IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA DISTRICT REGISTRY

AT BUKOBA

MISC. LAND APPLICATION NO. 142 OF 2021

(Arising from the Judgment of High Court of Tanzania in Land Case Appeal No. 73 of 2020, originating from Application No. 22 of 2017 in Bukoba District Land and Housing Tribunal for Muleba at Muleba.)

FRANCIS PETRO.....APPLICANT

VERSUS

THE REGISTERED TRUSTEES OF ELCT NW DIOCESE.....RESPONDENT

RULING

14/04/2022 & 24/06/2022

E. L. NGIGWANA, J.

The applicant Francis Petro has lodged this application by way of chamber summons made under section 5 (1), (c) of the Appellate Jurisdiction Act, Cap. 141 R:E 2019 and Section 47 (2) of the Land Disputes Courts Act Cap 216 R:E, and supported by an affidavit sworn by the Applicant. In this application, the applicant is in pursuit for leave to Appeal to the Court of Appeal of the United Republic of Tanzania against the judgment and decree of this honorable Court **(Mwipopo, J)** in Land Appeal No. 73 of 2020 delivered on 12th day of November 2021 in favor of the respondent.

The brief back ground giving rise to this application as can be gathered from the record is to the effect that; sometimes in 2012, the respondent, **The Registered Trustees of ELCT North West Diocese** (Applicant in the trial

tribunal) sued the applicant (respondent in the trial tribunal) in the DLHT for Kagera at Bukoba in Land Application No. 51 of 2012 for unlawful invasion upon the land located at Guta Hamlet, Bunywambele Village, Ibuga Ward within Muleba District in Kagera Region. The respondent prayed for an order that the applicant vacate from the suit land and remove his offending structures.

The applicant on his side resisted the applicant's claims contending that the disputed land is a clan land that he inherited from his father, the late Petro Kakunjozo. When the matter came for hearing, the Francis Petro entered no appearance, and as result, the hearing was conducted exparte.

At the end of the exparte trial, the DLHT was satisfied that **The Registered Trustees of ELCT North West Diocese** is the lawful owner of the disputed land. The trial tribunal proceeded to order the respondent, now applicant to vacate the suit land and remove his offending structures with immediate effect.

From there, the applicant successfully lodged an application to set aside the said exparte judgment, but since DLHT for Muleba was started operating and the disputed land is located at Muleba the suit was transferred to Muleba and registered as Application No. 22 of 2017.

Upon hearing both parties, the DLHT for Muleba was satisfied that **The Registered Trustees of ELCT North West Diocese** is the lawful owner of the disputed land. The respondent, now applicant was ordered to vacate the suit land and remove structures erected in the suit land with immediate effect.

Aggrieved by the decision of the DLHT, the Applicant lodged an appeal to this court to wit; Land Appeal No.73 of 2020. At the end of the hearing of the appeal, the appeal was dismissed with costs for being devoid of merits.

The applicant was dissatisfied by the decision of this court, thus intend to appeal to the Court of Appeal of the United Republic of Tanzania. When the application came for hearing the applicant was represented by Mr.Derick Zephurine while Mr. Lameck Erasto, learned advocate, and appeared for the respondent.

I would like to state at the outset that both advocates in this application were unable to draw the line between submissions ought to be made at this stage, and those to be made at the appeal stage. Notwithstanding their long submissions, I will confine myself to the matter before me as required by the law.

The duty of the court being the High Court or Court of Appeal while handling application like this was stipulated by the Court of Appeal on 11/02/2021 in the case of **Jireys Nestory Mutalemwa versus Ngorongoro Conservation Area Authority**, Civil Application No. 154 of 2016 (Unreported) where the Court held 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 the grant of leave to appeal. It is logical that holding so at this stage amounts to prejudicing the merits of the appeal"

In that premise, I have no mandate to go into the merits or deficiencies of the judgment or orders of the Hon. Judge or to analyze the grounds of the proposed appeal whether the appeal will succeed or not because this is not the Court of Appeal and application of this nature does not mean re-hearing of the appeal. All what I am duty bound to do is to consider whether there are arguable issues requiring the Court of Appeal intervention in the intended appeal.

