

**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
(MOROGORO SUB-REGISTRY)**

AT MOROGORO

MISC. LAND APPLICATION NO. 31 OF 2022

(From the decision of the High Court of Tanzania, at Morogoro, in Land Appeal No. 35 of 2021, Before Hon P. J. Ngwembe, J., delivered on 13th June, 2022)

BETWEEN

HALIMA YASIN MASANJA APPLICANT

VERSUS

NELSON MAYOMBO (Administrator of the Estate of the Late Wolfram Alexander Ngonyani) 1ST RESPONDENT

JENIFA MAYOMBO (Administratrix of the Estate of the Late Wolfram Alexander Ngonyani) 2ND RESPONDENT

RULING

18th Oct, & 12th Dec, 2022


CHABA, J.,

The applicant, Halima Yasin Masanja, filed the instant application against the respondents Nelson Mayombo and Jenifa Mayombo, the Administrator and Administratrix of the estate of the late Wolfram Alexander Ngonyani respectively, praying the Court to grant her with leave to appeal to the Court of Appeal of Tanzania against the whole decision of this Court (Ngwembe, J.) in Land Appeal No. 35 of 2021 delivered on the 13th day of June, 2022.



The application has been preferred by way of Chamber Summons supported by an affidavit deponed by Mr. Ezekiel Joel Ngwatu, learned advocate for the applicant.

The gist of the complaint is that, the decision of this Court is full of irregularities and illegalities. This is echoed from the applicant's affidavit supporting the prayers for certification of existence of points of law, in particular paragraph 4 (a) – (d). The relevant paragraphs depict that, I quote: -:

- (a) That, the Appellate Court erred in law and fact by not exercising its appellate jurisdiction to intervene with the Tribunal's decision and comes with its own decision;*
 - (b) That, the Appellate Court erred in law and in fact by allowing appeal, quash and set aside all subsequent orders which arose from nullity/illegal decision without redress on the illegalities;*
 - (c) That, the Appellate Court after observed that the Trial Chairperson has misdirected himself in his decision so appealed in deciding matters/issues which were not before him, Appellate Court erred in law and in fact by not ordering re-trial of the matter;*
 - (d) That, the Appellate Court erred in law and fact by not confined to the nature of the dispute, re-evaluated evidence on records hence ended up in delivering unfound, contradictory, unfair and un-maintainable decision.*
- 

On the other side, the respondents are in disagreement with the applicant's assertion, hence filed counter affidavit opposing the application.

When the application was called on for hearing on the 18th October, 2022, parties appeared in Court through their Learned Advocates. While the appellant enjoyed the legal services of Mr. Ezekiel Joel Ngwatu, the respondents enlisted the legal services of Mr. Kasaizi Andrew Kasaizi. Thus, with the parties' consensus, it was agreed that the application be disposed of by way of written submissions. Both parties complied with the scheduling order.

Amplifying, what is stated in the applicant's affidavit, Mr. Ngwatu accentuated that the application at hand is of public importance as the intended appeal has arguable grounds as enshrined under paragraph 4 of the applicant's affidavit which needs to be tested in the Court of Appeal of Tanzania.

He submitted further that, there is arguable appeal worth to be considered by the Court of Appeal, particularly when this Court upon observed that the trial Tribunal misdirected itself in its decision by deciding matters which were not before it, it failed to order re-trial of the matter and not quash and set aside all subsequent orders which arose from nullity / illegal decision.

He added that, to quash and set aside all subsequent orders which arose from nullity / illegal decision was not the last resort instead of re-trial of the matter. The learned counsel referred the case of **Omary Shaban Nyambu v.**



(Unreported), where it was held that: -

"it is significant to emphasize that the Court's discretion in deciding whether or not..... must be exercised judicially and not arbitrarily or capriciously, nor should it be exercised on the basis of sentiments or sympathy. Fundamentally, the said discretion must aim at avoiding injustice or hardship resulting from accidental inadvertence or excusable mistake or error, but should not be designed at assisting a person who may have deliberately sought in order to evade or otherwise to obstruct the cause of justice."

Based on the above submission, the applicant prayed the Court to allow this application for the interest of justice as the intended appeal has overwhelmingly chances of success.

In reply to the submission put forward by the learned advocate for the applicant, Mr. Kasaizi, learned advocate for the respondents, highlighted that there are no irregularities and illegalities in the impugned decision, and there is no need to grant leave to the Court of Appeal of Tanzania as there is nothing to be considered or to be determined by the Court of Appeal. Further, he was of the view that, the First Appellate Court did not err in law or in fact by not ordering re-trial as there was no issue of redeeming the disputed plot in the

appellant's application during the trial. He added that, the applicant's application had already been dismissed and the applicant did not appeal against the dismissal order, and therefore there was nothing to order for re-trial.

The learned counsel stressed that, this Court did not deliver contradictory or unfair decision, and that there is nothing to be tried by the Court of Appeal due to the fact that the applicant has failed to mention even a single legal issue to warrant this Court allow the applicant to appeal to the Court of Appeal of Tanzania. To cement his argument, he cited the case of **The Attorney General and The Advocate Committee v. Fatuma Amani Karume**, Misc. Civil Application No. 08 of 2021, at p. 12 - 13, in which this Court observed that:

"...for the reason given above, this court hereby decline to grant leave to the applicants to appeal to the Court of Appeal of Tanzania as prayed in the chamber summons for failure of the applicants to establish arguable case or issues for the Court of Appeal to consider. The instant application is thus dismissed....."

