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

MISCELLANEOUS LAND CASE APPLICATION NO. 23 OF 2022

(C/F Land case appeal No. 30 of 2021 High Court of Tanzania at Moshi, Original Land Application No. 64 of 2018 District Land and Housing Tribunal of Moshi)

ZABRON AMON NGUMA.....1ST APPLICANT

FRANSISCA FELICIAN NYAKI.....2ND APPLICANT

Versus

FELICIAN MANGALIA NYAKI.....RESPONDENT

Last Order: 29st Sept, 2022

Date of Ruling: 13th Oct, 2022

RULING

MWENEMPAZI, J.

The applicants, Zabron Amon Nguma and Fransisca Felician Nyaki are seeking for leave to appeal to the Court of Appeal of Tanzania (the CAT), pursuant to section 5 (1) (c) of the Appellate Jurisdiction Act, [Cap. 141 R.E. 2019] (the AJA) and Rule 45 (a) of the Tanzania Court of Appeal Rules, 2009 (the Rules) and section 47(2) of the Land Dispute Courts Act, (Cap 216 R.E 2019). The application which is by way of chamber summons is supported

by affidavits of Mr. Zabron Amon Nguma and Fransisca Felician Nyaki. Resisting the application, the respondent filed a counter affidavit.

The background to this application is as follows; that in 2018 the respondent sued the appellants for trespassing on his farm land of about six acres. He alleged that the 2nd appellant had maliciously without informing the respondent and other family members sold to the 1st appellant the land in dispute. The respondent informed the court that he had initially obtained eight acres of land from Oria village council way back in 1974. That after that in 2004 the respondent gave the 2nd appellant two acres out of the farm leaving six acres for the family to use. In the year 2018 is when the respondent learnt that the 2nd appellant had unlawfully sold to the 1st appellant the land in dispute which did not belong to her. After hearing the tribunal decided in favour of the respondent. Dissatisfied with the decision the appellants unsuccessfully appealed to the high court which also upheld the decision of the tribunal hence the present application for leave to appeal to the Court of Appeal.

The intended grounds of appeal have been mentioned in paragraph 10 of each of the appellant's affidavit. These are the same five grounds which were

advanced in their first appeal and I will reproduce them hereunder for ease of reference;

i. That the trial tribunal had failed to evaluate the evidence of parties.

ii. That the trial tribunal had failed or neglected to resolve some of the important issues.

iii. That the tribunal's decision had no reasoning.

iv. That the trial tribunal had failed to observe procedures and principles governing visiting of *locus in quo*.

v. That the trial tribunal had granted a relief which had not been pleaded or played.

When the matter was called up for hearing, parties prayed to proceed by way of written submission and the court granted leave for hearing to be conducted by way of written submission in an ordered schedule. The applicants' submission was prepared by Mr. Erasto Kamani, learned counsel while the respondent's submission was prepared by G.M. Shayo learned counsel.

Submitting in support of the application Mr. Kamani stated that with respect to the first ground of appeal the applicants disagree with the learned judge

by contending that a mere referring to the evidence of parties without directing his mind to it and expound the same, the trial chairman evaluated the evidence on record. The learned counsel was of the view that the act did not amount to evaluation of evidence.

With respect to the second ground of appeal the learned counsel submitted that the decision of the tribunal lacked legal reasoning and that what the learned judge had referred to as legal reasoning was just an opinion of the trial chairman and not legal reasoning. Arguing further the learned counsel submitted that legal reasoning cannot be a holding from a decided case rather the same is assessed by looking at how reason for decision has been associated with the weight of evidence given by the parties and not his opinion and case law which he argued was not relevant to the evidence on record.

Submitting on the fourth ground the learned counsel argued that although the learned judge decided that visiting of locus in quo did not occasion injustice to parties, his views were in contrary as he argued that since there was violation of the procedures and principles governing it, then it was his opinion that the same did cause injustice to parties.

Finally on the fifth ground the learned counsel submitted that they did not agree with the high court judge that the trial chairman did determine the framed issues as most of what was contained from the decision was different from the issues which were framed for determination and that some of them were his own opinion.

Mr. Kamani also submitted that after determining all the grounds which had been set forth in the memorandum of appeal, the learned judge went on to raise another issue as to whether the respondent has granted the whole disputed land to the 2nd appellant. The learned counsel argued that this issue was raised by the judge herself, discussed it and gave decision on it without according parties an opportunity to address her on the same. He submitted that this was improper and that the applicants were aggrieved by the decision of this court and intended to appeal to the court of appeal.

Concluding his submission Mr. Kamani submitted that the intended grounds of appeal are contentious legal points which are worth consideration of the Court of Appeal and that there are reasonable prospects of success on appeal. In view of his submission the learned counsel prayed for the application to be granted.

Replying to the written submission of the applications, it was Ms. Shayo's view that based on the applicants' submission it was difficult to understand as to whether the applicants were submitting on the grounds of appeal or seeking for leave to appeal to the Court of Appeal of Tanzania. Submitting in response to the first ground of appeal which stated that the trial chairman failed to evaluate and analyze the evidence adduced by parties, the learned counsel stated that the point constitutes pure point of facts which is not worthy determination by the court of appeal. He further contended that since there is no good reason normally on a point of law or on a point of public importance then the ground is destitute of any merit and ought to be expunged from records. Emphasizing on the point that an application for leave is usually granted if there is a good reason on a point of law or on point of public importance, the learned counsel referred this court to the unreported case of **Rutagina C. L vs. The Advocate Committee and Clavery Mtindo Ngalapa**, Civil Application No. 98 of 2010, Court of Appeal of Tanzania at Dar es Salaam.