In the present application the reasons as to why the Court of Appeal intervention is needed were stipulated under paragraph 5, 6 and 7 of the applicant's affidavit and were coached as follows;

5. *That the intended appeal to the Court of Appeal has great chances of success and if the applicant will be granted a leave to appeal to the said Court as there as are triable issues on matter of law as well as some illegalities as ascertained in the chamber summons.*

6. *That the respondent did not state when the applicant encroached the Respondent's land and its boundaries was not ascertained as well as size of the disputed land.*

7. *That, on the balance of convenience, the applicant stands to suffer an irreparable loss if a leave to appeal to the Court of Appeal is not granted.*

And proposed grounds of appeal were stated in paragraph (a) (i), (ii), (iii), (iv), (vi) and (vi) of the chamber summons and were coached as follows; *That, the Appellate Court erred in law and fact for not considering that the Respondent did not state the size of the disputed land.*

(i) That, the Appellate Court erred in law and fact by deciding that there is a cause of action against the applicant while not.

(ii) That the Appellate Court erred in law and fact for not considering that the matter was time barred hence, the Tribunal had no jurisdiction to entertain it.

(iii) That, the Appellate Court erred in law and facts by considering the evidence of the Respondent basing on the boundaries that does not exist and are not accepted under the Haya Customary Law while the parties are separated by the road.

(iv) That, the Appellate Court erred in law and facts without considering that the Respondent failed to prove its case on the required standard.

(v) That, the Appellate Court erred in law and facts for not considering that the witness who testified in favor of the respondent in the Trial tribunal had a conflict with the Applicant, hence had the interest to save.

Taking the floor, Mr. Zephurine adopted the applicant's affidavit supporting the application to form part of his submission. He argued that an appeal to

the Court of appeal is not automatic, thus leave must be sought and obtained that is why the applicant has filed the instant application.

The learned counsel for that applicant essentially reiterated the contents of the affidavit. He further contended that in law, the size and the boundaries of the land in dispute need to be ascertained, therefore, the trial tribunal ought to have visited the locus in quo. He supported this particular contention by a decision of this court; **Jeneroza Prudence versus Matungwa Salvatory,** Land case Application No.25 of 2020 High Bukoba Registry. He went on submitting that according to law, a plaint must disclose when the cause of action arose but the plaint presented in the DLHT did not disclose when the cause of action arose. He argued the matter was time barred therefore, hence ought to have been dismissed. He further argued that, reading the entire evidence, there is nothing indicating that the matter was proved to the balance of probability, hence this application.

On his side, Mr. Lameck Erasto submitted that the High Court went through the entire evidence adduced before the DLHT and found that the suit had been proved to the balance of probability, thus, there is no any misdirection done by both the trial tribunal and the Appellate Court. He added that, the issue that the size of the disputed land must be ascertained is not a legal requirement and equally, visiting the locus in quo is not mandatory. He referred me to the case of **Nazi N. H. versus Gulaman Fadhil Janmohamed [1980] TLR 29.** He further argued that, the plaint disclosed the plaint. He supported his argument by citing the case of **Msangandwa versus Chief Japhet Wanzagi and 8 others [2006] TLR 351.**

He added that, though the plaint is silent as to when the cause of action arose, the evidence adduced revealed that the cause of action arose in 2006 as also reflected in the judgments of both the trial tribunal and the Appellate Court. He further argued that leave is granted at the court's discretion and he referred the court to the case of Rutagatina **C.L versus The Advocates Committee and Another**, Civil Application No. 98 of 2010.

I have carefully considered the submissions from both sides, therefore the issue for determination is whether the applicant has been able to satisfy the court that he deserves to be granted leave to Appeal to the court of Appeal of Tanzania against the decision made by this court in the above-mentioned matter.

