

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF BUKOBA)**

AT BUKOBA

MISC LAND CASE APPLICATION NO. 91 OF 2021

(Originating from Land No. 13 of 2019 of the High Court Bukoba, Original Land Application No. 46 of 2014 of the District Land and Housing Tribunal for Kagera at Bukoba)

BRAISON DAMIAN..... APPLICANT

VERSUS

ANDASON DAMIAN..... 1ST RESPONDENT

JENIVA DAMIAN..... 2ND RESPONDENT

MWEBEMBEZI DAMIAN.....3RD RESPONDENT

DAMIAN LAZARO.....4TH RESPONDENT

RULING

Date: 24.06.2022

A.Y. Mwenda, J

In this application the Applicant one BRAISON DAMIAN, is seeking leave to appeal to the Court of Appeal against the decision of this court in Land Appeal No. 13 of 2019 dated 06/08/2021. It is made under Sections 5(1)(c) of the Appellate Jurisdiction Act, [Cap 141 RE 2019], section 47(1) of the Land Disputes Courts Act, [Cap 216 R.E 2019], Rule 46(1) of the Court of Appeal Rules, 2009 and it is supported by an affidavit sworn by BRAISON DAMIAN, the applicant. On his part the 2nd respondent filed a counter affidavit. As for the 1st, 3rd and 4th respondents,

this matter proceeded ex parte against them following a proof of service through substituted service by publication in a NIPASHE Newspaper dated 15/05/2022.

During hearing of this application, the applicant was represented by Mr. DANSTAN MUTAGAIHWA learned advocate and the respondent by Mr. JOSEPH BITAKWATE, learned Advocate.

In his submission in chief Mr. DANSTAN MUTAGAIHWA, begun by stating that this is an application for leave to appeal to the Court of Appeal of Tanzania against the judgment of High Court dated 06/08/2021 in Land Appeal No. 13 of 2019. He added that the said appeal was the first appeal and legally, upon being dissatisfied and filing the notice of appeal, the applicant is required to seek leave to appeal to the Court of Appeal. He said the applicant filed the notice of appeal on 23/8/2021.

He thus prayed the affidavit which is accompanying the applicant's Chamber application to be adopted as within it, the applicant avers/claims his dissatisfaction against the whole decision. He then concluded his submission with a prayer that this application be granted with costs.

In opposing this application, Mr. JOSEPH BITAKWATE begun by praying the contents of the 2nd respondent's counter affidavit to be adopted to form part of his submission.

The learned counsel stated that they are opposing this application on two grounds. One, that the applicant in his application failed to show/raise any ground to be subjected for scrutiny before the Court of appeal. He said, granting

applications of this nature is a discretion of this court upon raising the basis for so doing, which are grounds of appeal. In support to this point, the learned Counsel cited the case of *BRITISH BROADCASTING CORPORATION VS. ERICK SIKUJUA NG'MARYO, CIVIL APPLICATION NO. 138 OF 2004* (unreported) at page 6. He then concluded this point by submitting that in the applicant's affidavit there is no ground raised to enable this court assess his prayers.

In regard to the second ground of opposition to this application, the learned Counsel for the respondent submitted that the applicant failed to undertake important steps before filing this application. He said, by virtue of Rule 90(1) of the Court of Appeal Rules, 2019, there is a time fixed for filing appeal which is 60 days although there are exceptions in which an appeal can be filed upon lapse of the said 60 days. The said exception is satisfaction by the court that the applicant filed an application for a copy of judgment and the letter to that effect be copied to the respondent. He said, in this application, the plaintiff annexed a letter dated 9/8/2021 which was filed on 13/8/2021 but the same was never served to the respondent. He said, failure to serve the copy to the respondents denies him the right to receive a certificate of delay as his intended appeal is already time barred. To support this point, he cited the case of *DEOGRATIAS KASSINDA VS. MAKIU KAJWANGYA AND ANOTHER, MISC. LAND CASE APPLICATION NO. 34 OF 2021* (unreported) where the effect of failure to file/serve the letter to respondent were discussed at page 7 and 8 of the typed ruling.

The learned counsel concluded his submission with a prayer to this Court to have this application dismissed with costs.

In rejoinder to the reply by the learned Counsel for the respondent, Mr. DANSTAN MUTAGAIHWA stated that with regard to submission that the respondents were not served a letter applying for a copy of judgment, this point has no legal basis because what is before this court is an application and not an appeal. He then prayed this Court to depart from the decision in *DEOGRATIAS KASSINDA VS. MAKIU KAJWANGYA AND ANOTHER, MISC. LAND CASE APPLICATION NO. 34 OF 2021* (supra) because the service of the said letter is provable before the Court of Appeal itself and not in the present application.

