

**THE UNITED REPUBLIC OF TANZANIA
JUDICIARY**

**IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF MBEYA)
AT MBEYA**

MISC. LAND APPLICATION NO. 55 OF 2022

(From the Decision of the High Court of Tanzania at Mbeya in Land Appeal No. 93 of 2021. Originating from the District Land and Housing Tribunal for Mbeya at Mbeya in Land Application No. 09 of 2017)

RASHID MUYUKI.....APPLICANT

VERSUS

HAWA KANYAMALA.....1ST RESPONDENT
MAGE MWAKANYAMALE.....2ND RESPONDENT
ADOLF A. MWAGIKE.....3RD RESPONDENT

RULING

Date of Last Order: 20/10/2022
Date of Ruling : 16/12/2022

MONGELLA, J.

Unsatisfied with the decision of this Court (Karayemaha, J.) rendered in Land Appeal No. 93 of 2021, the applicant has filed the application at hand seeking for leave to appeal to the Court of Appeal. The matter emanates from the District Land and Housing Tribunal for Mbeya (the Tribunal, hereinafter) in Land Application No. 11 of 2020. The application is made under section 47 (2) of the Land Disputes Courts Act, Cap 216 R.E. 2019.



The applicant appeared in person while the respondent was represented by Mr. Simon Mwakolo, learned advocate. The application was argued by written submissions.

In his submission, the appellant started by addressing the point raised by the respondent in the counter affidavit to the effect that this Court lacks jurisdiction to entertain the application at hand as it arises from a non-existent case. Though contending first that the respondent has raised an objection through the back door, he went ahead to address the point. He submitted that in the counter affidavit, the respondent averred that the applicant stated that the matter originates from Land Application No. 11 of 2020 which has never been there between the parties. While conceding to the error in citing the correct number of the case in the Tribunal, which ought to be Land Application No. 09 of 2017 instead of Land Application No. 11 of 2020; he contended that the same is a minor error and curable under the law by even making correction by handwriting. He added that his appeal to the Court of Appeal is intended to challenge the decision of this Court rendered in Land Appeal No. 93 of 2021 and not against the decision of the Tribunal. He prayed for the Court to deal with the application on its merit.

Addressing the points of his application, he submitted that leave to appeal is granted upon the Court's discretion which is exercised judiciously in consideration of the fact that there is an arguable case worth taking to the Court of Appeal. He cited the case of **Lembrice Israel Kivugo vs. M/S DHL World Wide Express & M/S DHL Tanzania Limited** [2007] TLR 162 in that respect. Showing that there is an arguable case, he



referred to paragraph 5 of the supporting affidavit under which he listed the grounds for seeking leave, which are:

One, that this Hon. Court misconstrued the evidence on record with respect to the issue of location of the disputed land as it was only the trial Tribunal that visited the *locus in quo*. Two he argued that under paragraph 5 (ii) and (iii) of the supporting affidavit he raised other grounds showing that there is an arguable case and contentious legal issues worth of attracting consideration by the Court of Appeal. Under these paragraphs which were adopted as part of his submission he states the issue for determination to be: *One, whether the first appellate Court erred in law by misconceive (sic) the issue of standard of proof; and two, whether the first appellate Court erred in law when failure (sic) to re-evaluate the evidence on record, hence reached a wrong decision.*

The appellant raised new contentious issues claiming that they contain point of law, which he could not list in his supporting affidavit due to the reason that he had not been supplied with copies of the impugned judgment when preparing the application. Addressing the issues he claimed that: first, this Court determined the issue of non-disclosure of the location and address of the suit land in the application which initiated the suit in the trial Tribunal without affording the parties the opportunity to address the Court on the same. He considered that being wrong in law. Second, he claimed that this Court failed to enter verdict on the issue of ownership of the suit land. That, the Court failed to declare who is the owner of the suit land or to give any other orders or directives.



In his brief reply submission, Mr. Mwakolo centred on the point that this Court lacks jurisdiction to entertain the application as it emanates from a non-existent case, that is. Land Application No. 11 of 2020. He submitted that this Court cannot grant the leave sought as the applicant wishes to appeal against the decision which is not part of the record of this Court. He challenged the applicant's contention that the respondent has raised the objection from the back door arguing that objections on matters of jurisdiction can be raised at any time. He referred the decision in ***Tanzania-China Friendship Textile Co. Ltd. vs. Our Lady of Usambara Sisters*** [2006] TLR 70 in support of his argument.

