THE UNITED REPUBLIC OF TANZANIA
JUDICIARY

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

MISC. LAND APPLICATION NO. 46 OF 2021
(From the Decision of the High Court of Tanzania at Mbeya in Land Appeal No. 07 of 2016. Originating from the District Land and Housing Tribunal for Mbeya at Mbeya in Application No. 153 of 2006.)

THEODORA JOHN SHAO (Administratix
of the Estate of the late
JOHN SHAO @ KARANJA).....1ST APPLICANT

JONEVA JACKSON SHAO (Administratix
of the Estate of the late
JACKSON SHAO @ KISALENI).....2ND APPLICANT

VERSUS

ZABRON MWAKIFUNA.....RESPONDENT

RULING

Date of Last Order: 02/03/2022
Date of Ruling : 06/04/2022

MONGELLA, J.

This is an application for leave to appeal to the Court of Appeal against a decision of this Court (Mambi, J.) rendered in Land Appeal No. 07 of 2016. In the impugned decision, the respondent had appealed against the decision of the District Land and Housing Tribunal (the Tribunal) rendered

in Application No. 153 of 2006. The High Court ruled in favour of the respondent, which aggrieved the appellants, hence the application at hand. The application is brought under section 47 (2) of the Land Disputes Courts Act, Cap 216 R.E. 2019 and section 5 (1) (c) of the Appellate Jurisdiction Act, Cap 141 R.E. 2019. It is supported by a joint affidavit of the applicants, **Theodora John Shao** and **Joneva Jackson Shao**.

Both parties were represented. The applicants were represented by Ms. Joyce Kasebwa and the respondent was represented by Ms. Mary Mgaya, both learned advocates. The application was argued by written submissions.

In her submission in support of the application, Ms. Kasebwa first adopted the contents of the applicants' joint affidavit in support of the application. She then stated the reasons for moving this Court for the leave sought whereby she argued that there are points of law and illegalities worthy of consideration by the Court of Appeal. On this, she advanced three issues being:

First, that whether the Hon. Chairman of the Tribunal was right for not recording the assessors' opinion. On this point she advanced two issues, one regarding reasons for departure with assessors' opinion and two, regarding assessors' opinion being aired before the parties. With regard to provision of reasons for departure with assessors' opinion, she submitted that the matter at hand arises from the District Land and Housing Tribunal for Mbeya in Land Application No. 153 of 2006. She said that in the said decision the Hon. Chairman departed from one of the assessors' opinion,

but failed to give reasons for his departure as required under **Section 24 of the Land Disputes Courts Act, Cap 216 R.E. 2019.**

On the issue of inviting the assessors to air their opinion before the parties; Ms. Kasebwa, while referring to the provision of **Regulation 19 (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, G. N. No. 174 of 2003**, argued that the Tribunal Chairman is obliged to require every assessor present to give opinion in writing. However, she said, the Tribunal proceeding shows that the assessors were not required to give their opinion when the hearing was closed. Instead, the Chairman fixed the date for judgment. She further referred the Court to the case of ***Dora Twisa Mwakikosa vs. Anamary Twisa Mwakikosa***, Civil Appeal No. 129 of 2019 (CAT at Mbeya, unreported).

Regarding the impugned decision of this Court, Ms. Kasebwa contended that, despite the High Court Judge on appeal noting the error that the Hon. Tribunal Chairman did not give reasons for his departure from one of the assessors' opinion, he went ahead to allow the appeal and declare the respondent the lawful owner of the disputed land. She was of the stance that this was contrary to the law and practice. Commenting on the way forward under such situation, she contended that the proper method to be followed by the Court, in law and practice, is to quash the Tribunal proceedings, set aside its orders, and ordering for re-trial of the matter in the Tribunal.

