

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

**MOSHI DISTRICT REGISTRY**

**AT MOSHI**

**MISC. LAND APPLICATION NO. 26 OF 2021**

(C/f Land Case Appeal No. 7 of 2021, High Court of Tanzania at Moshi Original Same District Land and Housing Tribunal Application No. 27 of 2016)

**JOSEPHINA PAULO MNZAVA..... APPLICANT**

**VERSUS**

**MECK LAZARO.....1<sup>ST</sup> RESPONDENT**

**EMMANUEL MKUMBWA.....2<sup>ND</sup> RESPONDENT**

*Last Order: 27<sup>th</sup> June, 2022*

*Date of Ruling: 21<sup>st</sup> July, 2022*

**RULING**

**MWENEMPAZI, J:**

The applicant is seeking for leave to appeal to the Court of Appeal of Tanzania (CAT) against the decision of this Court made by Hon. Mutungi, J. in **Land Appeal Case No. 7 of 2021** delivered on 29<sup>th</sup> July, 2021. The application is brought pursuant to section 47 (2) of the Land Dispute Courts Act, Cap 216 R.E 2019 and Rule 45 (a) of the Tanzania Court of Appeal Rules, 2009.

Briefly the relevant facts are that the applicant unsuccessfully sued the respondents at the District Land and Housing Tribunal of Same at Same



(trial tribunal) in **Land Application No. 27 of 2016**. The dispute related to a suit land and a house appurtenant thereto which the 2<sup>nd</sup> Respondent had sold to the 1<sup>st</sup> respondent. The appellant prayed for among other things a declaratory order that the disposition of the suit property by the 2<sup>nd</sup> Respondent to the 1<sup>st</sup> respondent was null and void ab initio for lack of her consent. The applicant claimed that the suit property was a matrimonial property belonging to her and the 2<sup>nd</sup> Respondent who used to be her husband.

At the tribunal, the applicant prayed for the Tribunal to declare the suit property a joint and matrimonial property belonging to her and the 2<sup>nd</sup> respondent and at the same time issue a permanent restraining order against the 2<sup>nd</sup> respondent from disposing or leasing the property without her consent. The respondents disputed the claims and demanded proof of the same from the appellant. In the end the trial Tribunal decision was in favour of the Respondents. The applicant unsuccessfully appealed to this Court hence this Application for leave as she wants to further pursue her right to the Court of Appeal.

The application is supported by an affidavit sworn by applicant's counsel Mr. Chiduo Zayumba. The 1<sup>st</sup> respondent filed a counter affidavit opposing the application through her counsel Ms. Jane James. The 2<sup>nd</sup> respondent did not respond or enter appearance when the matter was scheduled for hearing. At the hearing of the application, it was ordered the same proceed by way of written submission.

In her submission in support of the application the learned counsel stated that the judgment in question raises issues of law that in their view



deserves determination by the Supreme Court that is the Court of Appeal of Tanzania. The said issues he said are as enumerated in their intended memorandum of appeal.

Submitting further Mr. Zayumba stated that this being an application for leave and not the appeal itself the governing principle is as stated in the case of **Bulyanhulu Gold Mine Ltd & 2 Others Vs. Petrolube (T) Ltd & Another, Civil Application No. 364/16 OF 2017 CAT at Dar Es Salaam** (Unreported). Quoting this case, the learned counsel submitted that it was observed by the court that at this stage the court is not supposed to look at nor make a finding on the merits or demerits of the intended appeal as it is not the duty of this court to examine the details of the proposed issues. He further submitted that they were however going to touch on the grounds of the proposed appeal for the sake of demonstrating that it stands chances of success.

On the first ground the learned counsel submitted that both the first appellate court and the trial tribunal erred to hold that there was no proof that the Applicant was a legal wife of the 2<sup>nd</sup> Respondent. He argued that according to the pleadings there was no dispute at all that the Applicant was a legal wife of the 2<sup>nd</sup> Respondent. He further explained that the issue at the trial was whether the disputed land was a matrimonial property and not whether the Applicant was a legal wife of the 2<sup>nd</sup> Respondent. He was of the view that the said issue being an issue of law it deserves determination by the court of appeal.

On the second ground as to whether the oral evidence brought by the Applicant was not proof in the eyes of the law as held both courts. The



learned counsel submitted that the Applicant had brought witnesses who testified to the effect that the suitland had been acquired during the subsistence of the marriage but the courts held there was no proof and stated no reason for rejecting the witnesses' oral evidence. He argued that it was in contravention of a cardinal principal of law that every witness is entitled to credibility to be believed unless there was a reason to disbelief which must be stated.

The third ground was with respect to the issue as to whether the court erred to award ownership of the land to the Respondents without requiring to prove anything. The learned counsel submitted that both courts did not look at the weight of the Respondents' evidence they only looked at the weakness of the Applicant's evidence as if it was a criminal case. It was his argument that in civil cases a party is awarded victory based on the weight of his evidence and that a party cannot be awarded ownership of land without any proof simply by looking at the weakness of the plaintiff's case.

