

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOB A DISTRICT REGISTRY

AT BUKOB A

MISCELLANEOUS LAND APPLICATION NO. 99 OF 2021

(Arising from the consolidated Appeal No. 12 and 16 of 2020 of the High Court-Bukoba, Original Land Application No. 252 of 2011 of the District Land and Housing Tribunal for Kagera at Bukoba).

SHARIFU NURU MUSWADIKU.....APPLICANT

VERSUS

SEBASTIAN KAFUBA.....1ST RESPONDENT

KASSIM KAIHURA.....2ND RESPONDENT

CHIFURU AHMADA.....3RD RESPONDENT

RULING

18/05/2022 & 05/08/2022
E. L. NGIGWANA, J.

The applicant, Sharifu Nuru Muswadiku is seeking leave to appeal to the Court of Appeal of the United Republic of Tanzania against the decision of this court delivered 12/11/2021 by His Lordship Kilekamajenga, J in Consolidated Appeal No. 12 and 16 of 2020. The application is brought under section 47 (2) of the Land Disputes Courts Act Cap. 216 R: E 2019, and supported by an affidavit deposed by the Applicant himself.

The brief facts giving rise to this application are as follows; the applicant alleged the land in dispute located at Kakiro "A" Sub-Village, Runyaga Village, Chanika Ward, Karagwe District in Kagera Region, was given to him by his late father one Mswadiku Tindamanyile in the year 1988. He further

alleged that the respondents had encroached into the suit land and made development therein including planting tree.

On the other hand, the 1st respondent claimed that he acquired the suit land in 1973. The 2nd respondent alleged to have acquired his land in 2002 and disputed to have encroached into the applicant's land. The 3rd respondent claimed that he was given the disputed Land by his father Mswandiku Tindamanyile Chamani in 2000.

In that respect, the applicant instituted a suit to wit; Application No. 252 of 2011 before the District Land and Housing Tribunal for Kagera at Bukoba, against the respondents, claiming for the following reliefs; a declaration order that the suit land is his property, permanent injunction restraining the respondents from further encroachment, an order directing the respondents to give vacant possession of the suit land, costs of the application and any other relief at the discretion of the trial tribunal. On the other hand, the respondents prayed for the dismissal of the suit with costs.

After a full trial, the matter was decided in favour of the Applicant. In other words, the Applicant was declared the lawful owner of the disputed land. The respondents were aggrieved by the decision of the trial tribunal.

The 1st respondent lodged an appeal in this court which was registered as Appeal No. 12 of 2020 while the 2nd and 3rd respondents lodged an appeal which was registered as Appeal No. 16 of 2020. Eventually, both appeals were consolidated for convenient determination.

After hearing the consolidated appeal, this court found that in the trial tribunal, there were frequent changes of chairpersons without reasons, the irregularity which rendered the proceedings of the trial tribunal a nullity. Consequently, Appeal was allowed, the proceedings of the tribunal were quashed and the judgment and orders thereto were set aside.

A retrial order was found by this court not desirable on the ground that it would justify the applicant's filthy practices against the respondents, thus ordered that parties should continue to maintain their *status quo*.

Aggrieved by the decision of this court, the applicant now seeks leave of this court in order to challenge the said decision/order at the Court of appeal. Paragraph 5 of the affidavit supporting the application contains three (3) grounds upon which the application for leave is predicated, coached as follows;

- (i) *Whether after the trial tribunal's proceedings have been quashed and the decision set aside, the court is legally justified to restrict the applicant to file a fresh the land dispute.*
- (ii) *Whether the order by the court to continue to maintain their (parties) status quo is justifiable.*
- (iii) *Whether the court was supposed in law to prohibit the applicant to reinstitute a fresh suit before the trial tribunal on the ground that it would justify the applicant's filthy practices against the respondents. The facts were contrary as the filthy acts were done by the respondents and the same was proved in court.*

At the hearing of the application, the applicant appeared in person, unrepresented, Mr. Lameck Erasto, learned advocate appeared for the 1st respondent, the 2nd respondent appeared in person, unrepresented while the 3rd respondent neither filed a counter affidavit nor entered appearance despite the fact that he was duly served with a copy of a chamber summons, therefore, the application proceeded in his absence.

At the outset, the applicant adopted his affidavit and argued that the reasons why the Court of Appeal intervention is necessary have been set out in paragraph 5 of his affidavit. To support his application, the applicant referred this court to the case **Kinondoni Municipal Council versus Consult Limited**, Civil Application No. 70 of 2016 CAT (unreported where it was held that failure to give reasons for shifting hands among presiding chairpersons renders the proceedings and decision thereon a nullity. He added, in that case, the Court of Appeal ordered a re-trial, and according to him, such the guidance ought to have been adopted by this court. He also submitted that the finding of the court re-instituting a fresh case would justify the applicant's filthy practices against the respondents is not supported by the any evidence on the record. The applicant ended his submission urging the court to grant this application.

