IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT TABORA

MISCELLANEOUS LAND CASE APPLICATION NO. 29 OF 2021

(Arising from Land Appeal No. 39/2018 High Court Tabora and Original Application No. 7/2017 of the District Land and Housing Tribunal for Tabora)

KHADIJA ALLY ALMASI ---------- APPLICANT

VERSUS

TABORA MUNICIPAL COUNCIL ----------RESPONDENT

RULING

Date: 03/05/2022 & 22/07/2022

BAHATI SALEMA, J.:

The applicant herein, named **Khadija Ally Almasi** being aggrieved by the decision of this Court in Land Appeal No. 39/2018 preferred this application for leave to appeal to the Court of Appeal against the decision of the High Court of Tanzania before Hon. Amour, J.

The application was preferred by the Chamber Summons supported by an affidavit deposed by the applicant. On the other hand, the respondent filed a counter affidavit resisting the application

The application is made under section 47(2) of the Land Dispute Court Act, Cap. 216 [R.E 2019.]

According to an affidavit in support of the application, the applicant intends to challenge the decision of the High Court on the following issues: -

1. *Whether the learned Appellate Judge properly re-evaluated the evidence before it.*
2. *Whether the appellate Judge was right or Justifiable to consider the denial in the written statement of defence in respect of Plot No. 34 while the Issue before it or the Disputed Land was Plot No. 94 Block DD.*
3. *Whether it was right or justifiable for the appellate judge to hold that Shiraz A. Remtula who sold the house in Plot No. 34 Block JJ was the necessary party for the determination of disputed (sic) Land in Plot No. 94 Block DD.*
4. *Whether it was right or justifiable for the appellate judge to hold that the name of Abdallah Ally Remtula (the 2nd Respondent) was wrongly pleaded from the application.*
5. *Whether it was right or justifiable for the appellate Judge to consider the transfer deed between Shiraz A Remtula and Eric Anthony Baharia which was not Completed and approved by Tabora Municipal Council.*
6. *With the New Amendment of the Laws whether it was right or justifiable for the appellate Judge to remit back the record to the trial tribunal.*

With the permission of this court the application was scheduled to be disposed of by way of written submissions whereby the applicant was represented by Mr. Emmanuel Musyani learned counsel, the 1st respondent was represented by Ms. Leticia Maliato, Solicitor, and 3rd respondent was represented by Mr. Mugaya Kaitila Mtaki, Senior counsel.

I have carefully perused the submission from both parties. Now, I am obliged to determine whether the applicant has advanced good cause for this court to grant leave to appeal to the Court of Appeal.

Section 47(2) of the Land Disputes Court Act Cap. 216 imposes a mandatory step to be undertaken by any party wanting to challenge the decision from the High Court. The law requires a party to obtain leave from the High Court so that he may appeal to the Court of Appeal of Tanzania.

The Court of Appeal of Tanzania has on numerous occasions addressed the danger in the likelihood of going into the substantive part of the intended appeal when determining the applications of this kind. In the case of ***Jireyes Nestory Mutalemwa vs Ngorongoro Conservation Area Authority CAT Application No. 154 of 2016 the*** learned justices of appeal stated that: -

> *"The duty of the Court at this stage is to confine itself to the determination of whether the proposed ground raises an*

arguable issue(s) before the Court in the event leave is granted. It is, for this reason, that 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 prejudging the merit of the appeal"

I have painstakingly examined the proposed grounds of appeal by the applicant, rival submissions, and the record of the case, the first six proposed grounds are related because all refer to the analysis of evidence by the High Court. That being the case, the issue is whether the proposed grounds are worth consideration by the Court of Appeal.

Understandably, as was rightly submitted by learned counsel, the grant of leave sought is in the discretion of this court which of course is to be exercised judiciously. But it should be noted that the grant of leave to appeal is not automatic, the same can be granted upon consideration of the materials presented before the court.

In the authority of **British Broadcasting Cooperation Vrs Erick Sikujua Ngi'maryo**, Civil Application No. 138 of 2004 (CAT) - Dar Es Salaam (Unreported) which was cited and relied on in the decision of **Swiss Port Tanzania Ltd Vs Michael Lugaiya HC –DSM**, Civil Appeal No.111/2010 (Unreported) where His Lordship Juma, J (as he then was) it was held inter alia 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 should however be judiciously exercised and 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, useless or hypothetical, no leave will be granted."

As I have stated earlier, the first five proposed grounds are interrelated as all refer to the analysis of evidence, I am well-informed of the proposition by the court of appeal in the case of ***Stanslaus Rugaba Kasusula and AG vs Falesi Kabuye [1982] TLR 388*** where the court held that, it is the duty of the trial court to evaluate the evidence of each witness as well as their credibility and make a finding on the contested facts in issue.

Upon my thorough analysis of the record and the submissions made by parties, I find that all first five grounds fall under one category of improper evaluation of evidence by the learned judge. Guided by the hints in **Stanslaus** case(supra) and without going deep to the roots of the proposed grounds, it is this court finds that, the learned judge considered the evidence and record of the appeal that

why he came up with an order for re-institution of the suit because of an error that was apparent in the pleadings.

As to the last ground, the applicant and the 3rd respondent agree on one issue that it was not proper for the learned Judge to order the retrial of the case before the District Land and Housing Tribunal taking into account the fact that in February, 2020 the Parliament of Tanzania passed a law that requires all suits by or against the Local Government Authorities be filed in the High Court.

The 1st respondent, Tabora Municipal on his part argued that the act by the learned judge to remit the record to the trial Tribunal was proper and just since the new amendment of the law does not cover the suits that were instituted on 2017. Citing the case of ***GAPCO Tanzania Limited vs TRC, Land Case No. 111 of 2019*** she was emphatic that the law requires not operating retrospectively as what the applicant tries to move the Court.

Upon my perusal of the judgment delivered by the learned brother Justice Amour S. Khamis, it came to my understanding that; the judge did not remit the record to the trial tribunal for retrial as the two learned counsels contend rather he directed the parties who may wish to re-institute the suit before the tribunal. I quote: -

> *"The records are accordingly remitted to the trial tribunal from where the appellant may wish to re-institute the suit to be handed (sic) by a different Chairman and assessors. I make no order as to costs."*

I also noted that we should not be confused by these two terms **"re-institution"** and **"retrial"** what the appellate court announced to the parties is at liberty to start the suit afresh (re-institute) so that a party that wishes may correct the errors that were apparent in the pleadings.

I am also aware that with coming into force the Written Laws (Miscellaneous Amendment) Act, No. 1 of 2020 required all proceedings involving the government to be instituted in the High Court. The order of the court that remitted the record of the suit to the trial tribunal for re-institution did not in any way prevent the parties to institute the suit in the High Court as the current law requires. If the last order was *'retrial'* the situation would be different.

Having said that, it is my considered view that, in the instant application there are no grounds of appeal worth consideration by the Court of Appeal. Thus, this application has no merit the same is dismissed.

No order as to costs.

A. BAHATI SALEMA

JUDGE

22/07/2022

Ruling delivered in chamber on this 22nd July, 2022 in the presence of both parties via virtual court link.

A. BAHATI SALEMA

JUDGE

22/07/2022

Right of Appeal fully explained.

A. BAHATI SALEMA

JUDGE

22/07/2022