While conceding that the leave sought is with respect to an appeal against the decision of this Court rendered in Land Appeal No. 93 of 2021, he argued that the said case did not emanate from Application No. 11 of 2020 but from Application No. 09 of 2017, which does not feature in the applicants Chamber Summons and supporting affidavit. He challenged the argument by the applicant on the ground that the applicant ought to have prayed to amend the application documents before using them. In the premises, he had the stance that the application at hand is incompetent and ought to be struck out with costs as the incorrect citation of the original case goes to the root of the matter.

On the same line of argument, Mr. Mwakolo while conceding that the grounds raised under paragraph 5 of the applicant's supporting affidavit present arguable issues, he contended that the complaints do not arise from Application No. 11 of 2020 pleaded by the applicant in his application. In that respect he concluded that there stands no arguable

facts to be determined by the Court of Appeal. He prayed for the application to be dismissed with costs.

Having considered the rival arguments by the parties, I shall start with the issue as to whether this Court has jurisdiction to entertain the application at hand given the fact that the applicant in his application stated that the matter originates from Land Application No. 11 of 2020 instead of Land Application No. 09 of 2017. Considering the arguments by both parties, I find that there is no dispute that the original case in the trial Land Tribunal was not properly cited. The controversial issue is whether the same is fatally defective with effect of ripping this Court its jurisdiction to entertain the application.

In my view, both parties have argued that the application at hand is sought to impugn the decision of this Court rendered in Land Appeal No. 93 of 2021, which dealt with a decision from the District Land and Housing Tribunal rendered in Land Application No. 09 of 2017 and not Land Application No. 11 of 2020 as incorrectly cited by the applicant in the Chamber Summons and supporting Affidavit. In the premises, and in the advent of the development in our law, particularly in dealing with technicalities in dispensation of justice, the incorrect citation of the original case number is curable. It is curable under the overriding objective principle envisaged under **Article 107A of the United Republic of Tanzania Constitution of 2007 as amended** and sections **3A and 3B of the Civil Procedure Code, Cap 33 R.E. 2019**. The provisions require courts to determine cases on merit and do away with undue technicalities for



purposes of attaining just, efficient and expeditious resolution of civil disputes.

In giving effect to the overriding objective principle, in a number of recent cases, this court and the Court of Appeal have done away with entertaining such points of preliminary objections by striking out suits in courts. Instead the courts have allowed amendments on the documents so that matters can proceed to be determined on merit. See: **Sanyou Services Station Ltd. v. BP Tanzania Ltd. (Now PUMA Energy (T) Ltd.**, Civil Application No. 185/17 of 2018 (CAT at DSM, unreported) and **Alliance One Tobacco Tanzania Limited & Hamisi Shoni v. Mwajuma Hamisi (as Administratrix of the Estate of Philemon R. Kilenyi) & Heritage Insurance Company (T) Limited**, Misc. Civil Application No. 803 of 2018. In the premises, I overrule the respondent's contention that this Court lacks jurisdiction to entertain the application on account of incorrect citation of the original case number. The record is hereby marked rectified to read Land Application No. 09 of 2017, instead of Land Application No. 11 of 2020. The matter proceeds to be determined on merits.

For leave to appeal to the Court of Appeal to be granted, the applicant must demonstrate presence of an arguable issue or arguable appeal, or a novel point, or a point of general public importance. The applicant, as argued by him in this matter, needs not mandatorily demonstrate points of law in the impugned decision. The matters to be determined by the Court of Appeal can be of law or of fact. See: **Safari Mwazembe vs. Juma Fundisha**, Civil Appeal No. 503/06 of 2021 (CAT at Mbeya, unreported);



and **Harban Haji Mosi & Another vs. Omari Hilal Seif & Another** [2001] TLR 409.

To this point, the issue to be considered is therefore whether the applicant has demonstrated triable/arguable issues necessitating the intervention by the Court of Appeal. In his submission, the applicant's main contention is that there was misapprehension, misconstructions, and non-evaluation of the evidence on record, especially on the question of visit to the *locus in quo*.

He further claimed that this Court never pronounced the rights of the parties as to ownership of the land and also dealt on an issue regarding description of the land in dispute without according the parties the opportunity to address it. Though not mentioned directly, I discern from his point that he complains about being accorded the right to be heard on a matter *suo motu* raised by the Court. Mr. Mwakolo clearly opted not to reply to these complaints signifying that he was not in dispute. In fact he conceded that the issues advanced under paragraph 5 of the applicant's supporting affidavit are arguable issues. His contention was only that they referred to another case. In the premises, I find the application meritorious and grant it accordingly. Each party shall bear his own costs.

Dated at Mbeya on this 16th day of December 2022.




L. M. MONGELLA
JUDGE