IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

MISCELLANEOUS LAND APPLICATION NO. 41 OF 2021

(From Land Appeal No. 65 of 2019 High Court of Tanzania at Mbeya in original Land Application No. 170 of 2018 of the District Land and Housing Tribunal for Mbeya)

BETWEEN

YOHANA MWAIFANI .....1ST APPLICANT

AIDA JACOB .....2ND APPLICANT

VERSUS

PATRICK ONESMO LUPONGO .....1ST RESPONDENT

MBEYA CITY COUNCIL .....2ND RESPONDENT

ANDREA RAPHAEL MAHENGE .....3RD RESPONDENT

RULING

A. A. MBAGWA, J.

In this application, the applicants, Yohana Mwaifani and Aida Jacob are seeking leave to appeal to the Court of Appeal against the decision of the High Court of Tanzania at Mbeya in Land Appeal No. 65 of 2019. The application is brought by way of chamber summons under section 5(1)(c) of the Appellate Jurisdiction Act [Cap 141 R: E 2019], Rule 45(a) and 47 of the Court of Appeal Rules, 2019 and section 47(2) of the Land Disputes Courts Act [Cap 216 R: E 2019] supported by affidavit of the applicants. The application is resisted by respondents through counter affidavit of

Mary Paul Gatuna for first respondent, Triphonia Kisiga for second respondent and Andrea Raphael Mahenge for third respondent.

Briefly, the applicants sued the respondents Patrick Onesmo Lupondo, Mbeya City Council and Andrea Raphael Mahenge in Land Application No. 170 of 2018 for ownership of piece of land described as plot 568 block "S" located at Iyela ward, Mbeya City Council within Mbeya region which was surveyed by the second respondent and allocated to the first respondent who also sold to the third respondent. The Tribunal held in favour of the first respondent. Aggrieved, the applicants filed the appeal to this court which was dismissed by Hon. J.H.K Utamwa, J on 7th May, 2021 for want of merits. The applicants are still aggrieved and determined to appeal to the Court of Appeal hence this application.

When the application came for hearing, the applicants appeared in person unrepresented while the first and third respondents had the service of Mary Gatuna, learned advocate and the second respondent appeared through Mbua Jibu and Modest Siwavula, State Attorneys. Both parties agreed the matter to be disposed by way of written submission.

Before discussing the merits of the application, it is worth noting application of this nature is filed after notice of appeal have been filed to the Court of Appeal as required by rule 46(1) of the Court of Appeal Rule;

Unfortunately, the applicants in their affidavit did not make reference if they had lodged notice of appeal. However, this court, in order to arrive at a just decision, took trouble to check with the registry concerned and discovered that notice of appeal was lodged with the Court of Appeal on 11th day of May, 2021, therefore this application is properly before the court.

The applicants in their affidavit raised various points one, the need of visiting ***locus in quo***, they submitted that in the suit land there was permanent crops and a house but the trial and appellate court did not bother to verify the same. Two, the applicants submitted that they had occupied the disputed land for over thirty-three years and it was allocated to the first respondent by the second respondent without being paid compensation. Three the applicants submitted on validity of certificate of title issued to the first respondent without being preceded by a letter of offer. They added that there was no proof as to whether the disputed land had ever been declared a planning area and the stake holder fully involved.

Four the applicants want the Court of Appeal to interpret whether by virtue of being given sketch map by the second respondent did not amount to allocation. The applicants further submitted that they owned the land in dispute customarily but when it was declared a planning area

and surveyed, they were not paid compensation as such they want the court to decide whether an area upon being surveyed and declared planning area the initial occupiers are not entitled to compensation.

Five applicants argued that they want the Court of Appeal to decide whether it is proper for one assessor to prepare two different opinion and the one who fully participated not to give his opinion. Six was on abridging their ground of appeal, they submitted that they raised six grounds of appeal but the court abridged it into three whether it was proper. They prayed the application to be allowed.

In reply Ms Gutuna for first and third respondents started her submission by adopting contents of two affidavits filed in opposition of the application, on the issue of ***locus in quo*** she submitted that visiting ***locus in quo*** is not automatic rather the discretion of the court and is conducted where there is necessity to verify evidence adduced. She relied on the case of **Sikuzani Saidi Magambo and Another vs Mohamed Roble**, Civil Appeal No. 197 of 2018 CAT at Dodoma (Unreported) and **Nizar M.H. Ladar Vs Gulamali Fazal Jan Mohamed** [1980] TLR 29. Ms Gatuna was of the view that the issue of ***locus in quo*** having been determined by the High Court there is nothing the Court of Appeal need to determine again.

