

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

MISC. LAND APPLICATION NO. 12 OF 2022

(c/f Land Appeal No. 35 of 2021 of the High Court Moshi District Registry, Originating from Misc. Application No. 135 of 2021 of the District Land and Housing Tribunal of Moshi)

ZENO JAMES MBUYA..... APPLICANT

VERSUS

LILIAN MMARI RESPONDENT

RULING

17/8/2022 & 16/9/2022

SIMFUKWE, J

The applicant Zeno James Mbuya pursuant to **section 47(2) of the Land Disputes Courts Acts, cap 216 R.E 2019** has moved this court seeking for the following orders:

- 1. That the applicant be given (sic) leave to appeal to the Court of Appeal of Tanzania against the Judgment and decree of Hon. B. Mutungi in Land Appeal No.35 of 2021 filed in the High Court of Tanzania at Moshi and delivered on 23rd February 2022.*
- 2. Costs to be borne by the Respondent.*



The background of this application is to the effect that; the applicant herein unsuccessfully instituted a suit of trespass to land in the District Land and Housing Tribunal against the respondent herein. Since he was not satisfied with the decision of the District Land and housing Tribunal, he appealed to this court (Land Appeal Case No.35 of 2021). This court dismissed his appeal with costs. Still aggrieved, the applicant wishes to institute the second appeal before the Court of Appeal. As per the requirement of the law, the appellant is required to apply for leave before the High Court. He thus lodged the instant application. The application was supported by the affidavit of the applicant.

The applicant was unrepresented while the respondent enjoyed the service of Mr. Philip Njau. When the matter was set for hearing, the applicant prayed to argue the application by way of written submissions.

In his very brief submission, the applicant submitted that the origin of this application was the respondent's Bill of Costs No. 44 of 2018 which was granted ex parte on 4/7/2018 by the District Land and Housing Tribunal for Moshi. That, the said Bill of Costs was filed out of time more than 90 days thus contravening **section 3 of the Law of Limitation Act, Cap 89 R.E 2002** which provides that proceedings instituted after the period of limitation should be dismissed whether or not limitation has been raised as a defence.

The applicant underscored that the above point of law is worth consideration by the Court of Appeal. He prayed this Court to grant the application with costs.

In his reply, from the outset Mr. Njau stated that the application for leave to appeal is being preferred following the decision in Land Appeal No. 35

of 2021 of the High Court Moshi District Registry. The said appeal was against the decision in Execution Misc. Application No. 135 of 2021 of the District Land and Housing Tribunal for Moshi. He said that having gone through the applicant's affidavit as well as the written submission in support of the application, it appears that if leave will be granted, the applicant's intended appeal at the Court of Appeal shall be against Bill of Costs No. 44 of 2018 which was delivered ex parte by the District Tribunal on 04/7/2018. The learned counsel submitted that, if that is the case, the intended appeal is bad in law as it contravenes **Order 7 (1) (2) of the Advocates Remuneration Order, 2015** which provides that an aggrieved party in a bill of costs may file reference to a judge of the High Court.

Mr. Njau added that, the applicant did not make application to set aside the ex parte order and he never filed reference to a judge of the High Court either. He insisted that if the applicant is intending to appeal against the order in the said bill of costs, this is not the correct path to take as what we have on record is Land Appeal Case No. 35 of 2021 which was filed by the applicant against the order for execution in Misc. Application No. 135 of 2021 which was delivered on 31/8/2021. It was stated further that execution was preferred after the applicant had failed/refused to pay the amount ordered by the Tribunal in the said Bill of Costs.

Opposing the submission of the applicant, Mr. Njau referred to **Part III to the Schedule of the Law of Limitation Act Cap 89 R.E 2002** under item 20 which reads:

A handwritten signature in black ink, appearing to be 'H. Njau', is located at the bottom right of the page.

"20. To enforce judgment, decree or order of any court where the period of limitation is not provided for in this Act or any other written law.... Twelve years."

On the basis of the above provision, Mr. Njau averred that there was no delay in filing Execution Misc. Application No. 135/2021 as it was within time. He also stated that the grounds for the intended appeal is frivolous and vexatious of which they urge the court to reject the application in its entirety for being devoid of merit.

Concerning the cited enabling provision, thus, **section 47 (1) (2) of the Land Disputes Courts Act, Cap 216 R.E 2019**; Mr. Njau stated inter alia that for a party to be successful in an application for order for leave to appeal, he has to advance reasons that will satisfy the court to issue the order. He cemented his averment by citing the case of **British Broadcasting Corporation vs Eric Ng'maryo, Misc. Civil Application No 138 of 2004**, CAT, in which the Court said that:

"Needless to say, leave to appeal is not automatic. This is within the discretion of the Court to grant or refuse leave. The discretion must, however 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, raises issues of general importance or a novel point of law or where the grounds show prima facie or arguable appeal (see BUCKLE V HOLMES (1926) ALL ER 90 at pg 90)"

Basing on the cited authority, Mr. Njau submitted that the applicant has not advanced sufficient reasons to move this court to grant leave.



Without prejudice to the advanced grounds herein above, the learned counsel for the respondent wished this court to note that the filed application in hand is accompanied with copy of the judgment in Land Appeal No. 35 of 2021. He said that **section 47 (4) of the Land Disputes Courts Act, Cap 216 R.E 2019** provides that:

"(4) the procedure to appeal to the Court of Appeal GN N. 102 of 1979 under section shall be governed by the Court of Appeal Rules."

