

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY**

AT MOSHI

MISC.CIVIL APPLICATION NO.26 OF 2022

*(C/F Lan Appeal No 26 of 2021, Originated from Land Application No
218 of 2017 Moshi District Land and Housing Tribunal)*

**1. ANNA GERALD MRUTU AND NAVONE
GERALD MRUTU as Administrix of the
deceased's estate of the late GERALD
SEMSI MRUTU**

2. CONSTANTINE TEMBA AND 17 OTHERS

APPLICANTS

VERSUS

MOSHI MUNICIPAL COUNCIL RESPONDENT

RULING

2/8/2022 & 23/8/2022

The applicants herein are aggrieved by the decision of this court delivered on 29th day of April,2022 before Simfukwe, J. They want to appeal to the Court of Appeal of Tanzania against the said decision. They have therefore filed this application for leave appeal to the court of appeal..

This application has been brought under *section 47(2) and (3) of the Land Disputes Courts Act, Cap 216 R.E 2019 and section 5(1) (c) of the Appellate Jurisdiction Act. Cap 141 R.E 2019 and Rule 45(a) of Tanzania*

Court of Appeal Rules and any other enabling provisions of the Law. The applicants are also praying for costs of the application to be borne by the respondents.

The application is supported by the affidavit of Mr. Joseph Peter, learned advocate who is representing the applicants. The application is being opposed by the respondents and they have filed a counter affidavit of Ms. Leah Francis, learned State Attorney. When the application came for hearing it was argued orally and or *viva voce*.

In support of the application, the applicants through the service of Mr. Joseph Peter submitted to the effect that before filing the instant application, they had filed a Notice of Intention to appeal on 20/5/2022 and served the same to the respondent on 24/5/2022. He stated that this application has been lodged with intention to examine *prima facie* or arguable appeal of the impugned decision, that is; the said decision had doubts on section 7 of the Law of Limitation Act which provides that where there is continuation breach of the contract, a fresh period of limitation shall begin to run every time there is a breach of the terms of the contract. It was Mr. Joseph's views that this doubt has to be determined since it was not accorded proper weight which led Appeal No 26 of 2021 to be allowed.

Further to that, the applicants' counsel referred to the case of **Hariban Haji and Another vs Omary Hillary Seif and Another [2001] TLR 409** which held that in order for leave to be granted it must be determined that there is arguable appeal. It was Mr. Joseph beliefs that the learned Judge erred when held that the land dispute is time barred while the dispute was continuous.

The second reason for applying for leave was that the trial Judge erred in law and fact for evaluating the evidence improperly. That, she failed to note that the contract between the appellant and respondent is governed by the Land Act. Thus, the by-laws enacted by the respondent could not supersede the Land Act. In the end, the applicants' advocate prayed the application to be allowed and granted.

In reply, Ms. Leah adopted the counter affidavit to form part of the submission. She submitted to the effect that for leave to appeal to be granted the applicant has to identify the real questions of facts or law; that is, the subject matter of the intended appeal. That, the applicant should not criticize the decision sought to be challenged, without necessary pointing out the nature and substance of serious issue for consideration by the court of appeal. She referred to the case of **Kadili Zahoro (Administrator of the Estate of Late Bahati Ramadhan Mponda) and another vs Mwanahawa Seleman**, Civil Application No 137/2021 of 2019 CAT DSM at page 7 to substantiate her argument.

Ms. Leah referred to paragraph 6 of the affidavit which contains the intended grounds of appeal and argued that there is no crucial issue of law which is intended to be placed before the court of appeal for determination. The learned State Attorney was of the view that the whole grounds criticize the decision of High court.

Regarding paragraph 6(ii) and (iii) in respect of time limitation, Ms. Leah argued that the same is pure point of law, however, paragraph 8 of the counter affidavit clearly replied to the same. That, the issue of time limitation erupted from the decision of the trial chairman which led to Land Appeal No 26 of 2021.

Moreover, the learned State Attorney referred to the case of **Attorney General and Advocate Committed vs Fatuma Amani Karume, Misc. Civil Application No 8/2021-HC-DSM** which held that; -

"Leave is restrictive application and must be confined to the High Court decision, order ruling, judgment, decree or finding and not otherwise."

