IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(BUKOBA DISTRICT REGISTRY)
AT BUKOBA

MISC. LAND APPLICATION No. 3 OF 2023
(Arising from the Decision of the High Court of Tanzania at Bukoba in Land Appeal No. 05/2022, Originating from the Decision of the District Land and Housing Tribunal for Kagera at Bukoba in Land Application No. 26 of 2021)

BASHIRU ATHUMAN ..... APPLICANT

VERSUS

ANNAJOYCE MUTUNGI
(Administratrix of Estate of the ..... RESPONDENT
Late Veneradiana F. Ihangwe

RULING

28th September & 06th October 2022

OTARU J.:

Dissatisfied with the decision of the High Court of Tanzania at Bukoba dated 11th November 2022 (Ngigwana J.) which upheld the decision of the District Land and Housing Tribunal for Kagera at Bukoba in favour of the Respondent, the Applicant, **Bashiru Athuman,** is seeking Leave of this court so he would appeal to the Court of Appeal against that decision.

The Appellant claims to have been husband to **Ms. Veneradiana F. Ihangwe,** also known as Diana who died on 4th June 2020 and whose estate is administered by her sister **Annajoyce Mutungi** (the Respondent) despite of objections from the Applicant. In the course of administering the estate, the

Respondent was met with resistance from the Applicant concerning the suit premises. She filed Land Application No. 26 of 2021 at the Land and Housing Tribunal for Kagera at Bukoba to evict the Applicant from the suit premises, among others. After hearing the parties and assessing the evidence on record, the tribunal held that the Applicant was a trespasser and ordered eviction from the suit premises. Aggrieved, the Applicant appealed to the High Court, but to his dismay the appeal was dismissed with costs. Dissatisfied again, the Applicant intends to challenge that decision in the Court of Appeal of Tanzania. He is seeking for Leave of this Court to do so, hence this Application.

The Applicant has moved this Court by way of Chamber Summons supported by Affidavit sworn by Mr. Bashiru Athuman, the Applicant, contending that there are sufficient legal issues for consideration of the Court of Appeal.

When the matter came for hearing, the parties were represented by learned Advocates Mr. P. Mutasingwa and Mr. D. Mujuni, for the Applicant and the Respondent, respectively.

Counsel for the Applicant prayed to adopt the contents of the Affidavit, specifically paragraph 2 thereof which enumerates intended grounds for consideration by the Court of Appeal as;-

1. That the High Court erred in law and in fact for failure to quash the proceedings of the trial court that were tainted with illegalities for the

trial tribunal was not at all time well constituted and the assessors opinion was not recorded in the proceedings,

2. That both the High Court and the trial court grossly erred in law for failure to hold that the trial court had no jurisdiction to determine matrimonial or probate matters into land matters,

3. That for both the trial court and the High Court holding that there was co-habitation between the applicant and the late Diana Ihangwe held in law for failure to hold that the Applicant was the legal owner of the land in dispute that was jointly acquired by the late Diana Ihangwe and the Applicant; and

4. That both the trial court and the High Court erred in law for failure to properly evaluate evidence on the required standard and thus arriving at wrong and unjust decision against the Appellant.

In expounding the grounds, the Applicant's counsel emphasized concerning the 1st ground that the trial tribunal was not properly constituted in contravention of Sections 23 and 24 of the **Land Disputes Courts Act** (Cap. 216 R.E. 2019). He argued that it is not indicated in the proceedings if assessors' opinions were read to the parties although the same is recorded in the judgment. He also contended that the assessors were not present when the defense hearing begun. In connection with grounds 2 and 3 above, counsel for the Applicant argued that the trial tribunal had no jurisdiction to determine the matter because the land in dispute belongs to his deceased wife. That the matter should have been dealt with

as a probate case and not as an ordinary matter. On the 4th ground, the Applicant argued that the trial tribunal did not analyze the evidence properly. He contended that although there was sufficient evidence to prove that the Applicant and the late Diana were married and acquired the property together, yet they were treated as separate individuals denying him right to property of the spouse.

The Respondent, through the learned Advocate, Mr. Mujuni strongly contested the Application. The counsel contended that all these grounds were already well considered by the High Court and that the same are not legal issues warranting the determination of the Court of Appeal. He contended that ground 1 contradicts ground 2 and the rest of the grounds in the sense that the first ground is to the effect that the proceedings are tainted with illegality, the second that the trial tribunal lacked jurisdiction while the rest of the grounds require the court to declare him as the rightful owner of the suit premises. Counsel argued that the Applicant knows that the proceedings are in order that is why he prayed for the declaration of ownership in the last two grounds. He further argued that Regulation 19 of the **Land Disputes Courts Regulations 2003,** concerning assessors requires their opinion to be in writing and should be read. It does not require the same to be reproduced in the proceedings. That the issue of assessors has been dealt with by the High Court and ruled accordingly. On the issue of jurisdiction of the trial tribunal, counsel was firm that it was a land matter and not probate,

therefore it was rightly dealt with by the trial tribunal. He further insisted that there was nothing to warrant the intervention of the Court of Appeal.