Responding to the second ground of the intended appeal the learned counsel submitted that the contention by the applicants' counsel that the tribunal judgment was bad for lack of legal reasoning had no room to be determined by the court of appeal of Tanzania since it is on record that the tribunal

chairman did focus on legal reasoning before reaching his decision. On this point the learned counsel argued that the applicants' have no reasonable chances of success to require guidance of the court of appeal thus the ground lacked merit. While citing the case of **Harban Haji Mosi and Another vs. Omar Hilal Seif and Another**, Civil Reference No. 19 of 1997, the learned counsel submitted that leave can be granted where the grounds of appeal raise an issue of general importance or a novel point of law where the grounds show a prima facie or arguable appeal.

Responding to the third ground of the intended appeal where the applicants complained that the trial tribunal made a gross error by awarding relief which was not pleaded, the learned counsel submitted that the records are clear particularly under the contents of paragraph 7(g) of the land application No. 64 of 2018 at the District Land and Housing Tribunal where the respondent prayed to be awarded any other relief as the tribunal deemed fit to grant. He argued that the tribunal had discretion to grant any other relief and that the position was reaffirmed by the appellate judge thus it was their submission that the applicants had no arguable issue of public importance requiring attention of the court of appeal.

Responding to the fourth ground of the intended appeal the learned counsel submitted that no injustice had been occasioned during the visit of the locus in quo hence the ground cannot impress the court of appeal for determination.

Finally on the firth ground of the intended appeal the learned counsel submitted that the contention by the applicants that there were some issues left un-answered, the same was not true since the records are clear and self-explanatory. He further concluded that the grounds set forth by the applicants seeking for leave to appeal to the Court of Appeal of Tanzania are hypothetical, frivolous, vexatious and with no public importance to be determined by the court of appeal. He further argued that all that all what is contended by the applicants are based on pure points of facts with no importance to be determined by the court of appeal as there is no error in court's records drawing the attention of the court of appeal. He then prayed for the application to be dismissed with cost.

In a brief rejoinder Mr. Kamani submitted that the counsel for the respondent has overstepped and discussed the merit of the appeal instead of application for leave. He argued that it was not the duty of the respondent or this court in application for leave to assess the merit of grounds of the intended appeal

as that would amount to pre determination of the appeal which has not yet been filed.

Submitting further Mr. Kamani stated that it has been decided in a number of cases by the Court of Appeal of Tanzania that pre determination of the intended appeal is illegal and that the same cannot constitute sufficient cause to justify refusal for granting leave. He cited the case of **Shija Marco vs. Republic**, Criminal Appeal No. 246 of 2018 (unreported). Based on the above argument and authority, Mr. Kamani submitted that one cannot be denied leave to appeal to the court of appeal based on the argument that the grounds which he intends to lodge to the court of appeal have already been decided by the subordinate courts or that such appeal will not succeed. He on the contrary submitted that all the grounds set forth in applicants' affidavits are contentious legal points worth consideration of the court of appeal. In the end he prayed for the application to be granted.

Now, having considered parties affidavits and submissions for and against the application, the issue for determination is whether the application has merit. In determining this issue, let me start by stating the obvious, that leave to appeal is not automatic but discretionary. Also in order for the Court to exercise its discretion, it is crucial that it be furnished with the necessary

information. The information which is usually obtained from the affidavit in support of the application for leave.

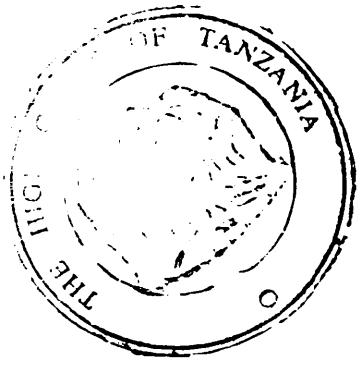
Considering what parties have argued in their submissions, I have noted that both sides have in their submissions found themselves arguing the appeal. Based on the nature of the application, if one is not careful it is easy to find yourself arguing the intended appeal. The court of appeal has in a number of cases given directions as to what should be considered in determining applications like this. In the unreported case of **Jireyes Nestory Mutalewa vs. Ngorongoro Conservation Area Authority**, Application No. 154 of 2016, it was stated that;

> *"The duty of the court at this stage is to confine itself to the determination of whether the proposed grounds raise an arguable issue(s) before the court in the event leave is granted. It is for this reason the court brushed away the requirement to show that the appeal stands better chances of success as a factor to be considered for the grant of leave to appeal. It is logical that holding so at this stage amounts to prejudging the merits of the appeal."*

Examining the application before me in light of what is stated in the above case, my duty here is to determine whether the applicants have presented

arguable issues which can be considered by the Court of Appeal without going into the merits of the issues. The substance of applicants' application based on their affidavits they challenged issues of weight of respondent's evidence in proving the claim as against the applicants' evidence, court's failure to resolve important issues and adhering to procedures in visiting of the locus in quo. In my view these are arguable issues which can be considered at an appellate level.

Having concluded so, I find merit in the application and proceed to grant the same. It is so ordered.



T. MWENEMPAZI
JUDGE
13th OCTOBER, 2022.