The second issue advanced, is whether the time limitation for claiming deceased's land was legally considered. On this she argue that the High

Court Judge noted that the time limit of 12 years under the law had elapsed, but reasoned that the respondent was a young boy incapable of pursuing his claim under the land he inherited from his late father. Ms. Kasebwa sought to challenge the Court's decision on the ground that the respondent had relatives who also came to testify in the Tribunal during the hearing, whom could have intervened when the applicants entered the land. Instead, no one intervened and the applicants used the land undisturbed for more than 12 years since the year 2000. She found the Court's reasoning erroneous.

The third issue is on whether it was proper for the seller of the disputed land to the applicants not to be joined in the suit. Ms. Kasebwa argued that the applicants bought the land in dispute from other people who ought to have been joined in the suit. She said that the 2nd applicant bought the disputed land from one Simon Mwakifuna, who is the respondent's father; and the 1st applicant bought the suit land from one Deo Lakamoyo and one Sekela Ikenda. She added that the said Sekela Ikenda testified in favour of the respondent in the Tribunal. That, the said Deo Lakamoyo bought the disputed land from Simon Mwakifuna and sold it to the 2nd respondent.

In her view, the said Deo Lakamoyo should have been joined in the suit as a necessary party. She faulted the High Court for not seeing the effect on non-joinder of that necessary party as the 2nd applicant could bring an action against the said seller leading to non-stop of actions in courts. Referring to the case of ***Juma B. Kadala vs. Laurent Mnkande*** [1983] TLR 103; and that of ***Geofrey Nzowa vs. Selemani Kova & Another***, Civil

Appeal No. 183 of 2019 (CAT at Arusha, unreported), she argued that the matter is to be remitted to the trial court whereby the seller not joined in the suit is joined for resolving the matter in controversy between the parties.

Considering the arguments advanced she concluded that there is a need for the matter to be intervened by the Court of Appeal. She prayed for the leave to be granted.

On the other hand, the respondent vehemently opposed the application. In the submissions filed by his counsel, Ms. Mary Mgaya, a legal issue was first advanced regarding the competence of the notice of appeal. On this, Ms. Mgaya argued that the notice of appeal, which is a pertinent document in initiating the appeal in the Court of Appeal, is defective. She found it defective on the ground that the applicants are purporting to challenge the trial Tribunal and this Court's findings while they know nothing about it. She argued so saying that the said Jackson Shao died in 2012 and it is not known as to who stepped into his shoes as no one has ever introduced himself/herself to act for him as either an administrator or legal representative.

Ms. Mgaya saw the notice of appeal being questionable as to who initiated it or instructed the advocates from Ntagazwa & Co. Advocates as the said John Shao @ Karanja and Jackson Shao @ Kisaleni are deceased whereby Jackson Shao died in 2012. In the premises she had a stance that the application at hand stems from an incurably defective

notice of appeal, hence no appeal shall be entertained by the Court of Appeal rendering the grant of leave by this Court a futile exercise.

Without prejudice to the issue regarding competence of the notice of appeal as argued above, Ms. Mgaya proceeded to address the main subject of the applicants' application. First on the issue of assessors, she contended that the same is an afterthought. She argued so, on the reason that the issue was never contested on appeal to this Court by the parties, but was discovered by the Hon. Judge who also determined it accordingly. She was of the view that the same issue cannot be re-determined. She added that the applicants' husbands were declared winners by the trial Tribunal who consequently celebrated victory, thus complaining of the irregularity of the proceedings at this stage is an afterthought.

Second, with regard to the issue of time limitation, Ms. Mgaya argued that the same was also determined by this Court on appeal. She further argued that the highlighted issues by the appellants' counsel are not points of law, rather of facts to which the answers are on records of the Tribunal and this Court. She was of the view that things would have been different if the said point was not discussed by the courts below, but the appellants have not stated in which parameters they wish the Court of Appeal to re-determine the matter.

