

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF BUKOBA)

AT BUKOBA

MISC. LAND APPLICATION NO. 49 OF 2022

(Arising from High Court of Tanzania in Land Appeal No. 10/2019, Misc. Land Application No. 6/2022 and Original Application No. 13/2015 Bukoba District Land and Housing Tribunal)

ZAMLAT AYUBU..... APPLICANT

VERSUS

SAMWEL MANUMBU..... RESPONDENT

RULING

Date of Ruling: 19.08.2022

A.Y. Mwenda, J

In the present application, the applicant is applying for leave to appeal to the court of Appeal. It is brought under S.47(2) of the Land Dispute's Court's Act, [Cap 216 RE 2019]. It is also supported by an affidavit affirmed by Mr. Alli Chamani, learned Counsel for the Applicant. Opposing the present application, the respondent swore a counter affidavit.

At the hearing of the present application, the applicant was presented by Mr. Alli Chamani, learned counsel and for the respondent, Ms. Pilly Hussein was in attendance.

Invited to submit in support to the application, Mr. Alli Chamani, learned counsel begun with a prayer to have the contents of the applicant's affidavit to be adopted and form part to his oral submission.

The learned counsel further submitted that this court may exercise its discretion to grant leave to appeal to the court of appeal if the intended appeal contains arguable appeal and contains disturbing features as to require guidance of the court. He added in that in so doing the intended grounds of appeal should not be frivolous, vexatious, useless or hypothetical. In support to this point he cited the case of BULYANHULU GOLD MINE LIMITED AND TWO OTHERS VS. PETROLUBE (T) LIMITED AND ANOTHER, CIVIL APPLICATION NO. 364/16 OF 2017, CAT at page 12 unreported.

The learned counsel further asserted that the issue which are intended to be placed before the court of appeal are contained in para 10 of the amended affidavit and Annexure 'G' which is entitled grounds for leave to appeal. He said the said grounds fits under the conditions which this court may exercise its discretion. The learned counsel said that at para 6 of the counter affidavit, the respondent challenged the intended grounds of appeal by alleging that they were not raised in Land Case Appeal No. 10 of 2019 before this court. He said, it is true that the same were not raised at that level as the present applicant was not the appellant in the said Appeal and for that matter the grounds of appeal may not be the same although the proposed grounds were discussed and determined by this court in

one way or the other. He said the first proposed ground of appeal was discussed at page 3, 7 and 9 of the typed judgment of Land Case Appeal No. 10 of 2019, while the second proposed ground of appeal was discussed at page 4. He added in that the 3rd proposed ground was discussed at page 7 and 9 of copy of judgment. Further to that the learned counsel submitted that the 5th proposed ground of appeal is in regard to the involvement of assessors which is a legal issue. He said at page 66 and 67 of the trial tribunal's proceedings, i.e on 10/10/2018, the opinion of assessors was not read. He said at page 6 of the typed judgment this court discussed this issue but did not reach at a proper conclusion. He said this point alone is sufficient to warrant this court to exercise its discretion of granting leave to appeal to the court of appeal. To support this point, the learned counsel cited the case of Y.S CHAWALLA AND CO. LIMITED VS. CR. ABBAS TEHERALI, CIVIL APPEAL NO. 70 OF 2017 CAT (unreported) at page 5.

Further to that, Mr. Ali Chamani submitted that there is a new point of law which the applicant intends to table before the court of appeal. He said in the present matter, the land allocating committee's members were not gazetted contrary to section 12(4) and 25(1) of the Land Act, [Cap 113 RE 2019]. In support to this point he cited the case of ANASTASIOS ANAGNOSTON VS. THE ADMINISTRATOR GENERAL, CIVIL CASE NO. 1 OF 2011, HC page 4 unreported.

From the foregoing submission, the learned counsel prayed the present application to be allowed.

Opposing the present application, Ms. Pilly Hussein learned counsel for the respondent began with a prayer to have the respondent's counter affidavit adopted to form part to her oral submission.

The learned counsel went on to submit that the applicant's 5th proposed ground of appeal was subject to discussion at the hearing of Appeal No. 10/2019 before this court and Mr. Alli Chamani argued it in that the assessors were present during hearing before the trial tribunal but she wondered why he has u-turned and alleges there was no assessors opinion.

With regard to legal issues regarding failure to Gazette members of the land allocating committees Ms. Pilly Hussein submitted that this is an afterthought. She said that the 1st, 2nd and 3rd proposed grounds of appeal were not raised and discussed by the parties before the High Court. She then concluded her submission in that the present application is without merits and should be dismissed with costs.

