IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA DISTRICT REGISRY

AT BUKOBA

MISC. LAND APPLICATION NO. 66 OF 2022

(Arising from High Court of Tanzania Land Case Appeal No.56 of 2020 Originating from the District Land and Housing Tribunal of Kagera at Bukoba Application No.27/2018)

RAFIU HUSSEIN .....APPLICANT

VERSUS

SAMSON YUSTACE KAGAIGA.....1ST RESPONDENT

FORTUDAS NESTORY NDIBALEMA.....2ND RESPONDENT

RULING

13/09/2022 & 04/11/2022
E.L. NGIGWANA, J.

This is an application for leave to appeal to the Court of Appeal of Tanzania against the judgment of this court in Land Appeal No.56 of 2020 before Mwenda, J. The same is brought under section 47 (2) of the Land Disputes Courts Act [Cap 216 R. E 2019] and rule 46 (1) of the Tanzania Court of Appeal Rules, 2009. As usual, the chamber summons initiating the application is accompanied by the affidavit deposed by Rafiu Hussein/Applicant.

Among other grounds, paragraph 8 of the applicant's affidavit presents the major reason why leave has to be granted to the applicant to have the matter determined by the Court of Appeal. Samson Yustace Kagaiga filed the counter affidavit opposing the applicant's application.

Defending the application, Mr. Mathias Rweyemamu Advocate for the applicant elaborates that the applicant is seeking for the Court of Appeal intervention because the High Court assessed the evidence at the trial tribunal and came up with the different finding from that of the tribunal hence the Court of Appeal will therefore declare which was a proper finding between the duo. To support his arguments Mr. Rweyemamu made reference to the case of **Shah vs Agusto, (1970) EA** where it was held that; when the first appellate court has reversed a finding of fact, it is a question of law whether it has acted judicially.

Mr. Mathias contended that the act of the High Court Judge doubting on the existence or death of his client was to amend the pleadings.He went on submitting that the issue of Probate was dealt by the Primary Court of Bukoba and the necessary documents were filed in the DLHT in that respect. He added that the existence or non-existence of Kwekemege was not an issue. He went on submitting that PW1, PW2 and PW3 gave evidence in the DLHT but there was double standard as the evidence of the first and second respondents was not considered. He also stated that Mutalemwa was not summoned, to prove that he gave his land to the second respondent. He further argued that double standard is not required in the administration of justice.

He added that, the Misenyi District has no its District Land and Housing Tribunal, therefore one in Bukoba District operates in Misenyi too. He added that Exhibit P1 which is the "Will" was just annexed in the WSD but its original was never tendered in trial tribunal therefore, the High Court would have drawn inference as to why the will was not tendered.

He further added that the matter was time barred as the issue of limitation was raised by the High Court but his client explained that the cause of action arose in 2010 after the death of his mother. He also said Kabugane had no capacity owing that he was a mere care taker. He finally prays for leave to be granted as the matter involves issues of public importance.

In reply, Advocate Theresia Bujiku for Respondents argued that the submission that the High Court did not evaluate evidence correctly is baseless and as well the argument that the High Court amended the pleadings is baseless too. She contended that there is no issue of public importance. She added that DW1, DW2 and DW4 disputed the existence of Kwekemage therefore it was proper for Hon.Judge to address it because it was the issue in the DLHT.She argued that section 42 of Cap. 216 R.E 2022 allows the High Court to re-evaluate the evidence.

Concerning the issue of double standard, the learned counsel submitted in reply that, that was baseless as the High Court centered on section 110 of the Evidence Act Cap 6 R.E 2022 that who alleges must prove, and there was no one said the suit land was inherited save that the land was given to the them while the giver was still alive hence the issue of probate was immaterial. The law is very clear that probate has to be filed in the fixed place of abode therefore it wasn't proper to file in Primary Court of Bukoba while there is a primary Court of Misenyi District.

As regards the issue of Limitation, she refuted that it was not raised by the judge but it was the issue raised as ground No.1 at the DLHT hence the issue of new point is baseless. She added that the respondents have been

in the disputed land since 1980 therefore, there is nothing to be taken to Court of Appeal.

In rejoinder Mr. Rweyemamu reiterated what he had earlier submitted.

Having heard the submissions for and against the filed application, I will determine whether the application is meritorious.

Appeal is a right which is guaranteed in our Constitution. The exercise of that right, is however not absolute. There are certain procedures to be complied with before one can exercise his right to appeal and in the case of appeal from the High Court to the Court of Appeal, such procedures are stipulated under Section 5 (1) (c) of the Appellate jurisdiction Act, [Cap 141 RE 2019]. The provision states as follows;

"In civil proceedings, except where any other Written law for the time being in force provides otherwise, an appeal shall lie to the Court of Appeal with the leave of the High Court or of the Court of Appeal, against every other decree, order, judgment, decision or finding of the High Court."

