

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LAND DIVISION

AT MOSHI

MISC. LAND APPLICATION NO. 48 OF 2021

(c/f Land Appeal No. 21 of 2021 of the High Court Moshi District Registry, Originating from Application No. 96 of 2018 of the District Land and Housing Tribunal of Moshi)

MICHAEL BENEDICT MBOYA.....1st APPLICANT

ISAYA RAPHAEL KIMATH..... 2nd APPLICANT

VERSUS

EMILY JOSEPH MKAMBA1st RESPONDENT

VENANCE EMMANUEL MBOYA.....2nd RESPONDENT

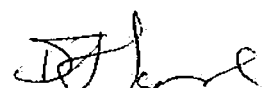
RULING

29/7/2022 & 19/8/2022

SIMFUKWE, J.

The applicant, pursuant to **section 47(2) of the Land Disputes Courts Acts, Cap 216 R.E 2019, section 5 (1) of the Appellate Jurisdiction Act, Cap 141 R.E 2019 and Rule 45 (a) of the Tanzania Court of Appeal Rules** and any other enabling provision of the law, has moved this court seeking for the following orders:

- 1. That this Honourable Court may be pleased to grant leave to the Applicant to appeal to the Court of Appeal of*



Tanzania against the Judgment of the High Court (Hon. Mwenempazi J) in the High Court at Moshi of Land Appeal No. 21/2021 delivered on 28th October 2021. (sic)

2. Any other relief as the Honourable Court may deem fit to grant.

The application was supported by the affidavit of Mr. Emmanuel Pascal Karia, learned counsel for the applicants. In his affidavit the learned counsel for the applicants deponed among other things that:

- a. The applicants are aggrieved by the Judgment of the High Court and intend to appeal against the same to the Court of Appeal of Tanzania. The applicants have filed a formal notice of appeal and applied for certified copied of ruling and proceedings. Copies of the notice and letter requesting for the relevant documents are annexed hereto and collectively marked A3 forming part of the affidavit.
- b. The applicants stand overwhelming chances of success in case they are allowed to appeal to the Court of Appeal.
- c. Leave is required for appealing against the ruling and order given by the High Court in Land Cases in its appellate jurisdiction.

The application was argued through written submissions. The applicants were represented by Mr. Emmanuel Karia learned counsel while the respondents were represented by Mr. Chiduo Zayumba, learned counsel.

Mr. Karia adopted his affidavit to form part of his submission. He submitted inter alia that this court has discretion to grant the application for leave to appeal to the Court of Appeal of Tanzania upon aggrieved

party to the decision meeting the statutory requirement which are first lodging a notice of appeal and filing application for leave timely. He stated that the right of appeal is open to any person who is aggrieved by the decision of the High Court. That, the applicants herein have met that crucial requirement and the respondents have not shown in what ways they will be prejudiced in case leave to appeal is granted to the applicants.

Mr. Karia advanced two grounds of their application as follows:

First, that the Appellate Court erred to allow the appeal on ground that the deceased purchased the land from a vendor who had lost ownership of the suit land in Land Application No. 198/2009 without proof of the judgment of Appeal No. 5/2011 of this honourable court which was not tendered as exhibit.

Second, that the Appellate Court erred in law in failing to find that the proceedings of the District Land and Housing Tribunal were defective for the Chairman's failure to comply with the provisions of **Regulation 19 (2) of the Land Disputes Courts (The District land and Housing Tribunal) Regulation**. That, at the beginning of proceedings the tribunal had two assessors, then one assessor retired and left only one assessor. However, in the judgment there was another new assessor who did not participate in the proceedings but she gave out her opinion. The incorporation of the new assessors in giving out opinion makes the whole proceedings fatal. Mr. Karia referred to the case of **Dora Twisa Mwakikosa vs Anamali Twisa Mwakikosa, Civil Appeal No. 129 of 2019** in which the Court of Appeal directed the role and how the issue of assessors may be dealt with properly to ensure the compliance of **Regulation 19 (2) of the Land Disputes Courts (The District land**

and Housing Tribunal) Regulations as well as **section 23 of the Land Disputes Courts Act**, (supra).

Basing on the two grounds, Mr. Karia contended that they stand overwhelming chances of success in case they are granted leave to appeal to the Court of Appeal.

Opposing the application, Mr. Chiduo Zayumba started his submission among other things by stating the brief history of the matter. That, the genesis of this dispute is hinged on two parcels of land measuring a total of 160 by 12 meters situated at Kindi Village, Kibosho ward, Moshi Rural District. That, the two opposing sides claim to derive their titles by way of purchase from two different vendors namely Aloyce Stanslaus Mushi and Peter Sulia. The duo had a land case at the same trial Tribunal Application No. 198/2009 which was concluded by way of a judgment way back on 05/11/2010 whereby the said Aloyce Mushi was declared rightful owner of the suit land. Thereafter, he sold the land to the current respondents' side who used the land until 2017 when the dispute erupted after the current applicant invaded the land claiming that their deceased relative Benedict Hamis Mboro purchased the same land from the said Peter Sulia who had earlier lost a case. That prompted the current Respondents to institute the land case at the trial Tribunal where they were unsuccessful but on appeal to this court, they were successful.

