

**THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA
MISCELLANEOUS LAND APPLICATION NO. 45 OF 2021**

(Originating from Miscellaneous Land Application No. 119 of 2016)

BEST MWANSASU.....APPLICANT

VERSUS

JOEL KIPUTA.....RESPONDENT

R U L I N G

Dated: 31st May & 23^d June, 2022

KARAYEMAHA, J

This Court is moved under section 47(1) of the Land Disputes courts Act (Cap. 216 R.E. 2019) to grant orders for:

1. Leave to appeal to the Court of Appeal of Tanzania.
2. Costs be provided for.

The application is brought by way of a chamber summons supported by an affidavit sworn by Kelvin Kuboja Gamba setting out reasons and background to this application.

This application was vehemently resisted by the respondent through the counter affidavit sworn by Mr. Mika Thadayo Mbise instructed to act as such by the respondent.

Perhaps before dwelling deep into this matter it may be befitting to set the factual background to it which is very short, undisputed and not difficult to comprehend. It is this. Best Mwansasu (the applicant) sued Joel Kiputa (the respondent) in the Malindo Ward Tribunal vide a case baptized Land Case No. 6 of 2008 for trespassing in the land he bought. After hearing both parties the Ward Tribunal decided in favour of the applicant. The respondent successfully appealed to the District Land and Housing Tribunal. Aggrieved, the applicant appealed to the High Court in 2009 vide a case baptized Miscellaneous Land case appeal No. 13 of 2009. On 25/06/2011 it was struck out with costs for being time barred. On 08/07/2011, the applicant preferred an application for extension of time which was granted and the applicant given fourteen days from the date of ruling to appeal to the High Court. On 03/08/2012 the applicant filed an appeal to this Court (Miscellaneous Land case appeal No. 26 of 2012) but was withdrawn after spotting incurable errors. This event triggered the applicant to file Miscellaneous Land Appeal No. 21 of 2015. Again, his appeal was dismissed with

costs. The applicant did not give up. She again knocked on this Court's door on 18/11/2016 armed with Misc. Land Application No. 119 of 2016 seeking for extension of time to appeal against the decision of the District Land and Housing Tribunal for Rungwe. Unfortunately, this court (Mongella, J.) dismissed it with costs for having been filed out of time. Unhappy with this decision, the applicant intended to challenge it before the Court of Appeal but due to the fact that he bypassed a step of seeking this court's leave, his appeal was struck out. Knowing that he was late to file leave to this court, notice of appeal to the Court of Appeal and memorandum of appeal, the applicant applied to this Court for extension of time through Misc. Land Application No. 10 of 2021. Granting the application, this Court (Mambi, J.) stated at page 7 of ruling handed down on 28/05/2021 as follows:

"... this court finds it proper the applicant to be granted an extension of time to file notice of intension to appeal to the court of appeal out of time. This means that the applicant has to file his application to this court if he wishes to do so. This means that the applicant shall file Notice of appeal, grounds of appeal and other relevant documents. The applicant shall file his appeal within 21 days from the date of this ruling."

The above quoted order gave the applicant a gate pass to file the present application seeking leave to appeal to the court of appeal. Each part has annexed this ruling to its affidavit in support of the application and counter affidavit respectively. Upon reading each ruling, I have noted that each bears different orders. Whereas, the one annexed by Mr. Mbise extends time to file notice of intention to appeal to the court of appeal out of time and elaborates further that the applicant had to file his application to this court if he wished to do so, the one attached by Mr. Gamba extends time to file an application for leave to file notice of intention to appeal to out of time. The ruling elaborates further that the applicant had to file his application to this court if he wished to do so. On examining the original copy found in the court's file, on which I shall base my findings, I have learnt that the court ordered the applicant as follows;

"... this court finds it proper the applicant to be granted an extension of time to file notice of intension to appeal to the court of appeal out of time. This means that the applicant has to file his application to this court if he wishes to do so. This means that the applicant shall file Notice of appeal, grounds of appeal and other relevant documents. The applicant shall file his appeal within 21 days from the date of this ruling."

Having examined all orders in all three documents, it has become apparent that the applicant was allowed time to file application for leave in this court. Therefore, I shall proceed to determine the application.

According to the applicants' depositions in an affidavit, they intend to challenge this Court's decision on the ground that it raises a serious matter of irregularity. The same he averred is seen in the memorandum of appeal. The contemplated illegality is the declaration that the application for extension is time barred and that this court dismissed the application for extension of time instead of striking it out.

When the application was placed for hearing on 31/5/2022, Ms. Rose Kayombo, learned Counsel appeared for the applicant and the respondent enjoyed legal service of Mr. Mika Mbise, learned Counsel.

