

**THE UNITED REPUBLIC OF TANZANIA**

**JUDICIARY**

**IN THE HIGH COURT OF TANZANIA**

**MBEYA DISTRICT REGISTRY**

**AT MBEYA**

**MISCELLANEOUS LAND APPLICATION NO. 109 OF 2021**

*(Originating from Land Appeal No. 43 of 2021 of the High Court of Tanzania at Mbeya)*

**RICHARD OSIA MWANDEMELE ..... APPLICANT**

**VERSUS**

**LWITIKO OSIA MWANDEMELE..... RESPONDENT**

**RULING**

In this application, the applicant is seeking leave to appeal to the Court of Appeal against the decision of the High Court of Tanzania at Mbeya in Land Appeal No. 43 of 2021. The application is brought by way of chamber summons under sections 47(2) of the Land Disputes Courts Act [Cap 216 R: E 2019] and 5(1)(c) of the Appellate Jurisdiction Act [Cap 141 R: E 2019]. It is supported by an affidavit of Kelvin Kuboja Gamba learned advocate for the applicant. The application is resisted by the respondent through his counter affidavit.

Briefly, the disputants are battling over the plot of land designated as plot No. 1030 located at Isyesye area within Mbeya City in Mbeya

region. The applicant sued the respondent via Application No. 146 of 2016 in the District Land and Housing Tribunal for Mbeya. Upon hearing evidence from both parties, the Tribunal decided in favour of the respondent. Aggrieved, the applicant appealed to this Court via Land Appeal No. 43 of 2021, the appeal was heard by this court (Karayemaha, J) who upon appraising the evidence dismissed the appeal. It is against such decision the applicant lodged the present application seeking leave to appeal to the Court of Appeal.

When the application came for hearing the applicant was represented by Kelvin Kuboja Gamba whereas the respondent had the service of Sospeter Tyear, both learned advocates. The application was disposed through written submission.

Mr. Gamba was the first to take the ball rolling, he submitted that leave is granted upon the Court being satisfied that the intended appeal raises issue of general importance of a point of law, that the intended grounds show prima facie or arguable appeal, grounds are not frivolous, vexatious or hypothetical and the appeal stands reasonable chance of success. On this he cited the case of **British Broadcasting Corporation v. Erick Sikujua Ng'maryo**, Civil Application No. 138 of 2004, CAT Dar es Salaam (Unreported) to support the argument.

Mr. Gamba went on to submit that under paragraphs 11, 12 and 13 of the affidavit they have demonstrated that there is arguable issue, chance of success and the case of **Harban Haji Mosi & Another v Omar Hilal Seif & Another**, Civil Reference No. 19 of 1997 was referred to. It was further submitted that the matter involves ownership of the registered land which affect right of the applicant and therefore leave is sought so that the said irregularities can be addressed by the Court of Appeal.

In reply Mr. Tyeah adopted contents of the respondent's affidavit filed on 25<sup>th</sup> January, 2021 and went on to submit that for the Court to grant leave to appeal the applicant must demonstrate that there is a prima facie merits on the intended appeal sought to be challenged to the Court of Appeal. He cited the case of **Doscus Guyu v Guyu Mhindi & Another**, Misc. Land Application No. 56 of 2018, HC at Shinyanga.

It was the submission of the respondent's counsel that although the applicant has cited different authorities expounding on condition to grant leave to appeal but has failed to relate them to the application at hand. He added that leave is not granted on the reason that the appeal is arguable rather where there are prima facie grounds which merits the appeal.

Mr. Tyeah was right to submit that the averment that the appeal has great chance of success is no longer a condition warranting grant of leave to appeal as was stated in the case of **Bulyanhulu Gold Mine Limited & 3 Others v. Petrolube (T) Limited & Another**, Civil Application No. 364/16 of 2017(Unreported).

It was further submitted that the applicant has not indicated what are the irregularities committed by this Court upon which leave to appeal is sought. He added that although the duty of this Court is not to determine the appeal but it has to grant leave upon the application satisfying the conditions stipulated in law and practice.

He rested his submission starting that the applicant has not advanced any disturbing feature in the judgment of this Court which needs intervention by the Court of Appeal.

During rejoinder, it was submitted that under paragraph 12 of the affidavit grounds of the intended appeal were annexed which in essence raised issues for consideration by the Court of Appeal. It was further submitted that in the application for leave to appeal the Court has no duty of rehearing the matter rather look if there is arguable grounds meriting an appeal.