On the strength of above case Ms. Leah contended that the same insists that for an issue to be considered, it must have been in the decree, judgment or findings. Thus, the intended grounds of appeal as shown in paragraph 6 of the affidavit is not what was said in the decision. In conclusion, she prays for application to be dismissed with costs.

In his short rejoinder, Mr. Joseph Peter, learned Advocate referred to the cited case of **Kadili Zahoro and Another** (supra) and argued that the respondent's counsel has admitted that the applicant must clearly show those matters to enable the court to consider them judiciously based on the relevant material placed before it. He said that in his affidavit paragraph 6 (i) and (ii) has clearly shown those matters to enable the court consider them in an appeal. He reiterated that the criteria are to have an arguable case and not to go deep on the matters raised.

It was his opinion that there is legal arguable matter on the time limitation since the respondent counsel admitted that the issue of time can be raised at any stage thus, he called upon this court to grant leave to appeal to the Court of Appeal as there is a serious issue for determination in the Court of Appeal of Tanzania. He reiterated his prayer that leave be granted to the applicant so as to appeal to the court of appeal of Tanzania.

Before scrutinizing this application, I wish to start with obvious. In granting application of this nature, the court must satisfy itself that there is arguable appeal so as to give adequate attention to cases with true public importance. In the case of **British Broadcasting Corporation vs Eric Sikujua Ng'maryo (Misc. Civil Application 138 of 2004) [2005] TZCA 93 [Tanzlii]** the court of appeal had this to say in respect of application for leave;

"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."

Having established the position of the law, I now come to the merit or otherwise of this application. Under paragraph 6(ii)(iii) of the deponent has raised intended grounds of appeal as follows:

- (i). That, the learned Judge erred in law and fact when holding and finding that there was no continuation of breach on the part of the Respondent, which is contrary to the evidence in record.
- (ii). That the learned Judge erred in law and fact when holding and finding that the Applicant's claims is

time barred without considering that there was continuation of breach of lease agreement as clearly admitted by the respondent's witness in his testimony.

- (iii). That, the learned Judge erred in law and fact when holding and finding that the Land dispute was time barred while the issue of time limitation was not raised as the ground of appeal and also it was not raised at the Trial Tribunal.
- (iv). That, the learned Judge erred in law and fact when holding and finding that receipts of payment of rent in the year 1994,2007,2008, 2003,2005,2006,1993, and 1999 cannot be relied in the application.
- (v). That the learned Judge erred in law and fact for re-evaluating the evidence improperly.

Thus, in the applicants' affidavit, the learned advocate raised an issue of time limitation which I am of considered view that the same is arguable in the intended appeal. The grounds as they are do raise issues of importance to be considered and adjudicated by the Court of Appeal.

The learned State Attorney to the contrary was of the view that the issue of time limitation though is a point of law it erupted from the decision of the trial chairman which led to land appeal No 26/2021. With due respect to Ms. Leah, I think and that is what it is, in an application of this nature the duty of this court is to assess whether the points and or issues raised are arguable grounds of appeal. That was stated in the case of **Jireys Nestory Mutalemwa vs Ngorongoro Conservation Area Authority, Civil Application No. 154 of 2016** at page 6 that;

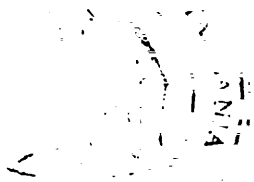
"...Similarly, in applications of this nature, it is a well-established principle of law that the Court is not expected to determine the merits or otherwise of the substantive issues before the appeal itself is heard..."

As rightly submitted by Mr. Joseph for the applicants, the criteria of granting leave are that there should be an arguable case and not to go deep on the matters raised. Digging down the intended grounds is like placing this court to the shoes of the court of appeal.

Basing on the above findings, I hereby grant leave to the applicants to appeal to the Court of Appeal as prayed. Considering the circumstances of the case, no order as to the costs.

It is so ordered.

Dated and delivered at Moshi this 24th day of August, 2022.




T. M. MWENEMPAZI

JUDGE

Ruling delivered in court on the 24th day of August, 2022 in the presence of Mr. Joseph Peter, learned advocate for the applicant and Mr. Muyungi, learned State Attorney for the Respondent.


T. M. MWENEMPAZI

JUDGE