

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

**(IN THE DISTRICT REGISTRY )**

**AT MWANZA**

**MISC. LAND APPLICATION NO. 114 OF 2021**

*(Arising from the Ruling of the High Court in Land Appeal No. 05 of 2021  
originally in Land Case No 08 of 2020 before the District Land and Housing Tribunal  
of Chato)*

**THOMAS MISALABA (Administrator of the Estate of the Late  
Misalaba Nkingwa Migoda)-----APPLICANT**

**VERSUS**

**WILLIAM NGUNULE-----RESPONDENT**

**RULING**

*Last Order: 05.07.2022*

*Ruling Date: 08.07.2022*

**M. MNYUKWA, J.**

This application is brought under Section 47(2) of the Land Disputes Courts Act, Cap 216 R.E 2019. The applicant sought leave to appeal to the Court of Appeal against the decision of this Court delivered on 10<sup>th</sup> November 2021 before Ismail, J. The applicant's application is supported by an affidavit sworn by Constantine Ramadhani, the learned counsel for

the applicant. The application is opposed by the respondent who filed a reply to the Affidavit sworn in by William Ngunule, the respondent in this application.

Briefly, it goes thus, in the District Land and Housing Tribunal for Chato at Chato in Land Application No. 8 of 2020, two prayers were sought; The declaration that the applicant is the lawful owner of the suit land and a permanent injunction restraining the respondent or his agent from trespassing into the suit land. It was alleged that, the applicant who is the administrator of the Estate of the late Misalaba Nkingwa Migonda, his late father, bought a piece of land way back in 1972 from Mihungo Kuchila. In 1980, the said land was allegedly to be given to the applicant who hold it. It is on the record that, the applicant was imprisoned for about 15 years and when released, he found that his land has been trespassed and occupied by the respondent. He therefore instituted the suit before the District Land and Housing Tribunal of Chato which he lost. Dissatisfied with the decision of the trial tribunal, he lodged an appeal before this court which was dismissed for being time-barred.

Aggrieved by the decision of this court which dismissed his appeal, the applicant filed a Notice of Appeal to the Court of Appeal. He also filed the present application seeking leave to appeal to the Court of Appeal



against the decision of this court. According to paragraph 8 of the applicant's affidavit, he wishes to challenge the decision of this Court on the following points of law worth for consideration and determination by the Court of Appeal.

- (i) *That the Honourable Court erred in law to hold that the applicant's appeal to be time-barred on Exchequer Receipt of filing fees without taking into consideration that it was filed electronically of which fees payment is out of applicant's control as its payment depends on Court Registry Officers to generate control number.*
- (ii) *That the applicant was denied the right to be heard as the position taken by this court to declare the applicant's appeal to be out of time was not the basis of the respondent's objection addressed in the parties' written submission.*

When this application was fixed for hearing, the applicant was represented by the learned counsel Mr. Constantine Ramadhan whereas the respondent appeared in person, unrepresented but engaged the services of Joram Kuboja for drawings only. By an order of the Court dated 30<sup>th</sup> May 2022, the application was disposed of by way of written submissions. Both sides filed their respective submissions as ordered hence this Ruling.



Submitting in support of the application, the learned counsel for the applicant averred that the law requires that a party who wants to appeal against the decision of this court as the first appellate court in a land dispute to be granted leave by this court as per the requirement of section 47(2) of the Land Disputes' Courts Act, Cap 216 R.E 2019.

He went on that, in making this kind of application, the applicant is duty-bound to satisfy this court that there is a point of law worth for determination and consideration by the Court of Appeal and that this court is not obliged to determine the merit or otherwise of the appeal or if the appeal has a chance to succeed as by doing so it will prejudice the decision of the Court of Appeal. He supported his argument by referring to the case of **Jireyes Nestory Mutalemwa v Ngorongoro Conservation Area Authority**, Civil Application No 164 of 2016, CAT at Arusha and the case of **Said Ramadhani Mayange v Abdallah Salehe** [1996] TLR 74.

The counsel for the applicant went on to state that the points of law that the applicant wants the Court of Appeal to determine, are reflected in the eighth paragraph of his affidavit.

In reply to the submission, the respondent opposed the application by filing a Reply to the Affidavit in this Court on 8<sup>th</sup> March 2022. He strongly disputed the applicant's points for determination to the Court of





Appeal by averred that, the applicant's appeal was time-barred and it is a known practice that after the document is lodged online, the party had to file the hard copy and that the applicant failed to adhere to that practice. He added that, the applicant failed to substantiate if the delay was contributed by the court, as there is no proof of the affidavit sworn by the registry officer to prove the same.