When rejoining, counsel for the Appellant reiterated his prayer and added that failure to reflect in the proceedings that assessors' opinions were read is a fatal omission which vitiates the proceedings, consequences of which is to nullify the proceedings. As this is a legal matter touching on the issue of jurisdiction, can be raised at anytime thus should be subjected to determination of the Court of Appeal.

My task is centered on the question whether the Application demonstrates sufficient ground (s) or a disturbing feature that requires attention of the Court of Appeal. The issue is based on the settled position that grant of Leave to Appeal to the Court of Appeal is not a matter of mere formality. The party seeking to be granted leave must demonstrate, with material sufficiency, that the intended Appeal carries an arguable case that merits attention of the Court of Appeal. As such, the Application can be allowed if prima facie grounds are meriting the attention of the Court of Appeal. This position can be traced back to the case of **Sango Bay v Dresdner Bank A.G.** [1971] EA 17, which is still good law, that:-

> *'Leave to appeal will be granted where prima facie it appears that there are grounds which merit serious judicial attention and determination by a superior court.'*

Equally, in the case of **Gaudensia Mzungu v IDM Mzumbe**, Civil Application No. 94 of 1994 (CAT Dsm) (unreported), the Court of Appeal of Tanzania held that '*Leave will be granted if prima facie there are grounds meriting the attention and decision of the Court of Appeal.*' Further, the court in the case of **Nurbhain Rattansi v Ministry of Water, Construction, Energy, Land and Environment & Another,** (2005) TLR 220, emphasized that '*the disturbing features must be in the form of* ***serious points of law*** *that warrant the attention of the Court of Appeal.*'

From the above analysis, it is evident that there must be serious point/s of law warranting attention of the Court of Appeal such that it is within this court's discretion to allow or refuse to grant leave depending on the Applicants grounds.

I am aware that in determining whether this court can grant leave or otherwise, the court has to do it without assuming power of the appellate court of going into the merits of the appeal itself. This has been expressed in the case of **Grupp v Jangwani Sea Breeze Lodge Ltd**, Commercial Case No. 93 of 2002 (HC Dsm) (unreported), that:-

> '*I have no jurisdiction to go into merits or deficiencies of the judgment or orders of my sister judge in this application. What I am required to determine is whether there are arguable issues fit for the consideration of the Court of Appeal.*'

Having heard the rival submissions by the learned Advocates for and against the Application and having perused the Applicant's Affidavit specifically paragraph 2 which contains the intended grounds of appeal, I am ready to tackle to the task in front of me.

Beginning with grounds 2, 3, and 4 of the intended Appeal, although counsel for the Applicant presented these grounds as legal in nature but I do not agree with him. They are matters of facts. The issues contended in these grounds were discussed and determined by the Primary Court which dealt with probate and administration of estate issue not subject of the intended Appeal. What the trial tribunal did was determine the issues according to the evidence submitted. Such evidence also included the Primary Court's decision. This has been well explained also by the appellate Judge. If the Appellant is not happy with the decision of the Primary Court, he should have appealed against it but not raise this in these proceedings. I am thus in agreement with counsel for the Respondent that these three grounds are not legal grounds neither are they relevant to this application. They therefore fail.

Concerning the first ground, on the issue of the composition of the trial tribunal, Section 23(1) of the **Land Disputes Courts Act**, (Cap 216 R.E. 2019) provides for the composition of the District Land and Housing Tribunal as the

chairman and not less than two assessors. Sub 2 of Section 23 further provides that the tribunal;-

> *'shall be duly constituted when held by a chairman and two assessors who shall be required to give out their opinion before the chairman reaches the judgment'.*

The above requirement is amplified under Regulation 19(2) of the **Land Disputes Courts (the District Land and Housing Tribunal) Regulations, 2003,** which imposes a duty on the chairman before delivering his judgment, to require every assessor present to give his opinion.

The Court of Appeal has persistently held that opinions of assessors have to be given to the chairman in the presence of the parties, failure to comply is a fatal omission. In the case of **Edina Adam Kibona v. Absolom Swebe (Sheli)**, Civil Appeal No. 286 of 2017 (CAT Mbeya) (all unreported), just to name one, the Court of Appeal stated that; -

> *'We wish to recap at this stage that in trials before the District Land and Housing Tribunal, as a matter of law, assessors must fully participate at the conclusion of evidence, in terms of Regulation 19(2) of the Regulations, the chairman of the District Land and Housing Tribunal must require every one of them to give his opinion in writing. It may be in Kiswahili. That opinion* ***must be in the record*** *and* ***must be read to the***

parties *before the judgment is composed.'* [Emphasis Added]

As the proceedings in the case at hand do not demonstrate that the assessors gave their opinion to the chairman in the presence of both parties, I find this to be a legal matter warranting the intervention of the Court of Appeal.

Consequently, for the reason advanced above, this Application has merits. Leave to Appeal to the Court of Appeal is hereby granted to the Applicant.

No order as to costs.

DATED at **BUKOBA** this 10th day of March, 2023.

M.P. Otaru
JUDGE

Court: Judgement delivered in Court, in the presence of the Applicant and the Respondent.

Right of appeal is explained.

M.P. Otaru
Judge
10/03/2023