

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(IN THE DISTRICT REGISTRY OF BUKOBA)**

**AT BUKOBA**

**MISC. LAND APPLICATION NO. 99 OF 2021**

*(Arising from Land Appeal No. 45/2019, Original Application No. 14/2013 of Bukoba District Land and Housing Tribunal)*

**JONATHAN ARON LUGAIMUKAMU..... APPLICANT**

**VERSUS**

**MURSHID MUTALEMWA MUSTAPHA..... RESPONDENT**

**JUDGMENT**

*Date of Judgment: 11.03.2022*

*A.Y. Mwenda, J*

JONATHAN ARON LUGAIMUKAMU (the APPLICANT) through the Services of the learned Counsel Mr. Aaron Kabunga, filed the present application with one major prayer which reads:-

***"That the Honorable Court be pleased to grant an application for leave to appeal to the Court of Appeal of Tanzania as required by the Law to impugne the whole Decision and Decree made by this Court On 6<sup>th</sup> August ,2021."***

This application is brought under Section 11(1) & Section 5(1)(c) of the **Appellate Jurisdiction Act**, [Cap 141 R.E 2019] and Section 47(1) of the **Land Dispute Court's Act** [Cap 216 R.E 2019]

In response, MURSHID MUTALEMWA MUSTAPHA, the Administrator of the estate of ABDUL SHABAN (the respondent) instructed his advocate, Mr. Alli Chamani to file a Counter Affidavit to challenge this application.

The facts giving rise to this application are that the applicant successfully sued the respondent before the District Land and Housing Tribunal of Bukoba in Application No. 149 of 2019 where he was declared as the rightful owner of the Suitland. He was also awarded an order for vacant possession of the same. Aggrieved by the trial tribunal's decision the respondent appealed before this Court in Land Appeal No. 45 of 2019 where the trial tribunal's decision and Decree were reversed. The respondent was thus declared as the rightful owner with a good title to the suit land.

Dissatisfied with the Judgment and Decree of this Court, the applicant is seeking leave of this court to appeal to the highest Court of the Land.

During hearing of the present application both parties appeared represented by their respective advocates.

In his submission in Chief Mr. Aaron Kabunga averred that following the applicant's dissatisfaction against the decision of this court as mentioned above, the applicant filed notice of appeal and also wrote a letter to the Deputy Registrar seeking the

necessary documents. He pointed out that the said documents and proof of service are annexed to the affidavit. He thus prayed the contents of the affidavit to be adopted to form part to this submission. He further stated that leave to appeal to Court of Appeal of Tanzania is a procedural requirement paving a way to an appeal which is a constitutional right under Article 13 (6) (a) of the Constitution of the United Republic of Tanzania.

The learned advocate concluded his submission by stating that the applicant intends to present before the Court of Appeal of Tanzania the ground that *there is a legal misdirection, with regard to the 'will' as the property in dispute was acquired by the applicant through a "will"* whose probate was never challenged by anybody, including the respondent and to him this is an arguable appeal fit to be determined by the Court of Appeal of Tanzania.

He concluded by submitting that the said appeal won't prejudice the respondent as he shall as well be accorded rights to be heard. He then prayed this application for leave to be granted and the cost be awarded in due course.

In opposing the submissions by the applicant's advocate, Mr. Chamani, learned Advocate begun by praying the contents of the counter affidavit to be adopted and considered by this court in reaching its decision. The learned advocate submitted that with the intended appeal, there are no notable illegalities which are disclosed in the applicant's affidavit. He cited the case of **Theotino Itanisa and One another vs. Godwin Rudomora, Civil Application No. 11/2015**

(unreported) at page 5 and 6 to support this point. He also said there are no triable issues/grounds of appeal arguable before the Court of Appeal of Tanzania and this matter is not fit to be tabled before the said Court.

He stated further that it is true that the "will" was never challenged because the respondent was a third party who was not involved in the matter at the lower stage. Nevertheless the issue of "will" was discussed and decided by the trial court as it was ruled out that there was no any illegality.

The learned advocate also submitted that the necessary documents such as notice of appeal and letter to the Deputy Registrar were not served to the respondent and that what the applicant's advocate did is the submission from the bar and not the evidence.

Rejoining to the submission by Mr. Chamani, Mr. Kabunga said that the authorities cited by the learned advocate for the respondent are in favor of the applicant's application. He said the present application is supported by the legal requirements reflected in the said authorities.

With regard to the argument by Mr. Chamani that there is no proof of service of the necessary documents Mr. Kabunga submitted that there is no law which require, at this stage to show proof of service as this Court is only asked to grant leave and not otherwise. He said the issue of proof of service is covered under the Court of Appeal rules which do not apply in the High Court at the leave stage.



With regard to submission by Mr. Chamani that there are no grounds of appeal raised fit to be tabled before the Court of Appeal of Tanzania, the learned advocate submitted that the said requirement is required only when there is a need for a certificate on the points of law which is not the case with the present application. He said the enabling provisions cited in the chamber application describes leave only and the same is grantable where there is demonstration of arguable grounds appeal. With regard to the submission that the "**will**" was not challenged by the respondent because he was a third party, Mr. Kabunga was of the view that, by itself entail it is an arguable issue to be tabled before Court of Appeal of Tanzania. He said this is so because the Court of Appeal will discuss on how a third party can benefit or inherit from a "**will**" which he is not a party.

He concluded his rejoinder by repeating to his previous prayer that this application be granted.

Having examined the rival submissions of the parties' advocates as well as the records, it is high time that this court deliberate on the merits of the application.

In the Chamber Application the applicant has cited a number of enabling provisions and of essence is section 5(1)(c) of the **Appellate Jurisdiction Act**, [Cap 141R.E 2019]. This section reads and I quote:-

***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-***

***(a) N/A***

***(b) N/A***

***(c) With the leave of the High Court or Court of Appeal against every other decree, order, judgment, decision or finding of the High Court”.***

The applicant in his affidavit have raised his dissatisfaction with this Court’s findings in Land Appeal No. 45 of 2019. In paragraph four (4) of his affidavit he has categorically stated that the impugned decision is tainted with notable illegalities as the court misapprehended the nature of the claim by the respondent against the applicant over the property he (the applicant) obtained by “will”. With this ground the learned advocate for the applicant was of the view that it is an arguable issue fit to be tabled before the Court of Appeal. This court subscribes to the settled position of the Law with regard to leave to appeal to the Court of Appeal of Tanzania as stated in the case of ***Six Telecoms Company Limited V. Capital properties Limited, Misc. Land Case Appeal No. 269 of 2017*** (unreported). In the said case this Court quoted the case of ***Rudolf Temba and Another Vs. Zanzibar Insurance Corporation***, Court of appeal Civil Application No. 167 of 2008(unreported) whereby the case of British Broadcasting was quoted as follow:-






***"Leave to appeal will granted where the grounds of appeal raise issues of general importance, a novel point of Law or where the grounds show a prima facie or arguable appeal".***

On the basis of the above authority and having considered the averments contained in the applicant's affidavit that this court misapprehended the nature of the claim by the respondent against the applicant over the property he (the applicant) obtained by "will" this court find the same as an arguable appeal fit to be tabled before the Court of Appeal.


That being said I find merits with this application. I accordingly allow it and costs shall be in due cause.



  
A.Y. Mwenda  
**Judge**  
11.03.2022

This Ruling is delivered in chamber under the seal of this court in the presence of the Mr. Frank Karoli the learned counsel for the Applicant and in the presence of the Respondent Mr. Murshid Mutalemwa Mustapha



  
A.Y. Mwenda  
**Judge**  
11.03.2022

