

**THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA**

MISC. LAND APPLICATION No. 83 of 2021

*(Originating from the High Court of Tanzania at Mbeya Land Case App.
No. 36/2021. Originating from the District Land and Housing
Tribunal for Mbeya at Mbeya, Appl. No. 27 of 2017)*

JOSEPHINA DENYA MAHONGOLE.....APPELLANT

VERSUS

ROBART EMMANUEL KILUMBI.....RESPONDENT

R U L I N G

KARAYEMAHA, J

This is a ruling on an application for grant of leave to appeal to the Court of Appeal of Tanzania, against the decision of this Court (Hon. Ebrahim, J.) delivered on 24th September, 2021, in respect of Land Appeal No. 36 of 2021. The decision sought to be appealed against reversed the trial District Land and Housing tribunal for Mbeya's judgment and decree and declared that the suit land was the property of the deceased (Akwilino Jumanne Kalongola) and ordered the same to form part of the deceased's estate capable of being administered by the appellant. The applicant felt aggrieved by this decision and intends to challenge it by way of appeal. A notice of appeal has been filed.



The application has been preferred by way of a Chamber Summons, made under the provisions of section 5(1)(c) of the Appellate Jurisdiction Act (Cap 141 R.E 2019) (hereinafter the AJA) and section 47 (2) of the Land Disputes Act (Cap. 216 R.E 2019) (the Land Disputes Act). It is supported by an affidavit, sworn by Josephina Denya Mahongole, the applicant, and it sets out grounds on which the prayers are sought.

The respondent is fervently opposed to the application. In a counter-affidavit sworn by James Berdon Kyando, the respondent's counsel, the respondent maintained that the contents of paragraphs 3 (b) and (d) contain argumentative statements. He argued that the remaining paragraphs do not disclose good grounds for grant of leave to appeal to the Court of Appeal.

In the affidavit and supplementary affidavit sworn in support of the application, the applicant has taken a serious exception to the Court's decision, terming it flawed and that notice of intention to appeal against it has been filed in court. Having examined closely her affidavit, the applicant has drawn two issues that she considers pertinent in determining veracity or otherwise of the allegations leveled by the

respondent, culminating in the decision that reversed the trial court's finding. These grounds are:

- (i) *That the honourable Court based its findings on matters which were neither discovered nor addressed by parties hence parties were denied a right to be heard; and*
- (ii) *That the Honourable misapprehended the evidence on record regarding the issue of ownership of the suit land by the applicant.*

At the hearing of the application on 9/6/2022, the applicant was ably represented by Sr. Amelia Adam Chalamila, learned counsel, as the respondent enjoyed the services of Mr. James Kyando, learned advocate.

On taking the stage to address that court, Sr. Chalamila first abandoned paragraph 4 of the supplementary affidavit. Hence remained and reinforced paragraphs 5 and 6. She submitted reckoning to the contents of paragraphs 5 that this Court misapprehended the evidence because its decision was based on the unavailable and deceit evidence. However, the learned counsel spent considerable effort in discussing propriety or otherwise of the decision sought to be challenged. In my view it was enough for the learned counsel to address her mind on



whether the application raises grounds that are of any sufficiency to engage the Court of Appeal by way of the intended appeal. I am of the view that that is a subject for another day and, in any case, not in support of or against the present application.

On his part, Mr. Kyando prayed for this court to expunge Paragraphs 3, 6 and 7 of the affidavit for being argumentative. He however did not indicate the areas he so labeled. He submitted further that paragraph 5 carries no point of law it is instead based on matters of facts. He seems to argue that the Court of Appeal being the 2nd appeal will have no opportunity to re-evaluate the evidence. Attacking paragraph 6 he said that the complaint is premised on illegalities but no specific explanation. He, nevertheless, observed that the learned counsel submission on this is a statement from the bar not from the affidavit. He enhanced his position by citing the case of **Attorney General vs. Mkongo Building and Civil Works Constrictors Ltd and another**, Civil Application No. 81/16 of 2019 (unreported). He wound up by stressing that the application raises no any issue needing intervention by the Court of Appeal.

Rejoining, Sr. Chalamila submitted that having abandoned paragraph 4 of the supplementary affidavit, Mr. Kyando had no chance

of asking the same to be expunged. She said that she concentrated on paragraph 5 which concerns the issue of misapprehension of evidence hence depriving the applicant right to ownership of the suit land. In her view that is a point of law because the Court of appeal will have to evaluate the evidence guided by the grounds of appeal. She cited in that respect the case of **Kwiga Masa vs. Samwel Mtumbata** [1989] TLR 103.

As regards paragraph 6, the learned Counsel submitted that it raises a point of law and was guided by the case of **Emmanuel Abraham Manyaro vs. Peniel Ole Saita Ballah** [1987] to emphasize that contradictory evidence must be rejected by the Court of appeal. She submitted zealously that paragraphs 5 and 6 are not argumentative because they are calculated at seeking leave to appeal to the Court of Appeal.

