

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA DISTRICT REGISTRY

AT BUKOBA

MISC. LAND APPLICATION NO. 79 OF 2021

(Arising from High Court of Tanzania in Land Appeal No. 33 of 2019 and original Application No. 226 of 2011 Bukoba District land and Housing Tribunal)

JAMES SIMON APPLICANT

VERSUS

MUNICIPAL DIRECTOR BUKOBA MUNICIPAL COUNCIL

.....1ST RESPONDENT

RESTITUTA NGAIZA.....2ND RESPONDENT

ANNE NDILE.....3RD RESPONDENT

RULING

30/03/2022 & 13/04/2022

NGIGWANA, J.

The applicant James Simon has lodged this application by way of chamber summons made under Section 47 (2) of the Land Disputes Courts Act Cap 216 R: E, and supported by an affidavit sworn by the Applicant. In this application, the applicant is in pursuit for leave to Appeal to the Court of Appeal of the United Republic of Tanzania against the judgment and decree of this honorable Court (Kilekamajenga J) in Land Appeal No. 33 of 2019 delivered on 15th day of July, 2021 in favor of the respondents.

The brief facts of this matter are that; the 2nd and 3rd respondents were allocated surveyed plots of land by the 1st respondent. It is alleged that the disputed land was declared planning area in 1994 and later surveyed in

1997 whereas in 2003, the 2nd and 3rd respondents applied for the land and were granted plots by the 1st respondent.

On the other hand, it was alleged that, the applicant James Simon bought the disputed land in 2000 from one Paul Kamazima. In 2011, the 2nd 3rd respondents sued the Applicant in the District Land and Housing Tribunal for Kagera at Bukoba in Application No. 226 of 2011, alleging that the applicant had invaded the 2nd and 3rd respondent's land. At the end of the trial, the DLHT was satisfied that the applicant owned the land under customary right of occupancy after purchasing it in 2000 from one Paul Kamazima, for that matter, the applicant won the case.

Aggrieved by the decision of the DLHT, the respondents lodged an appeal to this court to wit; Land Appeal No.33 of 2019. At the end of the hearing of the appeal, the appeal was allowed with costs, the decision of the DLHT was set aside, and the 2nd and 3rd respondents were declared the lawful owners of the disputed land. The applicant was ordered to vacate the suit land and pay the losses he occasioned to the respondents. The applicant was dissatisfied by the decision of this court, thus intend to appeal to the Court of Appeal of the United Republic of Tanzania.

When the application came for hearing the applicant was represented by Mr. John Lameck Erasto, learned advocate, the 1st respondent was represented by Mr. Athumani Msosore, learned State Attorney but the 2nd and 3rd respondents appeared in person and unrepresented.

Taking the floor, Mr. Erasto adopted an affidavit supporting the application to form part of his submission. He argued that an appeal to the Court of appeal is not automatic, thus leave must be sought and obtained that is

why the applicant has filed the present application. He further argued that paragraph 5 of the affidavit carries the grounds worthy of being considered by the Court of Appeal. Mr. Erasto further submitted that the applicant owned the disputed land under customary right of occupancy as stated in the DLHT, but the decision of the DLHT Tribunal was reversed by this court on the ground that the applicant's evidence was weak as compared to the respondents' evidence. That, there is nothing showing that, the 1st respondent, after surveying the land, and allocating it to the 2nd and 3rd respondents, the applicant was ever compensated. The learned counsel referred me to the case of Rashidi **Baranyisa versus Hussein Ally** [2001] TLR 470 and the case of **Barnabas James versus Francis S, Moshi** [1999] TLR 364 to emphasize that a mere act of designating the area or surveying the area has no effect of extinguishing the deemed right of occupancy, and that customary title to land can be extinguished by surrender, significant by offer and acceptance of compensation. That since, the customary title was never surrendered nor extinguished, it was still subsisting when the purported allocation was done to the 2nd and 3rd respondents. He also referred me to section 3(1) (b) of the Land Act, Cap 133 R: E 2019 that deemed right of occupancy and granted right of occupancy have the same rights. He ended his submission in chief urging the court to grant leave to the Applicant to Appeal to the Court of Appeal. In response to the application, Msosore argued that, at the time of surveying the disputed land, the applicant had no deemed right of occupancy thus was not entitled to any compensation, thus the cases cited by Mr. Erasto are distinguishable. Mr. Msosore further stated that, the applicant has failed to demonstrated sufficient cause to warrant the grant

of this application. Msosore, referred to me the case Markus **Kindole versus Burton Mdinde**, Civil application No. 137 of 13 of 2020 where the court held that, in determining an application for leave to appeal to the Court of Appeal, the court must ascertain if there is legal point worth of being considered by the Court of Appeal. He further stated that, looking at the affidavit of the applicant, there is nowhere the points of law worth consideration by the Court of Appeal were Stated. In that premise, he urged the court to dismiss the application for being baseless.