He went on to attack the applicant's submission by submitting that the Court of Appeal in its various decisions holds that this court had discretion to grant leave to appeal to the Court of Appeal and that leave is granted if the grounds of appeal raise issues of general importance or a novel point of law or where the grounds show a prima facie or arguable appeal and that not every application can be granted leave if it does not qualify the test given by the Court of Appeal. He supported his argument by referring to the case of **Rutagatina CL v The Advocates Committee and Another**, Civil Application No 98 of 2020 and the case of **British Broadcasting Corporation v Eric Sikujua Ng'maryo**, Civil Application No. 133 of 2014.

He went on to state that, the decision of this court was very clear and it is the right position of the law that payment of fees precedes the filing of a document and that payment of fees becomes a condition



precedent for such filing since no document would be taken to have been filed without proof of payment of fees. He added that, the time of filing the document is reckoned from the day when the payment is done and not from the day when the document is presented to court.

He further submitted that if the applicant had no other issue for consideration by the Court of Appeal apart from the issue stated in paragraph 8(a) of his affidavit, then this court should not allow the application because the Court of Appeal has already given the position on that issue. He supports by referring to the case of **John Chuwa v Antony Giza** [1992] TLR 233.

He further submitted that the applicant was negligent as he failed to present his appeal to this court within the prescribed time as he lodged the appeal one day before the lapse of the statutory period of 45 days.

On the second issue posed by the applicant worth for determination by the Court of Appeal, the respondent submitted that the issue determined by this court emanated from the preliminary objection raised by the respondent and it is not true that the issue was raised by the appellate Judge *suo moto* and that both parties were given an opportunity to argue the preliminary objection raised by the respondent. He retires his submission by praying the court not to grant the applicant's application.



I have considered the parties' submissions for and against the application. The main issue for determination is whether there are sufficient grounds to grant leave for the applicant to appeal to the Court of Appeal.

In the determination of this application, the court is mandated to see if the intended appeal is arguable or not. This court lacks jurisdiction to go into merit or deficient of the judgment. In the case of **Jireyes Nestory Mutalemwa vs Ngorongoro Conservation Area Authority**, Application No 154 of 2016, the Court of Appeal observed that;

*"The duty of the Court at this stage is to confine itself to the determination of whether the proposed grounds raise an arguable issue(s) before the Court in the event leave is granted. It is, for this reason, the Court brushed away the requirement to show that the appeal stands better chances of success as a factor to be considered for grant of leave to appeal. It is logical that holding so at this stage amounts to prejudging the merits of the appeal."*

Furthermore, in the case of **The Regional Manager-TANROADS Lindi v DB Shapriya and Company Ltd**, Civil Application No. 29 of 2012 CAT (unreported) as quoted with approval in the case of **Jireys Nestory Mutalemwa** (supra) it was pointed out that;




*"It is now a settled that a Court hearing an application should restrain from considering substantive issues that are to be dealt with by the appellate court. This is so in order to avoid making decisions on substantive issues before the appeal itself is heard."*

Guided by the above decisions, it is upon this Court to scrutinize the points of law advanced by the applicant and exercise judiciously the discretion to grant or refuse leave to appeal to the Court of Appeal.

After going through the judgment intended to be challenged, the pleadings and the submissions by the parties, I find that there are two points of law worth to be determined by the Court of Appeal as demonstrated by the applicant in his affidavit and submissions. The said issues are;

- (i) That there was a misconception on the part of the learned judge to rule out that the appeal is time-barred based on Exchequer receipt of filling fees without considering the appeal was filed electronically and the payment of the fees is done after the court generated the control number.
- (ii) The learned judge denied the parties' right to be heard as the position taken by him to rule out that the application is time-






barred has no basis from the preliminary objection raised by the respondent.


For the foregoing reasons and to the extent as stated above, an application for leave to appeal to the Court of Appeal against the decision of this court in Land Appeal No. 05 of 2021 is hereby granted. Costs shall follow the cause.

It is so ordered.



  
**M. MNYUKWA**  
**JUDGE**  
**8/07/2022**

**Court:** Ruling delivered on the 8<sup>th</sup> day of July 2022 in the presence of the Applicant's advocate and in the absence of the respondent.

  
**M. MNYUKWA**  
**JUDGE**  
**8/07/2022**