Let me first address my mind on the issue of paragraphs 3, 6 and 7 being argumentative. The defective paragraphs are quote as follows:

"3. That during determination of the matter the appellant had heavier evidence than the respondent.

6. That this Honourable Court strayed on a wrong principle of law.



7. *That upon determination of the appeal on the 24th September, 2021 the court decided on the respondent's favour contrary to what is contained in record."*

These are paragraphs deposed in the original affidavit. Although Mr. Kyando did not make it clear, my review of those quoted paragraphs undisputedly imply arguments. Guided by the principle enunciated in the case of **Phantom Modern Transport (1985) Limited vs. D. T. Dobie (Tanzania) Limited**, Civil References No. 15 of 2001 and 3 of 2005 (unreported) that where defects in an affidavit are inconsequential, those defective paragraphs can be expunged or overlooked, leaving the substantive parts of it intact so that the court can proceed to act on it, being defective, the above quoted paragraphs are expunged. What I am sure of, after digesting Mr. Kyando's submission, the supplementary affidavit is not touched. Therefore, after expunging the foregoing paragraphs and being mindful of supplementary affidavit, I find that the remaining paragraphs hold the application.

The other issue that needs my attention prior dwelling to the gist of the application relates to the paragraph 6 of the supplementary affidavit. Mr. Kyando contended that apart from raising the point of illegality but it has not revealed the same. I absolutely agree with him



that the contemplated illegality was not pointed out by the applicant. Similarly, Sr. Chalamila did not give substantial explanation in her submission. Therefore, this court cannot consider unsubstantiated reasons as a good or not ground requiring the Court of Appeal to address it.

This finding leads me to proceed with the determination of the application on the remaining grounds.

Having critically analyzed the rival depositions the affidavit and supplementary affidavit, counter affidavit and submissions, the question that requires a settlement by the Court is whether the application demonstrates a sufficient ground or a disturbing feature which requires the guidance of the Court of Appeal.

This question takes into account the settled position of the law to the effect that grant of leave to appeal to the Court of Appeal is not a matter of a mere formality. A party intending to be allowed to appeal must demonstrate, with material sufficiency, that the intended appeal carries an arguable case which merits the attention of the Court of Appeal. Thus, grant of leave must be based on solid grounds which are weighty enough to engage the minds of the Court of Appeal, and they

(the grounds) must be premised on serious points of law or law and fact.

The current legal holdings are to the effect that an appeal constitutes an arguable case where the prospective appellant is able to demonstrate, in an application for leave, that he stands reasonable chances of success or, that disturbing features exist to require guidance of the Court of Appeal (see ***Rutagatina C.L. vs. The Advocates Committee & Another***, CAT-DSM (unreported), Civil Application No. 98 of 2010; and ***Abubakari Ally Himid vs. Edward Nyalusye***, CAT – DSM, Civil Application No. 51/2007 [unreported]). The decision in ***Himid's case***, quoted with approval, the superior Court's own decision in Civil Reference No. 19/1999, between ***Harban Haji Mosi (2) Shauri Haji Mosi*** and ***(1) Omar Hilal Seif (2) Seif Omar*** (unreported). It is emphasized, through the cited decisions that the disturbing features must be in the form of serious points of law which warrant the attention of the Court of Appeal. It is within this Court's discretion to refuse to grant leave if the application for leave falls short of disclosing any good ground on why it should be granted (see ***Saidi Ramadwani Mnyanga vs. Abdallah Salehe*** [1996] TLR 74).



The foundation in respect of this position was laid in the reasoning made by this Court in ***Simon Kabaka Daniel vs. Mwita Marwa Nyang'anyi and 11 Others*** [1989] TLR 64, wherein it was held:

"In any application for leave in the court of appeal the applicant must demonstrate that there is a point of law involved for the attention of the Court of Appeal".

See also the case of ***Nurbhain Rattansi vs. Ministry of Water Construction Energy Land and Environment and Another***, Civil Application No. 3 of 2004 TLR [2005] 220.

My dispassionate review of the affidavit sworn in support of the application gives me the resolve to answer the question raised above in the affirmative. My view is premised on the fact that the depositions made in the supporting affidavit reveal facts and grounds which justify my conclusion that there is an arguable case which merits attention of the Court of Appeal. Issues relating to misapprehension of evidence and right to be heard on issue raised **suo motto** are matters which are weighty, sound and serious enough to engage the Court of Appeal's mind and make a finding thereon. Refusal to grant leave will not only lead to miscarriage of justice but no guidance will be given by the higher court of the land regarding these pertinent issues. Therefore, I feel



constrained to allow the application so that the Court of Appeal may have a word on these grounds. I, therefore, hold that the respondent's arguments in opposition to the application are underwhelming.

In the upshot, I am overly convinced that the application meets the legal threshold for its grant. Accordingly, I grant the same as prayed. Costs to be in the cause.

It is so ordered.



DATED at MBEYA this 28th day of June, 2022

A handwritten signature in black ink, appearing to read "J.M. Karayemaha", is written above a horizontal line.

**J.M KARAYEMAHA
JUDGE**