In a brief rejoinder, Mr. Alli Chamani submitted that it is true that the issue of assessors was raised in Land Case Appeal No. 10 of 2019 but the same was in regard to failure of assessors to be involved in framing of the issues. He said the present issue is in regard to opinion of assessors is different from one which was discussed before this court in Land Case Appeal No. 10 of 2019. The learned counsel further submitted that point of law can be raised at any time and therefore raising it now is not an afterthought.

With regard to the 1st, 2nd and 3rd proposed grounds of appeal, Mr. Alli Chamani averred that in his submission in chief he stated how each was discussed in one way or the other. Having said so he concluded by repeating to his previous prayer beseeching the present application to be granted with costs.

As it was agreed and submitted by the learned counsels for both sides, this court has discretion to grant or refuse application for leave to appeal to court of appeal. The same can only be granted where the intended appeal contain arguable grounds and if it contain disturbing features to require guidance of the court. In the case of BULYANHULU GOLD MINE LIMITED AND TWO OTHERS VS. PETROLUBE (T) LIMITED AND ANOTHER, CIVIL APPLICATION NO. 364/16 OF 2017, the court of appeal while citing the case of BRITISH BROADCASTING CORPORATION VS. ERICK SIKUJUA NG'MARYO, CIVIL APPLICATION NO. 158 OF 2004, held as follows;

"Needless to say, leave to appeal is not automatic. It is the discretion of the court to grant or refuse leave. The discretion must, however judiciously exercised and on the material before the court. As a matter of General principle, the leave of 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. (see Buckla vs. Holmes (1926) ALL E.R

90 at page 91). However where the grounds of appeal are frivolous, vexatious or useless or hypothetical, no leave will be granted."

In the present application, Mr. Alli Chamani referred this court to Annexure G to the amended affidavit. In the same, a list of five intended grounds of appeal are put forward. On top of that, while submitting before this court the learned counsel raised two other legal issues which also are intended to be referred to the court of appeal. The first issue is in regard to the trial tribunal's records lacking opinion assessors where he referred this court at page 66 of the typed proceeding i.e on 10/10/2018, where the opinion of assessors was not recorded. I have perused the trial tribunal's records and found, on the proceedings dated 16/08/2018 that the Hon. Chairman ordered, among other things the assessors to record their opinions. However, on 10/10/2018 the record shows the assessors opinion was recorded but the same is not part of the proceedings. I thus agree with Mr. Alli Chamani that this point is one which fits to warrant this court to exercise its discretion and grant leave to appeal. Ms. Pilly Hussein opposed this point by raising two points, one that the same was not raised by the applicant in the Land Case Appeal No. 10 of 2019 and therefore it is an afterthought and two in that the same was discussed and determined by the High Court after it was raised by Mr. Alli Chamani himself. I have considered Ms. Pilly Hussein objection and with respect, I disagree with her. This is so because, it is trite principle that a point of law can be raised at any

time and the appellate court is bound to take judicial notice of matters of law relevant to the case even if such matters are not raised in the notice of appeal or in the memorandum of appeal. This position was stated in the case of B.9532 CPL, EDWARD MALIMA VS. THE REPUBLIC, CRIMINAL APPEAL NO. 15 OF 1989 CAT P.2 (unreported).

Also with regard to Ms. Pilly Hussein's argument that the issue of assessors was fully discussed and determined, I have revisited the record and come to an agreement with Mr. Alli Chamani that the issue regarding assessors which was discussed in this court was in respect of their failure to be involved when the issues were framed. For that matter the issue regarding opinion of assessors was never discussed and it is a new point.

Another point of law which was raised by Mr. Alli Chamani is that the members of the land allocating committee were not gazetted. Although this point is new, with the guidance of the court of Appeal in the case of B. 9532 CPL EDWARD MALIMA VS. REPUBLIC (supra), the same fits to justify this court to exercise its discretion to grant leave to appeal to the court of appeal.

I have also revisited the proposed grounds of appeal in Annexure "G" to the amended affidavit and noted that they appear to be arguable grounds of appeal. Although Ms. Pilly Hussein opposed them in that they were not raised at the first in Land Case Appeal No. 10 of 2019, having gone through them I have noted that they are relevant to the proposed appeal.

That being said, I find merits in this application and it is hereby allowed.

Each party shall bear its own costs.

It is so ordered.




A.Y. Mwenda

Judge

19.08.2022

Ruling delivered in chamber under the seal of this court in the presence of Mr. Mugisha, learned counsel hold brief for Mr. Chamani for the Applicant and in the absence of the Respondent.




A.Y. Mwenda

Judge

19.08.2022