Regarding the issue of letter of offer, it was submitted by Ms Gatuna that there is evidence that the first respondent was given letter of offer in 1995 but unfortunately it got lost. On whether the disputed land had been declared the planning area it was submitted that it was a new issue which was never posed in the two lower courts. Mary relied on the case of **Njile Samwel @ John vs Republic**, Criminal Appeal No. 31 of 2018, CAT at Shinyanga (Unreported). In alternative, she replied that the whole process of surveying the suit land was complied with as per exhibit PL. 3 and the applicants were not involved as they never owned the suit land.

On double allocation Ms Gatuna submitted that double allocation occurs where registered piece of land described by a single name or variable is inappropriately allocated by the competent authority to two different persons giving each of them equal entitlement to the piece of land and without revoking entitlement for any of them. She cited the case of **Oil Com Tanzania Ltd vs Christopher Letson Mgallai,** Land Case No. 29 of 2015, HC at Mbeya (Unreported) and **Colonel Kashimiri vs Naginder Singh Mathuru** [1988] TLR 164.

Submitting on the issue of assessors, Ms Gatuna argued that there is no proof that there were two hand written opinion of one assessor as such burden of proof lies on applicants who is trying to impeach court records.

She cited the case of **Alex Nendya vs Republic**, Criminal Appeal No. 2017 of 2018, CAT at Iringa (Unreported).

Regarding abridging grounds of appeal by the court it was submitted that the practice is not new in our jurisprudence and that the applicants did not explain if some of their grounds were left unattended by the court. On propriety of sale agreement between the first and third respondent Ms Gatuna reply was that it was a new issue not canvased by the lower court hence has to be dis-regarded.

Ms Gatuna brought to the attention of the court principles which must be considered when determining application for leave to appeal as enunciated in the case of **Kibelo Benjamin Ndondole T/A Kibelo Agro Suppliers vs Amos Magaba**, Misc. Land Application No. 11 of 2018 HC at Sumbawanga, and **Markus Kin Dole vs Burton Mdinde,** Civil Application No. 137/13 of 2020, CAT.

On part of the second respondent, it was submitted that there is confusion as to whether the applicants have applied for certificate on point of law or for leave to appeal and went on to submit that points advanced by the applicants on illegality of sale agreement, illegality of registering title and ownership of the disputed land are not points of law worth to be determined by the Court of Appeal. The counsel concluded that all issue

raised by the applicants were mere issues of facts which already were determined by the first appellate court.

In rejoinder the applicants basically restated their submission in chief and added on few matters like absence of police loss report and that new issues have also to be deliberated by the court as are on point of law. As for second respondent submission they re-joined that they misconstrued their submission which is clearly for grant of leave and not certificate on point of law.

I have gone through rival submissions from both parties and the application documents. The crucial point for determination is whether the applicants have raised arguable issue for consideration by the Court of Appeal. The grounds raised by the applicant can be summarised as follows;

1. Whether in the circumstance of the case it was proper for the trial Tribunal not to conduct ***locus in quo***;
2. Whether during survey of the suit land the applicants had customary title and effected exhaustive improvement over the suit premises to entitle them for compensation;
3. Whether grant of certificate of right of occupancy has to be preceded by grant of letter of offer;

4. Whether by virtue of the applicants being given sketch map of the suit land and first respondent having certificate of title both issued by the second respondent amounted to double allocation;
5. Whether there were two written opinion of one assessor;
6. Whether it was proper for the appellate court to abridge the grounds of appeal of the applicants

As hinted above, leave to appeal is granted upon establishing in the intended appeal issues of general importance or a novel point of law which merit a serious judicial consideration in the appeal before the Court. See **British Broadcasting Corporation vs Eric Sikujua Ng'maryo**, Civil Application No. 138 of 2004, CAT at Dar Es Salaam, **Bulyanhulu Gold Mine Limited & 3 Others versus Petrolube (T) Limited & Another,** Civil Application No. 364/16 of 2017, CAT at Dar Es Salaam(Unreported) and **National Bank Of Commerce Versus Maisha Musa Uledi (Life Business Centre)** Civil Application No. 410/07 of 2019, CAT at Mtwara (Unreported)