The 2nd and 3rd respondents gave a similar argument that, since the applicant had no right of occupancy, the present application is baseless. In his brief rejoinder, Lameck reiterated that, there is an arguable case worth of being considered by the court of Appeal.

I have carefully considered the submissions from both sides, therefore the issue for determination is whether the applicant has been able to satisfy the court that he deserves to be granted leave to Appeal to the court of Appeal of Tanzania against the decision made by this court in the above-mentioned matter.

Section 47(2) of the Land Disputes Courts Act Cap 216 R: E 2019 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"

It is common understanding that leave to the Court of Appeal is not automatic. It is granted where the court is satisfied that the grounds of

appeal raise issues of general importance or where the grounds show that there is an arguable issue of law, facts or mixed facts and law which need to be determined by the Court of Appeal.

In the case of **British Broad Casting Corporation versus Erick Sikusieas Ngimaryo, Civil** Application No. 138 of 2004, CAT at DSM (unreported) cited in the case of **Hamis Mdida and Another versus the Registered Trustees of Islamic Foundation**, CAT at Tabora, Civil Appeal No. 232 of 2018 it was held that;

As a matter of general Principle, leave to appeal will be granted where the grounds of appeal raise issue of general importance or a novel point of law or where the grounds show a prima facie case or arguable appeal”.

Furthermore, 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”

However, where the grounds of appeal are frivolous, vexations or useless or hypothetical, no leave will be granted. See the **case of Broad Casting Corporation** (supra).

At this juncture, 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 whether the appeal will succeed or not 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 is real prospect of success, or arguable issues or compelling reasons, or disturbing features,

or point of law or point of public importance requiring the Court of Appeal intervention in the intended **second appeal**.

In the intended appeal, the Court of Appeal of Tanzania will be expected to sit as the second appellate and the Apex Court as beyond it, no other Apex Court in the Hierarchy. It is common understanding that the role of the second appellate court is to determine matters of law only **unless** it is shown that the courts below considered matters, they should not have considered or failed to consider matters they should have considered, or looking at the entire decision, it is perverse. **See Otieno, Ragot & Company Advocates versus National Bank of Kenya** [2000] e KLR

While being guided by the stated principles stipulated in the herein above cases, I have gone through the judgment of this court as a whole, and the proposed grounds of the intended appeal deposed at paragraph 6 of the affidavit supporting the application and argued by the learned counsel for the applicants and found that the applicants have managed to satisfy the court that there is a *prima facie* case or arguable appeal which deserve to be determined by the Court of Appeal of Tanzania against the decision of the court in Land Appeal No.33 of 2019.

Reading carefully paragraph 5 of the applicant's affidavit, the following issues which, in my view constitute *prima facie case* worth to be decided by the Court of Appeal of Tanzania;

1. *Whether the declaration and survey of the land automatically deprive of the ownership rights to the holders of the same property under customary right of occupancy.*

2. *Whether the allocation of the said plots by the Allocating Authorities without the evidence of fair compensation outweigh the holding of the land under the customary rights.*
3. *Whether the High court considered matters, it should not have considered or failed to consider matters it should have considered, or whether looking at the entire decision, it is perverse.*

In the upshot, I am convinced that the application meets the legal threshold for its grant. Accordingly, I grant it as prayed. Costs to be in the cause. It is so ordered.




E. L. NGIGWANA

JUDGE

13/04/2022

Ruling delivered this 13th day of April, 2022 in the presence of Mr. Geoffrey Rugaimukamu, learned advocate for the applicant, Mr. Athumani Msosore, learned State Attorney for the 1st respondent, 2nd & 3rd Respondents in person, Mr. E. M. Kamaleki, Judges' Law Assistant, and Ms. Tumaini Hamidu, B/C.




E. L. NGIGWANA

JUDGE

13/04/2022