I have perused record of the application and considered rival submission. The only issue calling for determination is;

*whether the applicants have raised arguable issue for consideration by the Court of Appeal.*

Now, it should be understood that, in the application for leave to appeal, what is required of the Court hearing such application is to determine whether or not the decision sought to be challenged on appeal raises any legal point deserving consideration by the Court of Appeal. That is what is cardinal in any application of the this nature. See the case of **British Broadcasting Corporation v. Erick Sikujua Ng'maryo and Bulyanhulu Gold Mine Limited & 3 Others v. Petrolube (T) Limited & Another** (Supra) also, cited by the applicant's counsel.

I have gone through the affidavit of the applicant specifically para 12 under which the intended grounds of appeal are annexed. Looking at the proposed grounds of appeal they all revolves on the issue of evaluation of evidence. I have in mind that appeal to the Court of Appeal from decision of the District Land and Housing Tribunal in exercise of its original jurisdiction can be on point of law and fact. Under paragraph 12 of the affidavit are matter of facts which depends on credibility of witness.

There is chain of authorities that where there are concurrent findings on the issue of facts by the lower Court, the second appellate Court should be reluctant to overturn the said findings unless there was misapprehension and misdirection on evidence in record which occasioned miscarriage of justice. See the case of **Ali Abdallah Rajabu Vs Saada Abdallah Rajabu and Others** [1994] TLR 132. The question which follows is whether leave to appeal can be granted where there are concurrent findings of the Courts on matters of fact.

In an attempt to resolve the issue, I was faced with two conflicting decisions of the Court of Appeal. The first case is that of **Ameir Mwadini Kificho v Haji Muharami Abdalla**, Civil Application No. 06 of 2014, CAT at Zanzibar (Unreported) 11<sup>th</sup> December, 2015. In this case the applicant filed the suit in the District Court which upon evaluating evidence found the respondent the lawful owner. On appeal the High Court re-evaluated evidence and concurred with the trial Court decision. Then the applicant applied for leave to appeal which was refused by the High Court. The applicant applied for a second bite to the Court of Appeal and the Court had this to say;

*'No such circumstances are in existence in the case under our consideration and given the concurrent findings of fact by the two Courts below on the issue of ownership of the disputed parcel of land, the Court of Appeal will*

*be left with no room for any intervention. To say the least, the applicant has not demonstrated any point of law worth the attention or consideration by the Court.'*

The second case was decided recently **Yusufu Juma Risasi v Anderson Julius Bicha**, Civil Appeal No. 233 of 2018, CAT at Tabora dated 1<sup>st</sup> April, 2022. In this case the respondent had instituted a suit in the District Land and Housing Tribunal. The Tribunal declared the applicant the lawful owner. On appeal, the High Court concurred with the findings of the Tribunal. Aggrieved the appellant applied for leave to appeal which was refused. On appeal the Court of Appeal, the Court held that;

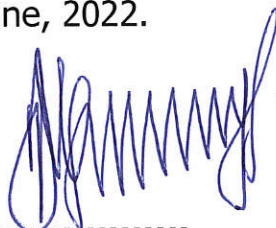
*'In our considered view, the learned Judge was not right; first by proceeding to consider the merits of those grounds and secondly, as submitted by Mr. Kassim by deciding that the DLHT and the High Court had arrived at concurrent findings.'*

This Court is bound by the decision of the Court of Appeal, and it is the law that where the Court is faced with conflicting decisions, the better practice is to follow the more recent of the conflicting decisions unless it can be shown that it should not be followed for any of the reasons discussed above. See the case of **Ardhi University v Kiundo Enterprises (T) Limited**, Civil Appeal No. 58 of 2018, CAT at Dar es Salaam (Unreported).

It has to be noted that I did not had an advantage of reading the facts pertaining to circumstances of the two decisions cited above. More importantly in the recent of **Yusufu Juma Risasi**(Supra) the Court did not make reference to the case of **Ameir Mwadini Kificho**(Supra). With that remark I am of the settled view that this Court has to apply the recent decision of the Court of Appeal which depict the current development of the law.

To that end the application is granted. The applicant is accordingly granted leave to appeal to the Court of Appeal under section 5(1)(c) of the Appellate Jurisdiction Act [Cap 141 R: E 2019] in respect of Land Appeal No. 43 of 2021. No order as to cost.

DATED at MBEYA this 30<sup>th</sup> of June, 2022.



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**D. P. NGUNYALE**  
**JUDGE**