Section 47(2) of the Land Disputes Courts Act Cap 216 R: E 2019 provides that;

"A person who is aggrieved by the decision of the High Court in the exercise of its revisional or appellate jurisdiction may, with leave of the High Court or Court of Appeal, appeal to the Court of Appeal".

It is common understanding that leave to the Court of Appeal is not automatic. It is granted where the court is satisfied that the grounds of appeal raise issues of general importance or where the grounds show that there is an arguable issue of law, facts or mixed facts and law which need to be determined by the Court of Appeal.

In the case of **British Broad Casting Corporation versus Erick Sikusieas Ngimaryo, Civil** Application No. 138 of 2004, CAT at DSM

(unreported) cited in the case of **Hamis Mdida and Another versus the Registered Trustees of Islamic Foundation**, CAT at Tabora, Civil Appeal No. 232 of 2018 it was held that;

"As a matter of general Principle, leave to appeal will be granted where the grounds of appeal raise issue of general importance or a novel point of law or where the grounds show a primafacie case or arguable appeal".

Furthermore, in the case of Ramadhani Mnyanga versus Abdala Selehe [1996] it was held that;

"For leave to be granted the application must demonstrate that there are serious and contentious issues of law or fact fit for consideration of appeal"

However, where the grounds of appeal are frivolous, vexations or useless or hypothetical, no leave will be granted. See the **case of Broad Casting Corporation** (supra).

In the intended appeal, the Court of Appeal of Tanzania will be expected to sit as the second appellate and the Apex Court as beyond it, no other Apex Court in the Hierarchy. It is common understanding that the role of the second appellate court is to determine matters of law only **unless** it is shown that the courts below considered matters, they should not have considered or failed to consider matters they should have considered, or looking at the entire decision, it is perverse. **See Otieno, Ragot & Company Advocates versus National Bank of Kenya** [2000] e KLR.

While being guided by the stated principles stipulated in the herein above cases, I have gone through the judgment of this court as a whole, and found that the presiding Judge considered the adduced in the DLHT and addressed

all grounds of appeal raised. Page 6 of the typed judgment of this court (Mwipopo, J) read;

"I have thoroughly perused the record and read the respondent's pleadings (Form No.1) which stated in item 6 that the cause of action constituting the claim is that the Appellant has unlawfully invaded the Respondent's Land, planted trees therein and erected structures therein without the consent of the owner".

According to the evidence of record, the cause of action arose in 2006. Indeed, reading the records of the trial tribunal, the judgment of the tribunal, judgment of this court I am convinced that the herein above proposed grounds of appeal; (i), (ii), (iii) and (vi), do not constitute issues neither nor of fact which deserve to be determined by the Court of Appeal of Tanzania.

However, as regard proposed ground (iv) and paragraph 6 of the affidavit supporting the application, I am satisfied that the same constitute an arguable issue. Reading the pleadings presented in the DLHT, the proceedings of the trial tribunal and both judgments, it is apparent that the central issue was encroachment where it was alleged that the applicant crossed/ overstepped the boundary and entered into the respondent's land where he erected structures therein. The disputed land appears to be un-surveyed land. The size of the land the applicant's land was pleaded and proved by evidence, and the trial tribunal did not visit the locus in quo and no reasons given for not visiting the locus in quo.

It is common understanding that visiting the locus in quo is not mandatory and it is done only in exceptional circumstances. Some of the factors to be

considered by the court or tribunal before exercising its discretion to visit the locus in quo as discussed in the case of see **Avit Thadeous Massawe versus Isidori Assenga**, Civil appeal No. 6 of 2017 CAT (unreported) are as follows;

(i) Where such a visit will clear the doubts as to the accuracy of a piece of evidence when such evidence is in conflict with another evidence.

(ii) Where the dispute between the parties' centers on location of the disputed land, the extent, boundaries and boundary neighbor, and physical features on the land.

(iii) Where it is manifested that there is a conflict in the survey plans and evidence of the parties as to the identity of the land in dispute and that the only way to resolve the conflict is for the court to visit the locus in quo.