The above provision is *pari matria* with the provision of section 47 (2) of the Land Disputes Courts Act [Cap 216 R. E 2019] for matters originating from DLHT and under rule 46 (1) of the Tanzania Court of Appeal Rules 2009 GN 368 of 2009 cited by the applicant.

From the above provision, it is apparent that appeals to the Court of Appeal against a decree, order or judgment of the High Court should be with the leave. The requirement for leave imposes a duty upon this court to filter out frivolous and vexatious appeals and in so doing, spare the

Court of Appeal from the specter of un-meriting matters and to enable it to give adequate attention to cases of true public importance.

The Court of Appeal in **Paulo Juma versus Diesel & Auto Electrical Services Ltd & 2 Others**, Civil Appeal No 183 of 2007, (unreported) held that:

"The purpose of the provision is therefore to spare the court the specter of un-meriting matter and to enable it to give adequate attention to cases of public importance".

The grant or refusal of the application is within the spectrum of discretionary powers of the High Court. The discretionary powers of the court in granting of leave and the exercise of that discretion is as stated in the excerpt below from the **British Broadcasting Corporation versus Erie Sikujua Ng'ymaro**, Misc. Civil Application No. 138 of 2004. (Unreported)

"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 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 appeals raise issues of general importance or a novel point of law or where the grounds show a prima facie or arguable appeal.... The purpose of the provision is, therefore, to spare the Court the specter of unmeriting matters and to enable it to give adequate attention to cases of true public importance."

In the case of **Ramadhani Mnyanga versus Abdala Selehe** [1996] it was held that;

"For leave to be granted the application must demonstrate that there are serious and contentious issues of law or fact fit for consideration of appeal"

In **Jireys Nestory Mutalemwa versus Ngorongoro Conservation Area Authority,** Civil Application No. 154 of 2016 it was held that;

"Much as the grant of leave is discretionary, yet it is not automatic. The court adjudicating on such application is not left free to do so. It can grant leave to appeal only where the grounds of the intended appeal raise arguable issues for the attention of the Court."

From the above authorities, we can learn that there are conditions to be met for the grant of leave to appeal to the Court of Appeal, amongst them being that; there are compelling reasons why the appeal should be heard, including conflicting judgments on the matter under consideration, the proceedings as a whole reveal disturbing features requiring the Court of Appeal intervention and provision of guidance, there is point of law or point of public importance detected from the appealed decision and that there are arguable issues fit for the consideration of the Court of Appeal.

However, it appears that the threshold or yard stick applicable in granting leave is lighter compared to the strict one in certifying that there is a point of law involved to be taken to the Court of Appeal for cases originating from primary Courts and those formally originated from Ward Tribunal before the amendment of the relevant laws. This is because unlike certificate on point of law where the applicant seeks to resort to the third

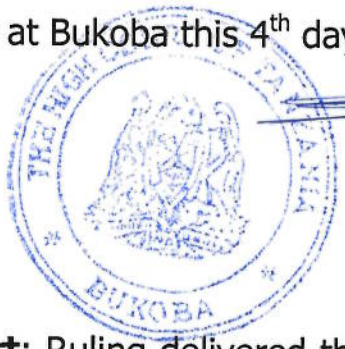
appeal, the current application for leave, the applicant seeks to resort to the second appeal. The former, must always be confined on point of law as issues of facts must have been looked into by two courts whereas the latter, issues of law and facts can be taken to the Court of Appeal provided there is arguable case and worthiness on public importance which attracts the intervention of the Court of Appeal.

In our case however, I would like to state very clearly that I have no mandate to go into the merits or deficiencies of the judgment or orders of the Hon. Judge or to analyze the grounds of the proposed appeal because this is not the Court of Appeal, and application of this nature does not mean re-hearing of the appeal. All what I am duty bound to do is to consider whether there are arguable issues or compelling reasons, or disturbing features, or point of law or point of public importance requiring the Court of Appeal intervention.

I have carefully gone through the proceedings of the trial court and of this court as a whole and the judgments to see whether they reveal disturbing features requiring the Court of Appeal intervention and provision of guidance. I have honestly grasped that this application has merit and found few disturbing features. As prayed by the applicant since the sought forum is the second appellate court and the first appellate court reversed the findings of the trial tribunal, the Court of Appeal will therefore be called to determine which court had properly evaluated the evidence between the DLHT and the High Court. Equally too, whether issues which were determined by the probate court can be re-corrected by this Court when determining a land appeal case.

In the event, the application for leave to appeal to the Court of Appeal of Tanzania is hereby granted. Costs in due course.

Date at Bukoba this 4th day of November, 2022.



E. L. NGIGWANA

JUDGE

04/11/2022

Court: Ruling delivered this 4th day of November, 2022 in the presence of all parties in person, Hon. E.M. Kamaleki, Judges Law Assistant and Ms. Sophia Fimbo, B/C.

E. L. NGIGWANA

JUDGE

04/11/2022