Finally, the fourth ground was related to the issue as to whether the court erred to hold that there was lawful transfer of ownership of land between Respondents without any legal procedure to be followed. On this ground the learned counsel submitted that the property in dispute is located at village land and that there was no dispute that the Village Council was not involved hence no consent was obtained in the disposition of the land, he argued. It was the learned counsel's submission that both the trial court and first appellate court erred to declare the disposition lawful while it did not follow the mandatory provisions of the law particularly section 31 of the Village Land Act, Cap 114 (R.E 2002). Based on his submission Mr.



Zayumba concluded that the application for leave has merit due to the reasons they have stated and therefore the intended appeal has chances of success as it raises issues of general importance and novel point of law.

Responding to the submission Ms. Jane James learned counsel submitted that the counsel for the Applicant has mislead this court by submitting on the appeal itself and forgetting his application which is the application for leave to appeal. Referring to the cited case of **Bulyanhulu Gold Mine Ltd & 2 Others Vs. Petrolube (T) Ltd & Another(supra)**, she stated that the case is straight forward on what should be submitted on the application for leave to appeal which should not be the appeal itself. She submitted further that the Applicant concentrated on the appeal itself and ignored the application and that the authorities cited and the submission were contradictory to each other.

Furthering her submission Ms. James cited the case of **SAFARI MWAZEMBE VS. JUMA FUNDISHA**, Civil Application No. 503/06 of 2021 CAT at Mbeya (unreported) where it was held to the effect that much as the grant of leave is the discretion of the court, the same is not automatic in the sense that the court has to be satisfied that the grounds of the intended appeal raise arguable issues for consideration by the court.

She argued that their question was whether the ground raised by the Applicant under paragraph 4 of the supporting affidavit merit a serious judicial consideration by the court. She further contended that it was without any doubt that the answer to the question will be negative because the Applicant dwelled on the appeal itself rather than raising



issues of law to be determined by the court. She concluded that the application was misconceived and hence prayed for the same to be dismissed with cost.

In the rejoinder submission Mr. Zayumba stated that the arguments by the learned counsel for the Respondent are misconceived and not backed by law. he argued that the Respondent's counsel did not cite any case law which set a principle that in an application for leave to appeal, Applicant is strictly prohibited on explaining the grounds of the intended appeal and that if he does so the application would be incurably defective. He was of the view that the cited case of Safari Mwazembe, is distinguishable and hence not applicable because in that case the application for leave which was a second bite was rejected because the grounds raised to the Court of Appeal were not raised in the first bite at the High Court.

Mr. Zayumba maintained that their application has merit and deserves to be granted. He further argued that one cannot show prima facie appeal or arguable appeal without at least touching on the grounds of the intended appeal. He was of the view therefore that the submission by the learned counsel was totally misconceived. He then prayed for the application to be allowed with cost.

Having gone through the submission from both parties in determining the application at hand the law is well settled that application for leave to appeal is not automatic and is granted only when there is good reason, normally on a point of law or on point of public importance. This legal position was laid down in **British Broadcasting Corporation V Eric**



**Sikujua Ng'maryo**, Civil Application No. 133 of 2004 (Unreported)

where the Court held that;

*"Needless to say, leave to appeal is not automatic. It is within the discretion of the Court to grant or refuse leave. The discretion must, however be judiciously exercised on the materials before the court. As a matter of general principle, leave to appeal will be 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."*

Based on the cited authority, this court therefore has no reason to traverse on the merits and demerits of the intended appeal but rather consider as to whether there are points of law and reasonable chances of success or if the proceedings as a whole reveal such disturbing features as to require the guidance of the Court of Appeal.

Examining the application at hand, I have considered the grounds of the intended appeal and the fact stated under paragraph 5 of the Applicant's affidavit where the learned counsel stated that the subject matter of the case concerned a house and land appurtenant thereto and that the applicant had been in continuous possession of the same for more than 30 years before the dispute arose. To me this is an issue of general importance and for that purpose I find it appropriate to get attention of the Court of Appeal. I have also considered the fact that Land disputes are





among the leading disputes in the country, and if not handled with caution can cause chaos in the society.

Additionally, I have as well considered, that the applicant has a justification to exercise her right to appeal as enshrined under **Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977**. An opportunity to be heard by the Court of Appeal, is the only way the applicant can exercise such Constitutional right.

On the basis of the foregoing, the application is hereby granted. Since the parties are related, I give no order as to costs.

It is so ordered.

Dated and Delivered at Moshi this 21<sup>st</sup> day of July, 2022.



  
**T. M. MWENEMPAZI**  
**JUDGE**

Ruling delivered in court in absence of the parties.

  
**T. M. MWENEMPAZI**  
**JUDGE**