

IN HIGH THE COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

MISC. LAND APPLICATION NO.9 OF 2022

(Arising from the High Court of Tanzania at Mtwara in Land Appeal No. 5 of 2020 and originating from the District Land and Housing Tribunal for Mtwara in Land Case No.99 of 2018)

BETWEEN

HAMISI FAKIHI BAKARI.....1ST APPLICANT

HAMISI SAIDI KUDEDA.....2ND APPLICANT

SHAIBU HASANI MTEPA.....3RD APPLICANT

SHAZI ALI MASUMBUKO.....4TH APPLICANT

VERSUS

KASIMU FAKIHI BAKARI (Administrator of the Estate
of the late **Fakihi Bakari Akalama**).....**RESPONDENT**

RULING

25/8/2022 & 4/10/2022

LALTAIKA, J.:

The applicants, **HAMISI FAKIHI BAKARI, HAMISI SAIDI KUDEDA, SHAIBU HASANI MTEPA** and **SHAZI ALI MASUMBUKO** are praying for this court to grant him leave to appeal to the Court of Appeal of Tanzania against the decision of the High Court of Tanzania at Mtwara in Land Appeal No.5 of 2020 delivered on 1/6/2021 by Hon. W.P. Dyansobera, J. They are moving this court under section 47(2) of the Land Disputes Courts Act, [Cap. 216 R.E. 2019] and Rule 45(a) of the Tanzania Court of Appeal Rules, 2009. The application is supported by the joint

affidavit affirmed by both applicants. Needless to say, that the application is vehemently resisted by a counter affidavit deposed by Ms. **ROSE REGINALD NDEMEREJE**, learned advocate for the respondent.

When this matter was called on for hearing the applicants were being represented by Ms. Happyness Sabatho, learned Advocate. Whereas, the respondent enjoyed the legal services of Mr. Hussein Mtembwa, learned Advocate. The learned Advocates by consent agreed this matter to be disposed of by way of written submissions. Indeed, the submission in chief and reply to applicants' submission were filed on time as per this court's order. The rejoinder by the applicants was not filed as scheduled by this court on 14/7/2022. However, this court granted Ms. Sabatho to file the same out of the prescribed but within the extended time.

When hearing commenced, Ms. Sabatho prayed this court to adopt the applicants' joint affirmed affidavit and form part of the applicants' submission. The learned counsel submitted that leave of appeal to the Court of Appeal may be granted where the applicant has raised a point of law or intended appeal stands a good chance of success, or the matter is fit for determination of an Appeal. To buttress her argument, she cited the case of **Nurbhain Ruttansi v. Ministry of Water Construction, Energy and Environment** [2005] TLR 220.

On top of that the learned counsel submitted that they intended to challenge the decision of this court of the following grounds; **one**, whether the estate of the late **Fakihi Bakari Akalama** particularly the land in question was distributed to the beneficiary. **Two**, whether the sale of land in question was legal. **Three**, whether the second, third and fourth respondents were the bonafide purchasers for value without adverse notice. **Four**, whether exhibits D5, D7 and D8 were tendered and received

improperly. **Five**, whether the deceased's properties acquired legally can be taken back to the administrator of the estate without full, fair and prompt compensation to the current owner. **Six**, whether the trial judge(sic) evaluated the evidence well to reach into just and fair decision.

Furthermore, Ms. Sabatho argued that since there is no dispute that the former administrator one Swalehe Saidi Mawazo allowed the court to distribute the estate of the late Fakihi Bakari Akalama. Thus, the learned advocate was of the view that the second, third and fourth applicants were the bonafide purchasers for value without adverse notice. In line of this submission, the learned counsel referred this court to the case of **Rugatina C.L. vs. The Advocate Committee and Clavery Mtindo Ngalapa**, Civil Application No.98 of 2010 CAT as it was cited in the case of **Thebard Rugambwa v. Rugimbana Divo Rugaibura**, Misc. Land Application No.04/2018 HC at page 4(unreported) it was held inter alia that: - "Leave is granted where the proposed appeal stands reasonable chances of success or where, but not necessarily the proceedings as whole reveal such distributing feature as to require the guidance of the Court of Appeal."

To this end, the learned Counsel prayed this court to grant the application with costs.

In response, Mr. Mtembwa submitted that the applicants submit that since there is no disputed that the former administrator one Swarehe Said Mawazo was allowed by the court to distribute the estate of the late Fakihi Bakari Akalama, it is on point that the second, third and fourth purchasers were the bonafide purchaser for value without adverse notice. The learned counsel went on and argued that the applicants have narrated on the grounds of challenging the judgment and decree of Hon. Dyansobera,

J dated on 1st June, 2021 in Land Case Appeal No.5 of 2020 as can be seen at paragraph 8 of the joint affidavit. The learned counsel stressed that apart from the authorities cited he cannot depict anything apart from what he has narrated above.