Replying to the application, Mr. Zayumba submitted that the position of the law regarding criteria for granting leave to appeal was put by the Court of Appeal of Tanzania in the famous case of **British Broadcasting Corporation v. Erick Sikujua Ng'amaryo, Civil Application No. 138 of 2004** (Unreported), in which it was held that:



"As a matter of general principle, leave will be granted where the grounds raise issues of general importance or novel point of law or where the grounds show a prima facie or arguable appeal."

Mr. Zayumba alleged that applicant's application is not supported or do not contain any ground of intended appeal. He reiterated that it is a cardinal principle of law that an application for leave to appeal is not automatic and will be granted where the grounds of appeal raise issues of general importance or novel point of law or where the grounds show a prima facie or arguable appeal. That, the applicant's application does not contain any ground of appeal either in the affidavit or the annexures. The learned counsel stated further that it was held by the Court of Appeal that an application for leave cannot be allowed where the grounds were not raised at the High Court. The same was held in the case of **Safari Mwazembe vs Juma Fundisha, Civil Application No. 503/06 of 2021** (unreported), CAT at Mbeya, that:

"Back to the application under our consideration, the question is whether the ground raised by the applicant under paragraph 8 (a) and 9 merit a serious judicial consideration by the Court. We entertain no doubt that the answer will be no, and the reason is not far-fetched. The applicant admittedly argued that this ground was neither raised nor determined by High Court and therefore this Court will not any jurisdiction to determine (sic). Time without number, and we need not cite any authority, this Court has clearly stated that usually the Court will not look into matters which were neither raised nor decided either by the trial court or the High Court on appeal. The complaint by the applicant was not raised at the High Court hence the Court in terms of section 4 and 5 of the Appellate

Jurisdiction Act, Cap 141 R.E 2019 will not have jurisdiction to entertain it."

Mr. Zayumba cited another case of **Harban Haji Mosi and Another vs Omar Hilal Seif and Another, Civil Reference No. 19 of 1997** (unreported) which was also referred in the case of **British Broadcasting Corporation** (supra) at page 7 that:

"Leave is grantable where the proposed appeal stands reasonable chances of success."

In this case, Mr. Zayumba pointed out that the applicant's affidavit is totally silent about grounds of intended appeal and there is no annexure of intended appeal. That, the intended appeal is hypothetical in that there are no raised grounds of appeal for determination by this court or Court of Appeal. Since there are no grounds raised in the application by the applicants, the learned counsel prayed that the application be dismissed with costs.

I have carefully considered the submissions of the learned counsels of both parties as well as the affidavit supporting the application and the counter affidavit of the respondents. The issue is ***whether the applicants has established grounds for granting this application.***

In his submission in chief in support of the application, Mr. Karia raised two grounds for this application to be granted. That, the Appellate Court erred to allow the appeal on ground that the deceased purchased the land from a vendor who had lost ownership of the suit land in Land Application No. 198/2009 without proof of the judgment of Appeal No. 5/2011 of this honourable court which was not tendered as exhibit. The second ground was that the Appellate Court erred in law in failing to find that the

proceedings of the District Land and Housing Tribunal were defective for the Chairman's failure to comply with the provisions of **Regulation 19 (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations**. It was alleged by Mr. Karia that the second assessor who gave the opinions before the District Land and Housing Tribunal had not participated in the hearing of the case.

On the other hand, Mr. Zayumba for the respondents contested the raised grounds on the reason that the said grounds were not raised before the first appellate court nor in the affidavit of the counsel for the applicants.

With due respect to the learned counsel for the applicants, I concur with the learned counsel for the respondents that having not raised the grounds before the two courts below and in the affidavit sworn by the learned counsel for the applicants, the raised grounds are rendered to be mere statements from the Bar and afterthoughts. It is trite law that mere statements from the Bar cannot be considered as parties are bound by their pleadings. That position has been over emphasized in plethora of authorities. In the case of **Kenedy Owino Onyachi and Another vs Republic, Criminal Application No. 26/01 of 2019**, Court of Appeal of Tanzania at Dar es Salaam at page 9 it was held that:

"This court has in times without number, taken the view of not giving credence on to the arguments from the bar."

In the case of **Kenedy Owino Onyachi** (supra), reference was made to the case of **Tanga Cement Company Limited vs Yahaya Athumani Mruma and 4 Others, Civil application No. 1 of 2017** (unreported) in which the Court when confronted with similar situation held that:



*"... In his obvious belated effort from the Bar, Mr. Zaharan contended that he could not lodge the application earlier than...because he had to prepare the relevant papers or documents at his office in Dar es Salaam and have them dispatched to this Court's sub registry in Tanga for filing. **I give no credence to that argument from the Bar. It ought to have been deposed in Mr. Zaharan's affidavit for it to be cogent and plausible....**"*

Emphasis added

In the event, on the strength of the above noted principle and authorities, this application fails for lack of merit. It is accordingly dismissed with costs.

It is so ordered.

Dated and delivered at Moshi this 19th day of August, 2022.



A handwritten signature in black ink, appearing to read "S.H. Simfukwe".

S.H. SIMFUKWE

JUDGE

19/8/2022