Finally she addressed the issue of non-joinder of the seller of the disputed land in the suit. On this, Ms. Mgaya argued that the applicants have missed the point as it is trite law that no suit shall be defeated by reason of

joinder of parties. In addition, she saw the point raised as an afterthought as well. She was of that view on the reason that the applicants' husbands being sued by the respondent in the trial Tribunal they could have raised the point by filing a third party notice or an objection to require the joinder of the purported seller. Further she found the issue not being one on point of law to warrant leave by this Court. She concluded by contending that the applicants' application is geared towards creating chaos and unreasonable embarrassment to the respondent. She called for the Court to deny the application.

Ms. Kasebwa rejoined specifically on the issue of competence of the notice of appeal raised by Ms. Mgaya. At first she was surprised by Ms. Mgaya's contention on the ground that it was her who represented the respondent from the trial Tribunal and in 2016 she challenged the trial Tribunal's decision in the name of the deceased persons while knowing that the said Jackson Shao demised in 2012. She said that it was from that appeal that the notice mentioned to be filed by Ntagazwa & Co. Advocates was made and it bore the names of the parties in the said appeal.

In addition to her observation as above, Ms. Kasebwa argued on the legal position regarding competence of the notice of appeal. On this, she contended that the same is premature to be discussed and determined at this stage. She referred to the Court of Appeal case in ***National Insurance Corporation vs. Kweyambah Quacker*** [1999] TLR 150 in which it was held that once a notice of appeal has been lodged any dealing with or in connection to it can only be transacted in the Court of Appeal. In

the premises she further argued that if the respondent's counsel wishes to challenge the competence of the notice of appeal she should do so when the matter has been scheduled for determination in the Court of Appeal whereby she can apply under Rule 89 (2) of the Court of Appeal Rules to have the notice of appeal struck out for its defectiveness, if any.

In addition to her arguments as presented above, while referring to the case of ***RE J & P Sussman Ltd***. [1958] 1 All ER 857; the case of ***Evans Construction Co. Ltd. vs. Charrington & Co. Ltd & Another*** [1983] 1 All ER 310 as cited in the case of J***oseph Magombi vs. Tanzania National Parks (TANAPA)***, Civil Appeal No. 114 of 2016 (CAT at DSM, unreported), she argued that the non-substitution of the names of the parties by the deceased persons' administrators did not occasion any injustice or prejudice the rights of the parties. That, the parties knew of the death of John Shao and Jackson Shao and that the administrators of the deceased persons' estate attended the court in their place. Referring to the case of ***Joseph Magombi*** (supra), she argued that in situations like that the Court resorts to overriding objective principle to avoid the matter being tried afresh which would consume a number of years.

After considering the rival arguments by the parties, I shall first address the issue raised by the respondent's counsel on the competence of the notice of appeal. In essence, Ms. Mgaya wishes for the Court to dismiss the application as it is ignited by a defective notice of appeal. As rejoined by Ms. Kasebwa, to which I subscribe, this is a matter to be dealt with by the Court of Appeal because once a notice of appeal has been lodged, the appeal is said to have been initiated already. In the premises all that

has to do with the appeal, including the competence of the notice of appeal, have to be dealt with by the Court of Appeal. In ***National Insurance Corporation*** (supra) the Court held:

> *"... once a Notice of Appeal has been lodged, any dealing with it or in connection thereto can only be transacted in the Court of Appeal.*

The Court in the above case approved the position of a single Judge in application between the same parties involving the same subject matter in which it was ruled that:

> *"After the Notice of Appeal has been filed, the matter is no longer in the High Court; it is now in this court, and any dealing with it subsequent to such filing of the notice can no longer be effected in the High Court unless this court for some reason remits the case there for the purpose."*

In consideration of the above settled position of the law, I can confidently rule that this Court is not seized with the jurisdiction to determine the competence of the Notice of Appeal. If the respondent's counsel wishes to challenge the Notice of Appeal she should do that before the Court of Appeal.

