Environment and Another
[2005] TLR 220.)

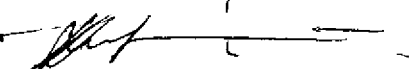
My unfleeting review of the instant application, especially paragraph 5 of the affidavit supporting the amended application brings me to a settled view that the intended appeal carries with it an arguable case of sufficient importance to justify the attention of the Court of Appeal. I take the view that proposed grounds, as gathered from paragraph 6 of the affidavit, raise an arguable case that convinces me to see merit in the application.

In the upshot, I take the view that the application has met the legal threshold for grant of leave. Accordingly, the same is granted as prayed. Costs to be in the cause.

Order accordingly.

DATED at **DAR ES SALAAM** this 22nd day of March, 2022.




M.K. ISMAIL
JUDGE