On his side, Mr. Lameck Erasto, learned advocate for the 1st applicant made reference to page 6 of the judgment intended to be challenged where the court through Kilekamajenga, J had this to say;

"I also considered the nature of the dispute and I find no reason to order a retrial of this matter because the case is founded on baseless

allegations. The re-trial of the case would justify the respondent's filthy practices against the appellants".

The learned counsel further stated that in the 1st appellate court, the presiding judge, before reaching the here in decision, has considered several litigations instituted by the applicants however, he admitted that the considered litigations do not feature in the court's judgment.

The learned counsel added that it is in the interest of justice that litigations must come to an end. To support his argument, he made reference to the case of **Karshe versus Uganda Transport Company** (1967) EA 774.

The learned counsel further argued that, in order to grant leave to appeal to the Court of Appeal, this court has to see that there is an arguable case worth consideration by the Court of Appeal as stated in the case of **Rutagatina C. L. versus the Advocates Committee**, Civil Application No. 98 of 2010. Mr. Lameck further argued that in the instant application, there is no arguable case demonstrated worth of consideration by the Court of Appeal. The learned counsel ended his submission that this application be dismissed with costs.

On his side, the 2nd respondent briefly submitted that the applicant has no arguable case worth consideration by the Court of Appeal. He added that the applicant is a known troublesome person.

In his rejoinder, the applicant reiterated that under the circumstances of the case, a retrial was proper since the trial tribunal proceedings were tainted with fatal irregularities.

I have taken time to chew and digest the rival submissions by the parties as well as perusing the necessary documents filed before the court therefore; the issue for determination is whether the applicant has demonstrated grounds warranting this court exercise its discretion in granting the prayers sought in the chamber summons.

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 **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 prima facie case or arguable appeal"*.

Moreover, the Court of Appeal in the case of **Jireys Nestory Mutalemwa versus Nyoronyoro Conservation Area Authority**, Civil Application No. 154 of 2016 CAT (unreported), had this to say;

"The duty of the court at this stage is to confine itself to the determination of whether the proposed grounds raise arguable issues before the court in the event leave is granted".

Again, in the case of **Rweyemamu Constantine and two Others versus UWATEDA Group and Another**, Civil Application No. 563/17 of 2019 CAT (Unreported) the Court held that;

*"It should be understood that, in an application for leave to appeal, what is required of the court hearing such an 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 present nature. (see **National Bank of Commerce V. Maisha Musa Uredi (Life Business Centre)** [2020] 1 TLR 524."*

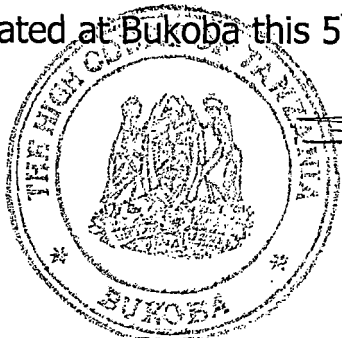
Being guided by the herein above the Court of Appeal decisions, the fundamental question that raises from the rival arguments maintained by the applicant, the 1st respondent's counsel and the 2nd respondent is whether after the trial tribunal's proceedings have been quashed and the decision and orders thereto set aside, the court was legally justified not to order retrial, and if the answer is in the negative , whether the court was legally justified to prohibit the applicant to institute a fresh suit before the tribunal on the ground that it would justify the applicant's filthy practices

against the respondents considering that that finding is not supported by the evidence on record. The third issue is whether under the circumstances of the case, the order by the court that parties should maintain status quo was legally justifiable.

In my opinion, the herein above issues are crucial to deserve consideration by the Court of Appeal. In other words, the proposed grounds of appeal raise arguable issues.

In the event, leave to appeal to the Court of Appeal of the United Republic of Tanzania against the impugned judgment is hereby granted. Costs shall be in the due course. It is so ordered.

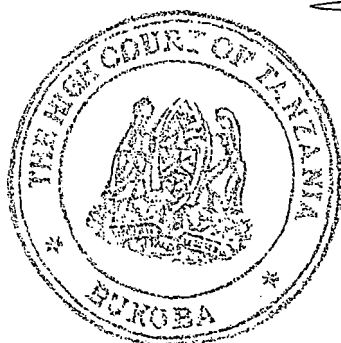
Dated at Bukoba this 5th day of August, 2022.



E. L. NGIGWANA
JUDGE

05/08/2022

Ruling delivered this 5th day of August, 2022 in the presence of the Applicant, 1st Respondent and 2nd respondent, Ms. Erieth Barnabas, learned advocate for the 1st respondent, Hon. E.M. Kamaleki, Judges' Law Assistant and Ms. Tumaini Hamidu, B/C but in the absence of the 3rd respondent.



E. L. NGIGWANA
JUDGE

05/08/2022