He also cited **Rule 49 (3) of the Court of Appeal Rules, Cap 141 R.E 2019** which provides that:

*"Every application for leave to appeal shall be accompanied by a copy of the decision against which it is desired to appeal and **where application has been made to the High Court for leave to appeal by a copy of the Order of the High Court.**" Emphasis added*

From the quoted provisions of the law Mr. Njau stated that this application in hand has been filed without copy of the Order being appealed against which is in contravention of the cited provisions of the law and hence makes this application incompetent. The learned counsel cemented his argument by citing the case of **Grace Fredrick Mwakapiki vs Jackline Fredrick Mwakapiki and Others, Civil Application No. 51 of 2021**, CAT in which the applicant filed the application without accompanying the order being appealed against the consequences of which the application was struck out. When striking out, the Court of Appeal quoted with approval its previous decisions in the case of **Alex Maganga v. The**



Director Msimbazi Centre, Civil Application No. 81 of 2001 where a copy of proceedings was filed instead of the order and said:

*"A copy of those proceedings does not satisfy the requirement of Rule 46 (3) of the Court Rules, as amended by GN No. 57 of 1984. **The words order of the High Court in the sub rule mean an extracted order of the High Court, which was not filed.** It is apparent therefore that the applicant did not comply with rule 46(3) at all and the application before me would be incompetent. [Emphasis added]*

In this matter, like the above authority of this Court, what was not filed along with the application, was the order of the High Court, a drawn order so to speak. In the circumstances, we are not hesitant to hold, as we hereby do, that an essential document required by rule 49(3) of the Rules, to accompany an application for leave before the Court, was not attached with the application, in this case it is incompetent."

In the same line of thinking, Mr. Njau urged this court to strike out the application for being incompetent as it has been filed without copy of the Order being appealed against. At the same time, the learned counsel prayed that this court refuse to grant leave to appeal to the Court of Appeal and dismiss this application with costs for not only being fatally defective but also unlawful.

In his brief rejoinder, the applicant submitted that the submission of the respondent is a repetition of the preliminary objections which were

overruled with costs on 20th June 2022. He reiterated that the applicant is appealing against the Bill of Costs No. 44 of 2018 which was determined ex parte on 4th July 2018. The said Bill of Costs was emanating from Land Application No. 124 of 2015 which was determined on 29/9/2017. Thus, the period of limitation expired on 28th November 2017. He insisted that the bill of costs was time barred. The applicant alleged that the respondent had conceded in his reply submission that the said bill of costs was filed out of time. Consequently, the applicant prayed that this application should be granted with costs.

That marked the end of submissions of both parties. After going through the submissions of the parties, I would like to start with the issue raised by the respondent that Land Appeal No. 35 of 2021 was against the decision in Execution Misc. Application No. 135 of 2021 filed at the District Land and Housing Tribunal while in his sworn affidavit and the written submission in support of the application it appears that the applicant's intended appeal shall be against Bill of Costs No. 44 of 2018. The learned counsel for the respondent contended that the intended appeal is bad in law.

As a matter of law, one cannot appeal against the bill of costs of the District Tribunal to the Court of Appeal directly. My perusal of the records revealed that the applicant's intended appeal is against the decision in Land Appeal No. 35 of 2021 of the High Court. The said appeal emanated from Execution Misc. Application No. 135 Of 2021 which originated from Bill of Costs No. 44 of 2018. With due respect to the learned counsel for the respondent, the decision which is sought to be appealed against discussed both the bill of costs and the execution applications which were the subject of the impugned appeal. To be precise, before the District

Tribunal, the applicant had raised preliminary objections on point of law which were overruled by the Tribunal. Then, the applicant was aggrieved by the ruling of the trial tribunal which overruled his objections. He appealed before this court unsuccessfully as the decision of the trial tribunal was upheld. The issue for determination therefore is whether, this is a fit case to be referred before the Court of Appeal for determination.

The requisite condition for granting leave to appeal to the Court of Appeal is that there should be arguable point of law sought to be determined by the Court of Appeal. In Land Appeal No. 35 of 2021, the applicant noted that Taxation Cause No. 44 of 2018 was filed out of the prescribed 60 days.

In the case of **Magige Nyamoyo Kisinja vs Merania Mapambo Machiwa, Civil Appeal No.87 of 2018**, the Court of Appeal of Tanzania at page 7 of its judgment stated that:

*"We must emphasize that **the point to be certified by the High Court must be that of legal nature and significant to warrant the decision of the Court.** It is not enough for a party in a third appeal, like in the instant appeal, to simply think the lower court is wrong in its decision to have his case heard by the Court of Appeal. Matters of law which the Court is called upon to determine must transcend the interest of the immediate parties in the appeal. Indeed, in some cases matters of law placed before the Court for determination are of public importance especially when an interpretation of the law is involved."* (Emphasis added)



On the strength of the cited authority, as I have already noted herein above, the applicant intends to appeal against the decision of this court on the reason that the bill of costs which was the subject of execution application was filed out of time. The learned counsel for the respondent submitted that the said matter was filed in time. With due respect, I think this court is functus officio to determine whether the said bill of costs was time barred or not. What ought to be done by this court is to determine whether the raised issue is of legal nature to warrant determination by the Court of Appeal. I am of settled opinion that the issue of time limit is a point of law, hence worth to be determined by the Court of Appeal.

In the event, I hereby grant this application without costs.

It is so ordered.

Dated and delivered at Moshi this 16th day of September, 2022.




S. H. SIMFUKWE
JUDGE