More so, Mr. Mtembwa contended that it is without fear that the grounds for challenging the decision of this court, whether are on points of law or not, should have been argued and or supported by the applicants. The learned Advocate argued that the way they are left unattended brings an impression that the court should deal with them alone. He insisted that the applicants were duty bound to argue each point and ground raised and submit as to why leave should be granted leave to appeal to the Court of Appeal of Tanzania.

Mr. Mtembwa further submitted that the application has not been argued by the applicants' counsel and thus, the application has been left to the court for determination without hearing. The learned advocate stressed that because the grounds were not argued at all, it has brought difficulties to them to write this submission. The learned advocate submitted that this is not an appeal to the Court of Appeal of Tanzania but it an application for leave to appeal. He further insisted that failure to argue the same this honourable court cannot grant the application. In addition, the learned counsel submitted that paragraphs 5 and 6 of the counter affidavit, they averred that the raised grounds cannot be said to be points of law of which this honourable court can grant leave to appeal.

However, the learned counsel referred this court to the cases dealing with leave to appeal to the Court of Appeal such as **Rugatina C.L. vs.**

The Advocate Committee and Clavery Mtindo Ngalapa (supra), **Harban Haji Mosi and Another vs. Omar Hilal Seif and Another**, Civil Reference No.19 of 1997(unreported) and **British Broadcasting Corporation vs. Eric Sikujua Ng'maryo**, Civil Application No.133 of 2004(unreported).

More ever, Mr. Mtembwa submitted that the grounds raised by the applicants in their joint affidavit do not disclose or show a point of law that deserve to be referred to the Court of Appeal since the applicants failed to argue them. However, the learned counsel tried to argue each of one and eventually he came to the conclusion that all raised grounds are points of facts and not of law hence are not worth for the consideration by the Court of Appeal. To fortify his argument, he referred this court to the cases of **Buckle v. Holmes** (1926) All ER 90 and Simon **Kabaka Daniel v. Mwita Marwa Nyanganyi & 11 Others** [1989] TLR 64. To this end, he prayed this application to be dismissed with costs.

In rejoinder, Ms. Sabatho was of the firm view that the learned counsel for the respondent did not give a look to open legal principles well portrayed in the applicants' joint affidavit and submission in chief of the applicants. In view of that argument, the learned counsel for the applicants submitted that the application has been made purely on point of law and intended to move this court to grant leave to appeal on the point of law as stated in the submission in chief.

Furthermore, it was Ms. Sabatho's submission that they do not dispute the fact that in their intended appeal which has been made on point of law seeking for clarification to the Apex Court in our jurisdiction. The learned counsel stressed that there will be matters of facts to be considered for the court to find clear legal points of law for determination

as it was observed in the case of **Hassan Marua v. Tanzania Cigarette Company Ltd**, Civil Application No. 338/01 of 2019 CAT Dar es Salaam where the Court stated that; "Points of law do not exist in vacuum. That means a determination of a point of law cannot be devoid from underlying facts which includes evidence on record."

Ms. Sabatho went on and argued that the intended grounds of appeal mentioned under paragraph (a-f) are on point of law. For instance, the learned counsel argued the second ground or (paragraph b) on whether the sale of land in question was legal or not. The learned counsel stressed that that is a pure point of law worth for determination by the court despite the fact the Court of Appeal shall inquire into the evidence adduced in order to find out if the prerequisite conditions of sale were met.

Submitting on the third ground of an intended appeal, the learned counsel contended that that is a pure point of law whereby determination of the bonafide purchaser without adverse notice shall ascertain some legal principles of law mixed with facts in order to come out with the answer to the issue. To cement her argument, the learned advocate referred this court to the case of **Tom Mario vs Athumani Hassain** (suing as an administrator of the late Hassan Mohamed Siara) and 2 Others, Civil Appeal No. 179 of 2019 CAT Arusha (unreported).

The learned counsel went further and argued that they intend to move Court of Appeal in order to see this legal point and determine the matter to the benefit of all parties as it is illegal and illogical for the later Administrator to recover the property which have been distributed earlier by the former administrator. The learned counsel contended that challenging the act of the present administrator recovering the properties distributed by the former administrator and sold is a point of law which is

mixed with the facts. In addition, the learned advocate stressed that the inventory had been issued which signified that division of the properties was closed. Ms. Sabatho insisted that the present administrator has challenged the ownership of the suit properties which were purchased for almost twelve years ago. To this end, she insisted that these facts need a clear look since the applicants are being deprived their rights without any legal justification.