Ms. Kayumbo's submission commenced by adopting the affidavit in support of the application. The learned Counsel submitted that the impugned decision raises a serious matter of illegality as illustrated under paragraph 9 of the affidavit and in ground 1 of the annexed memorandum of appeal. She argued that the ground raised in the memorandum of appeal by itself requires a strong consideration by the Court of Appeal. The learned Counsel buttressed her position by citing the case of **Hamis Mdida &another vs. Registered Trustees of**

Islamic Foundation, Civil Appeal No. 232 of 2018 CAT-Tabora (unreported) and **Shabani Mkakanze vs. Theresia Judi Mkakanze**, Civil Application No. 135/13 of 2020 CAT-Iringa (unreported). She then asked this Court to exercise its discretion and grant leave as it is only that way the applicant can appeal to the Court of Appeal. Having submitted as such she prayed the application to be granted with costs.

Submitting in rebuttal, Mr. Mbise fiercely opposed the prayer for leave to appeal to the court of appeal. Having adopted the counter affidavit to form part of his submission, the learned Counsel submitted that the impugned decision of Mongella, J in Misc. Land Application No. 119 of 2016 was not annexed to the affidavit to enable this court make a thorough scrutiny of the matter. He observed that the applicant had to annex it and eventually make reference to the page where the illegality resides. He concluded on this point that this court is not to play double role of finding the ruling and peruse and thereafter find the illegality complained of.

Mr. Mbise attacked the annexed memorandum of appeal and submitted quite vehemently that it is not an intended memorandum of appeal because it was drawn and signed on 19/9/2019 and copied to

him in September, 2019 but the instant application was drawn and signed on 18/06/2021 after two years.

Mr. Mbise submitted further that the contention by the applicant that the decision contains point of illegality is not a point of law but a factual issue. Therefore, cannot be a basis for grant of leave to appeal.

The learned Counsel submitted adding that the applicant applied for extension of time through Misc. Land Application No. 10 of 2021 as categorically stated under paragraph 6 of the supporting affidavit. He said that orders given in the ruling at page 7 granting the application required the applicant to file leave to the High Court, to file a notice of appeal and memorandum appeal to the Court of appeal. He contended that since this application was a response to orders given in that application, the applicant had to comply with them all not some.

By way of wounding up, Mr. Mbise asked this court to dismiss this application with costs.

Ms. Kayumbo's rejoinder began by reacting on the issue of attaching the ruling of Mongella, J. on the affidavit. She argued firstly, that it was not the requirement of the law and secondly, that it was not a condition precedent for this court to exercise its discretion to grant the application for leave. She firmly remarked that the court is required to

see whether the applicant has raised an issue of general importance or novel point of law or whether grounds reveal a prima facie case or arguable appeal. The learned counsel added that the said ruling is the decision of the court and it can take judicial note of its existence and do substantial justice.

Regarding the failure to show the page harboring the illegality, Ms. Kayombo held the view that the pages will be shown at the Court of Appeal not in this court which has no jurisdiction to hear the appeal. She however attacked Mr. Mbise's reply that it was devoid of authority and was a statement from the bar since it has no bearing in the counter affidavit.

Another vital point rejoined by the learned counsel concerns the issue whether the raised illegality is a point of law or not. She contended that this court is required to consider whether that point is arguable and can bring out results.

With respect to orders in Misc. Land Application No. 10 of 2021, Ms. Kayombo submitted that the memorandum of appeal could not be filed prior leave to appeal was granted. She maintained that the application is properly placed before this court and prayed this court to exercise its discretion and grant leave to appeal to the court of appeal.

Before I get to the heart of the application, let me address the general principles governing applications of this nature. First of all it is a mandatory precondition that any person intending to appeal to the Court of Appeal must obtain leave of this Court or of the Court of Appeal in order to appeal, Section 47(1) of the Act. It reads:

"47-(1) 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."

Similarly, section 5(1)(c) of AJA provides that

5.-(1) 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-

(c) 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.

It is therefore gleaned from the above provisions that prior appealing to CAT, a part aggrieved by the High Court decision has first to obtain leave of the same.

In similar vein, the principle of law governing grant of leave to appeal to the Court of Appeal is well settled. In a proper application, the

duty of this court is just to gauge out whether there are contentious issues needing determination by the Court of Appeal.

This position of the law was tested by my Brother Hon. J. C. Tiganga, J. in the case of **Roti Kadasi vs. Emmanuel Lugombola**, Miscellaneous Civil Application No. 87 of 2019 (unreported), guided, on this point, by two decisions by the Court of Appeal in **Harban Haji Mosi and Another vs. Omar Hilal Seif and Another**, Civil Reference No. 19 of 1997 of (unreported) and in the case of **British Broadcasting Corporation vs. Erick Sikujua Ng'maryo**, Civil Application No. 138 of 2004 (unreported). In the former case the Court of Appeal *inter alia* said:

"Leave is grantable where the proposed appeal stands reasonable chances of success or where, but not necessarily the proceedings as a whole reveals such disturbing feature as to require the guidance of the Court of Appeal. The purpose of the provision is therefore to spare the court the spectre of un-meriting matters and enable it to give adequate attention to cases of true public importance."