It should be noted very clearly that the essence of a visit to locus in quo in land matters is to enable the Court see objects and places referred to in evidence physically and to clear doubts arising from conflicting evidence (if any) about physical objects on the land and boundaries. See the case of **Akosile versus Adeye** [2011]17 NWLR cited with approval by the Court of Appeal in **Avit Thedeus** (Supra).

In the instant case, the typed proceedings the of trial tribunal at page 33 shows clearly that when the matter initially heard exparte, the applicant

through its advocate Katabalwa urged the court to visit the locus in quo for the interest of justice. The record read;

"Katabalwa Advocate: Your Hon. We pray to close our case. Your Hon. I pray the tribunal to visit the locus in quo so as to verify our allegations

Sgd J. K. Banturaki

Chairman

31/07/2014

Order: Locus visit on 18/08/2014.The applicant to comply with the payment requirement"

Sgd J. K .Banturaki

Chairman
31/07/2014"

The hand written proceedings revealed that the tribunal visited the locus in quo on 18/8/2014, and on 13/ 05/2015 the exparte judgment was delivered in favor of the applicant, now respondent. The proceedings further revealed that. Later on, the applicant successfully lodged an application to set aside the said ex-parte judgment.

However, this time around when the matter was heard inter-parties, the locus in quo was not visited. The Chairman sat with two assessors who after the hearing gave dissenting opinion on the matter, and the Chairman opted to concur with the opinion Mr. Marijani. The assessors' opinions as per record were read to the parties on 09/04/2020. Part of the opinion by Marijani read as follows;

"Kutokana na kukosa vielelezo vya maandishi ili kufikia maamuzi sahihi itabidi kujikita kwenye usahihi wa mizania ya maelezo tu.

Historia ya shauri hili ina mambo muhimu, matatu.

(a) *Richard Kagoro, Mzee wa Kanisa alimshitaki France Petro kwa kuvamia eneo hili la kanisa kwenye Baraza la Kata Ibuga ambapo Baraza lilimwona France Petro Mvamizi.*

(b) *Baraza la Wilaya Bukoba lilisikiliza shauri hili na kutoa haki kwa kanisa na kumuona France Petro kuwa ni Mvamizi.*

Mabaraza yote mawili yalitembelea eneo la Mgogoro kuwasiliana na majirani na kupata picha halisi.

Kwa vile maombi kwenye Baraza la Wilaya Bukoba yalisikilizwa na kutolewa maamuzi Experte, mjibu maombi alipewa nafasi ya kusikilizawa.

Kwa kurejea kumbukumbu** na uzito wa ushahidi, **nampa haki mleta maombi. Ni maoni yangu kuwa maombi haya yakubaliwe na mjibu maombi abebe gharama ya shauri hili"

Reading the opinion, it appears that the above named assessor formed his opinion basing among other things on the locus in quo record and the ex parte judgment without considering that they were set aside. The Hon. Chairman concurred with him. It is my considered view that that is one of disturbing feature which need to be considered by the Court of Appeal.

Another issue is whether, considering the circumstances of this case, this is one of the cases which the trial tribunal, for the interest of justice ought to have visited the locus in quo or given reasons for not exercising its discretion

by visiting the locus in quo. The final issue is whether, basing on the evidence on the trial tribunal record, it was justifiable to hold that the respondent proved its case on the balance of probabilities.

In the upshot, I am convinced that the application meets the legal threshold for its grant. Accordingly, I grant it as prayed. Costs shall be in the due course.

It is so ordered.

E. L. NGIGWANA

JUDGE

24/06/2022

Ruling delivered this 24th day of June , 2022 in the presence of Mr. Derick Zephurine, learned advocate for the applicant, Mr. Lameck Erasto, learned State Attorney for the respondent, Hon. E. M. Kamaleki, Judges' Law Assistant, and Ms. Tumaini Hamidu, B/C.

E. L. NGIGWANA

JUDGE

24/06/2022