Finally, Ms. Sabatho submitted that the decision of the primary court is contradicting itself since it gave the letter of administration to Swalehe Mawazo who divided the properties to deceased's beneficiaries and thus, the court issued the inventory and eventually closed the probate. However, she contended that it is confusing the allegation that Swalehe Mawazo did not divide the properties as were already divided and some were sold to applicants as it was adduced in Land Application No.99 of 2019 of the District Land and Housing Tribunal for Mtwara. The learned counsel stressed that the confusion need interference of the Court of Appeal since some of the bonafide purchasers have stayed, developed and residing with their families for almost twelve years now.

Last but not least, the learned counsel submitted that there are great chances of success in the intended appeal once this court will grant leave to appeal to the Court of Appeal. Ms. Sabatho prayed this court to grant the application.

Having keenly considered the application and submissions of both parties. At the outset, I would stress that what Mr. Mtembwa has complained when was making his submission is baseless. In fact, tasking the applicants' counsel to argue the pinpointed and intended grounds of appeal at this juncture is improper. It is improper because it will be

construed to interfere the jurisdiction of the Court of Appeal. What should be known to the legal practitioners is that points of law on the raised grounds should be seen on the face of record. This means that, it does not entail a party or his representative to make strong and extensive argument in order to show the point of law or a matter of public importance. Looking at the face of the grounds appearing under paragraph 8 and with little submission by the applicants' counsel suffices this court to find it if the parties have raised a matter point of law or public importance or there is prospect of succeeding at the appeal.

At this juncture, I would like stress that determination of points of law depends also the availability of facts from the adduced evidence. See, **Hassan Marua v. Tanzania Cigarette Company** (sic). Furthermore, a point of law cannot exist in isolation with the facts. However, my emphasis is that a point of law and the like are supposed to easily seen by our eyes and not to be tasked to find it. Based on the above observation, I hereby find the respondent's argument as to this argument is concerned is devoid of merit hence it is dismissed.

Now, I am inclined, at this juncture, to determine whether the applicants have raised matters of point of law or the matter is fit for determination by the Court of Appeal as elaborated in the case of **Nurbhain Ruttansi vs Ministry of Water Construction, Energy and Environment** (supra). Also, it is trite law that leave may be granted where there is a point of law, or the intended appeal stands a good chance of success or there is a point of public importance to be determined by the Court of Appeal. See, **Rugatina C.L vs The Advocates Committee and Mtindo Ngalapa**, (supra), the Court elaborated that: -

"Leave is granted where the proposed appeal stands reasonable

chances of success or where, but not necessarily the proceedings as whole reveal such disturbing features as to require the guidance of the Court of Appeal. The purpose of the provision is therefore to spare the Court the spectre of unmeriting matter and enable it to give adequate attention to cases of true public importance”

Also, the same principle was articulated in the case **British Broadcasting Corporation vs Eric Sikuja Ngámaryo**(supra) thus: -

“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 importance, leave to appeal will be granted where the grounds of appeal raise issue of general importance or a novel of law or where the grounds show prima facie or arguable appeal.”

In the light of the afore said principles governing grant of leave to appeal to the Court of Appeal, I am now obliged to determine whether the applicants have advanced good reasons for this court to grant them leave to appeal to the Court of Appeal. I have curiously and with great diligence gone through the reasons advanced by the applicants in pursuing their application. In the light of the above authorities in conjunction with the reasons advanced by the applicants as seen in their submission and paragraph 8 of the joint affirmed affidavit of the applicants. Based on the reasons advanced by the applicants and the position of law stated above, the reasons have shown prima facie or an arguable appeal or raises matters on point of law which needs intervention of the Court of Appeal. For instance, the second ground which needs the

Court of Appeal to determine the issue of the legality of the sale of suit property.

From the foregoing, I hereby allow the application with no order as to costs.

It is so ordered.



E.I. LALTAIKA

A handwritten signature in blue ink, appearing to read "E.I. Laltaika".

JUDGE

4.10.2022

This Ruling is delivered under my hand and the seal of this Court on this 4th day of October, 2022 in the presence of Ms. Happyness Sabatho for the applicants and Mr. Hussein Mtembwa, learned Advocate for the respondent.



E. I. LALTAIKA

A handwritten signature in blue ink, appearing to read "E.I. Laltaika".

JUDGE

4.10.2022