With regard to the first point of submission by the learned counsel for the respondents that there are no grounds of appeal raised in the applicant's affidavit, the learned counsel for the applicant stated that the applicant is aggrieved by the whole decision of the High Court which is an arguable issue by itself as indicated at paragraph 4 of the affidavit. In support thereof, he cited the case of *JIREYS NESTORY MUTALEMWA vs. NGORONGORO CONSERVATION AREA AUTHORITY, CIVIL APPLICATION NO. 154 OF 2016, CAT* (unreported). He said what matters in applications such as this one is just a hint that the applicant is not satisfied and other matters are to be left to the court of appeal to determine. He prayed this court to disregard the case of *BRITISH BROADCASTING CORPORATION VS. ERICK*

SIKUJUA NG'MARYO, CIVIL APPLICATION NO. 138 OF 2004 (supra) cited by the counsel for respondents as it was decided by single judge:

Having summarized the rival submissions from both sides, the task that remains with this Court is to determine this application.

It is trite principle that leave to appeal to the Court of Appeal is not automatic. It is within the discretion of the Court to grant or refuse leave. In that process however, the said discretion must be exercised judiciously and on materials before the Court. On the same footing the law does not expressly state the factors to be considered for leave to appeal to the Court of Appeal. However there are circumstances under which the court may consider in granting leave. In the case of *JIREYS NESTORY MUTALEMWA vs. NGORONGORO CONSERVATION AREA AUTHORITY, CIVIL APPLICATION NO. 154 OF 2016* Court of Appeal of Tanzania (unreported), the Court while citing the case of *BRITISH BROADCASTING CORPORATION VS. ERICK SIKUJUA NG'MARYO, CIVIL APPLICATION NO. 138 OF 2004*(supra) stated as follows:

"...much as the grant of leave is discretionary, yet it is not automatic. The court adjudicating on such application is not left free to do so. It can grant leave to appeal only where the ground of the intended appeal raise arguable issues for the attention of the court. In other words, the grounds raised should merit a serious judicial

consideration by the court. This is intended to spare the Court from dealing and wasting its precious time on unmerited matters.”

The Court of Appeal have stated many times without number that as a general principle, leave to appeal is granted where 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. However, where the grounds of appeal are frivolous, vexatious or useless or hypothetical, no leave will be granted. Please see *BRITISH BROADCASTING CORPORATION VS. ERICK SIKUJUA NG'MARYO, CIVIL APPLICATION NO. 138 OF 2004* (unreported).

In the present application, the applicant's advocate stated that the applicant intends to appeal to the Court of Appeal against the whole decision of the High Court and to him what matters is not raising grounds of appeal rather, to just hint that he is not satisfied with the decision intended to be appealed against and other matters should be left to the Court of appeal to determine. With due respect to the submission by the learned counsel this court does not buy his argument. Guided by the authorities cited above, viz. *BRITISH BROADCASTING CORPORATION VS. ERICK SIKUJUA NG'MARYO, CIVIL APPLICATION NO. 138 OF 2004* (unreported) and *JIREYS NESTORY MUTALEMWA vs. NGORONGORO CONSERVATION AREA AUTHORITY, CIVIL APPLICATION NO. 154 OF 2016* Court of Appeal of Tanzania (unreported), the applicant ought to have raised specific

grounds of appeal for this court to assess if they pass the test set out in these authorities. By stating that he intends to challenge the whole decision, it is difficult to know what exactly he is intending to challenge, is it point of law or fact, is an appeal arguable before the Court of appeal or not? Failure to give answers to these questions it goes without saying that the present application failed to meet the said tests. There is neither issues of general importance nor a novel point of law raised in the ground of appeal. There is also no prima facie or arguable appeal shown.

The learned counsel for the respondent raised another pitfall in this application in that the applicant failed to serve the respondent with a copy of a letter applying for a copy of judgment and for that matter the intended appeal is time barred. This court having concluded on weakness of the intended appeal, finds no reason to deal with it as the fate of this application is already determined.

That being said this application fails and it is hereby dismissed with cost.

It is so ordered.



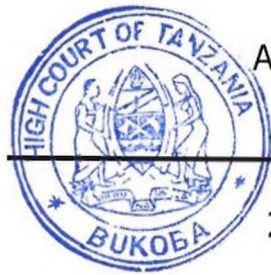

A.Y. Mwenda


Judge

24.06.2022

Ruling delivered in chamber under the seal of this court in the presence of Mr. Danstan Mutagahywa for the Applicant and in the absence of the 1st, 2nd and 3rd

Respondents and in the presence of Mr. Danstan Mutagahywa holding brief for Mr. Bitakwate for the 4th Respondent.




A.Y. Mwenda

Judge

24.06.2022