Mr. Kasaizi further referred this Court to the case of **Abdullah Amar Baajun** (Suing as an Administrator of the Estates of the Late Said Omary) **v. Asha Shaban Kinande** (Suing as an Administratrix of the Estate of the Late Asha Mwarabu) (Unreported) at p. 5 - 6, wherein the Court held inter-alia that: -

"It is the legal position ascertainment whether the legal threshold for granting an application for leave has been met, which entails

carrying out a thorough evaluation of the averments made in the supporting affidavit. Leave to appeal to the Court of Appeal must be on the satisfaction that the intended appeal raises issue of general importance or novel point of law or where there is prima facie, or arguable appeal...".

He continued to assert that, in principle there is no reason to grant leave because even if the leave is granted, the appeal cannot stand as the appellant has not served the respondent with the copy of the application for request of the decree, judgment and proceedings contrary to Rule 90 (3) of the Court of Appeals Rule, 2019.

As to the question of illegality, Mr. Kasaizi submitted that there was no illegality or contradictive decision as the decision is clear on the face of it. He thus prayed this Court to dismiss the application for leave with costs.

To rejoin, the learned advocate for the applicant arguing in respect to the assertion that the appeal cannot stand as the respondent was not served with the copy of the application for request of the decree, judgment and proceedings, he averred that the notice of appeal and letter requesting proceedings have nothing to do with the instant application for leave. However, he was of the view that the said letter and notice of appeal were duly served to the respondents' advocate on 13th July, 2022.



He reiterated that, after the decision of the lower Tribunal being found illegal, the available remedy was to order re-trial. In conclusion, the learned advocate prayed for the Court to allow this application for the interest of justice as in his opinions, the intended appeal has overwhelmingly chances of success.

Having summarised and considered the rival submissions advanced from both sides, it is now my duty to determine the matter whether the applicant has demonstrated serious and contentious issues of law or facts worth for consideration by the Court of Appeal. As indicated in the chamber summons, the applicant moved this Court under section 47 (2) of the Land Disputes Courts Act [Cap. 216 R. E, 2019] (LDCA) in a bid to seek leave to appeal to the Court of Appeal. Sub-section (2) of section 47 of the LDCA is a guiding principle of law to any person who is aggrieved by the decision of this Court and intends or wishes to appeal to the Court of Appeal of Tanzania: The law provides that: -

"A person who is aggrieved by the decision of the High Court in the exercise of its revisional or appellate jurisdiction may, with leave of the High Court or Court of Appeal, appeal to the Court of Appeal."

As rightly submitted by both counsels, the general principle is that leave to appeal will be granted where the ground of appeal raises issues of general importance or a point of law or where the grounds show a prima facie or arguable appeal. In determining this application therefore, I will only examine



whether the grounds relied upon by the applicant seeking leave fits or meets the requirements set by the general principle.

However, at the outset, I would like to state that I have no mandate to go into the merits or deficiencies of the judgment or orders of my learned brother Hon. Ngwembe, J., because this is not the Court of Appeal, and an application of this nature does not mean re-hearing. All what I am duty bound to do is to consider whether there are arguable issues, or compelling reasons, or disturbing features, or point(s) of law or point of public importance which requires intervention by the Court of Appeal.

In the case of **British Broadcasting Corporation v. Eric Sikujua Ng'yamaro**, Civil Application No. 133 of 2004, Court of Appeal of Tanzania at Dar Es Salaam (Unreported), the Court held inter-alia that: -

"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 be 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".

Similarly, in **Harban Haji Mosi and Another v. Omar Hilal and Another**, Civil reference No. 19 of 1997 (Unreported), it was held that:

"Leave is granted where the proposed appeal stands reasonable chances of success or where but not necessarily, the proceedings as a whole reveal such disturbing features as require the guidance of the Court of Appeal. The purpose of the provision is, therefore, to spare the Court the spectre of unmeriting matters and to enable it to give adequate attention to cases of true public importance."

In the instant application, the applicant simply prays for leave to appeal because the Appellate Court did not order for re-trial after allowing the appeal on the ground that, the tribunal chairperson misdirected his mind in deciding matter/issues which were not before the tribunal. The appeal was allowed and trial tribunal's decision quashed and all subsequent orders issued by the tribunal after the dismissal order were set aside.

Reading carefully the reasons advanced by the applicant seeking leave to appeal to the Court of appeal as stated at paragraph 4 of the applicant's founding affidavit in support of the application as well as the impugned decision as a whole, it is my considered opinion that there are disturbing features which requires intervention by the Court of Appeal of Tanzania and provision of guidance as to whether after declaring that the proceedings and the judgment of the lower tribunal were a nullity, and then quashed the proceedings and set aside the judgment, and further whether the Appellate Court was duty bound to order for re-trial as suggested by the learned advocate for the applicant.

In the final event, I find the application meritorious and accordingly it is hereby granted. Given to the nature of the application, each party to bear its own costs. **It is so ordered.**

DATED at MOROGORO this 12th day of December, 2022.




M. J. CHABA

JUDGE

12/12/2022