In the latter case the Court of Appeal, insisting on discretionary use of powers in granting leave, said:

"Needless to say, leave to appeal is not automatic. It is within the discretion of the work of the court to grant or refuse leave. The discretion should however be 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 appeal raise issues of general importance or novel point of law or where the grounds show a prima facie or arguable appeal... However, where the grounds of appeal are frivolous, vexatious, useless or hypothetical, no leave will be granted."

From these cases Hon. J. C. Tiganga, J. deducted five grounds to be considered by the court when deciding to grant or not to grant leave to appeal to the court of Appeal namely:

- i. That the intended appeal raises issues of general importance or novel point of law;*
- ii. That the grounds show a prima facie or arguable appeal;*
- iii. That the grounds are not frivolous, vexatious, useless or hypothetical;*
- iv. That the appeal stands reasonable chances of success; or*
- v. That the proceedings reveal that there is disturbing feature(s) which require the guidance of the Court of Appeal;*

I would add one more from **Nurbhai N. Rattansi vs. Ministry of Water Construction Energy Land and Environment and Hussein Rajabali Hirji** [2005] TLR 220, and **Saidi Ramadwani**

Mnyanga vs. Abdallah Salehe [1996] TLR 74 that is where there are contentious issues needing determination by the Court of Appeal. These grounds must be clearly seen in the proceedings, impugned decision and records of the case.

Ms. Kayumbo rightly argued that the court is required to see whether the applicant has raised an issue of general importance or novel point of law or whether grounds reveal a prima facie case or arguable appeal. This argument finds support from the case **Rutagatina C. L. vs. The Advocate Committee and Another**, Civil Application No. 98 of 2020 (CAT) at Dar es Salaam, which cited the case of **British Broadcasting Corporation vs. Eric Sikujua Ng'maryo**, Civil Application No. 133 of 2004 (both unreported) where it was said that

"Needless to say, leave to appeal is not automatic. It is within the discretion of the court to grant or to refuse leave. The discretion must, however be judiciously exercised on the material before the court. As a matter of general principle, leave to appeal will be granted where the grounds of appeal raise of general importance or a novel point of law or where the grounds show a prima facie or arguable appeal However, where the grounds of appeal are frivolous,

vexatious or useless or hypothetical no leave will be granted."

In this present application the issue is whether or not the application raises grounds of appeal raise of general importance or a novel point of law or where the grounds show a prima facie or arguable appeal. The view held by the applicant is that it has. Mr. Mbise on the other hand had a different view. He submitted that in order for this court to exercise discretion the issue raised must be on point of law not factual one.

On my part the guiding principles require this court to only exercise discretion, for matter originates from the high court, when grounds of appeal raise of general importance or a novel point of law or where the grounds show a prima facie or arguable appeal. In this application, the applicant is complaining that this court dismissed the application for extension time on the reason that it was time barred. He wants to challenge this observation. He, as well, intends to challenge this court's decision for dismissing the application instead of striking it out.

In my opinion, the applicant has met all the above requirements stipulated in the precedents. Firstly, the impugned ruling is appealable,

and there are proposed grounds of appeal calling for determination by the Court of Appeal of Tanzania as to:

- 1. Whether the High Court erred in law and in fact by regarding and holding that an application for extension of time is time barred.***
- 2. Whether the High Court erred in law and in fact by dismissing the application for extension of time instead of striking out.***

In my view, these grounds constitute arguable issues worth to be determined by the Court of Appeal. Conclusively, after passing through the record of this Court I have found that there are prima facie grounds meriting an appeal to Court of Appeal.

The rest of the arguments raised by Mr. Mbise such as failure to attach the ruling of Mongela, J, failure to file a notice of appeal and memorandum of appeal as ordered by this Court in Misc. Land Application No. 10 of 2021, with due respect do not strip off this Court's discretion to grant application for leave. Talking of the 2nd aspect, the gate way to court of appeal for a part aggrieved by the High Court decision is by first obtaining leave. Without it the appeal before the Court of Appeal is incompetent.

In the upshot of all this, I hold the view that applicant has met the threshold set out by the law for triggering the discretion to allow the application for leave to appeal to the Court of Appeal against the judgment of this Court (Mongella, J) dated 29/05/2019. It is accordingly ordered.

DATED at MBEYA this 23rd day of June, 2022



A handwritten signature in black ink, appearing to read "J. M. Karayemaha".

**J. M. KARAYEMAHA
JUDGE**