In the present application the applicants have submitted that there was need for visiting ***locus in quo*** as there was evidence to show that the suit land had improvements like house and permanent crops while Ms Gatuna in reply submitted that during survey no such improvement was discovered as shown in the survey plan as such there was no need for

visiting ***locus in quo***. The issue of ***locus in quo*** was well discussed in the case of **Avit Thadeus Massawe Versus Isidory Assenga,** Civil Appeal No. 6 of 2017, CAT at Arusha (Unreported), where it was held that it was not necessary in circumstances of the case. Be it as it may, the role of the Court in this matter is not to decide whether visiting ***locus in quo*** was necessary rather to make a finding whether there are arguable issues worth of consideration by the Court of Appeal.

Regarding second ground it was submitted no letter of offer was issued to the first respondent before being granted a certificate of right of occupancy. In reply, it was submitted that letter of offer was issued in 1995 to the first respondent but it was lost and that it has been raised as a new issue. On my part, for I agree with Ms Gatuna that this issue was not raised in the first appellate court, but I differ with her that it has to be disregarded. This is so because the duty of this court is limited to determining if it is an arguable issue, the merits or otherwise of this ground will be determined by the court hearing the appeal. See the case of **Hamisi Mdida and Said Mbogo Versus the Registered Trustees of Islamic Foundation**, Civil Appeal No. 232 of 2018, CAT at Tabora (Unreported).

In third ground the applicants asserted that they have occupied for long time through customary title and were not paid compensation upon

survey and declaring suit land a planning area. In reply, it was submitted that they have never owned the suit land and no exhaustive improvement was discovered during survey. To answer this question requires analysis of the evidence on record which is not the domain of this Court in the instant matter on it is my considered opinion that applicant has succeeded to establish to this Court that there is serious issue to be determined by the Court of Appeal.

Fourth ground hinges on double allocation, applicants submitted that they were issued with sketch map by the second respondent and paid the fees while in reply it was submitted that the issue of double allocation does not arise as there is no two certificates of title in respect of the same area. On my part, I think the issue of double allocation does not arise in this case as correctly submitted by counsel for the first and third respondent. The issue could have been different if the applicants were complaining the way their right over the suit land was distinguished by the second respondent. The issue whether they had title or not is the matter to be dealt with during appeal.

With regard to the issue of assessors, applicants argued that there were two opinion of one assessor and the one who fully participated did not give his opinion. On the other hand, Ms Gatuna submitted that there is no proof of two hand written opinion of one assessor. First this issue was not

raised in the appeal, however this court need not to discuss the propriety of this issue as it is not sitting as an appellate court. The law is well settled on constitution of the District Land and Housing Tribunal as stipulated under section 23 of the Land Disputes Courts Act [Cap 216 R: E 2019]. The question whether there are two opinion of one assessor and reason for one assessor not to prepare his written opinion are matters which will be discussed in the appeal itself.

Regarding abridging grounds of appeal indeed it is the law and practice of the court to combine grounds of appeal especially where related grounds have been raised as separate and distinct grounds in the memorandum or petition of appeal. The applicants fault the appellate judge for combining their grounds of appeal but they did not submit whether some of their grounds were not decided None the less, it is the duty of the Court of Appeal to decide on the merits of this complaint. Further, second respondent submitted in respect of certification on point of law. With due respect her submission is misconceived for the matter at hand is about leave to appeal. I am satisfied that the grounds advanced by the applicants raise serious issues of law and facts worth of consideration by the Court of Appeal.

I accordingly allow the application and hereby grant the applicants leave to appeal to the Court of Appeal against the judgment of this Court in

Land Appeal No. 65 of 2019 within sixty days from the date of this ruling.

Each party should bear its own costs.

It is so ordered.

Right of appeal fully explained.

A. A Mbagwa

JUDGE

29/04/2022

Court: Ruling delivered before E.R Marley, Ag Deputy Registrar in the presence of the applicant, Advocate Edna Mwamtimu for the 1st and 3rd respondents and Mbua Jibu, the learned state attorney for the 2nd respondent this 29th day of April, 2022.

THE HIGH COURT OF TANZANIA

E. R Marley

Ag DEPUTY REGISTRAR

29/04/2022