Concerning the gist of the applicant's application, I wish first to elucidate on matters to be considered by the court in granting leave to appeal to the Court of Appeal. Unlike in application for certificate on point of law whereby the applicant has to show the points of law to be determined by the Court of Appeal, in the application for leave to appeal, the applicant need not show the points of law, rather, the applicant has to show that

there are arguable issue(s) or disturbing features for consideration by the Court of Appeal. The issues can be of law or fact. In the premises, I do not subscribe to Ms. Mgaya's contention that the issues raised by the applicant do not reflect any point of law for consideration by the higher court, to warrant grant of leave applied for. 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 issues or disturbing features necessitating the intervention by the Court of Appeal. The applicants through their advocate raised three issues. The first concerns participation of Tribunal assessors whereby they claim that the assessors' opinion was not recorded and the assessors were not given the opportunity to air their opinion before the composition of the judgment. They further challenged the judgment for not containing reasons for departure with assessor's opinion as the Hon. Chairman departed with the opinion of one of the assessors. Ms. Mgaya, in fact, did not counter the truth of this allegation. She just argued that the applicants' husbands won the case in the Tribunal and there was no such complaint on the matter before the High Court when the respondent appealed.

The law under **Section 24 of the Land Disputes Courts Act, Cap 216 R.E. 2019** requires reasons to be recorded where the Chairman departs with the opinion of the assessors. Under **Section 23 (2) of Cap 216** and **Regulation 19 (2) of the Land Disputes Courts (The District Land and**

Housing Tribunal) Regulations, G. N. No. 174 of 2003, assessors are to air their opinion before composition of judgment. Failure to comply with the requirements under these provisions has the effect of vitiating the Tribunal judgment and proceedings as it has been ruled in a number of cases. See: ***Ameir Mbarak & Azania Bank Corp Ltd. vs. Edgar Kahwili***, Civil Appeal No. 154 of 2015. In consideration of the position of the law I find this being a serious triable issue for consideration by the Court of Appeal.

The second issue concerns time limitation whereby the applicants claim that the time limitation for claiming deceased's land was not considered by the Court. Ms. Mgaya argued that the High Court considered the issue and deliberated accordingly. She however did not state how the same was considered by the Court. The question of time limitation is a serious question as it touches the jurisdiction of the Court to entertain the matter before it. In the premises, whether the same was considered or not by the Court or was correctly or incorrectly considered poses a serious question to be considered by the Court of Appeal.

The last issue raised by the applicants, concerns non-joinder of necessary party, to wit, the seller of the disputed land. Ms. Mgaya challenged the same on the ground that under the law a suit is not to be defeated by reason of non-joinder or mis-joinder of parties. She further argued that the applicants' husbands ought to have raised the same during trial or filed a third party notice to join the seller. As much as I am aware of the provisions of **Order I Rule 9 of the Civil Procedure Code, Cap 33 R.E. 2019** to the effect that a suit shall not be defeated by reason of the misjoinder

or non-joinder of the parties, I am also aware of the settled position that a suit may fail for reason of non-joinder of a necessary party.

In ***Abdullatif Mohamed Hamis vs. Mehboob Yusuf Osman & Fatna Mohamed***, Civil Revision No. 6 of 2017 (CAT at DSM, unreported) the Court of Appeal explained a necessary party as "***... one in whose absence no effective decree or order can be passed.***" The Court further explained that, the determination as to who is a necessary party to a suit would differ from one case to another depending on the facts and circumstances of each particular case. Explaining on the indicators of a necessary party, it stated that "*among the relevant factors in such determination include the particulars of the non-joined party, the nature of the relief(s) claimed, as well as, whether or not, in the absence of the party, an executable decree may be passed.*"

Considering the decision in ***Abdullatif Mohamed*** (supra), it is clear that for a party to be termed as necessary and to be joined in a suit two important conditions must be met:

(i) There has to be a right of relief against such a party in respect of the matters involved in the suit; and

(ii) The court must not be in a position to pass an effective decree in the absence of such a party. The presence of this person must be indispensable to the constitution and for passing of an effective decree or order.

In the circumstances, I expected Ms. Kasebwa to demonstrate how necessary the sellers of the suit premises to the applicants' late husbands were necessary in the matter for this Court to be in a position to determine the serious triable issues between the parties on the matter. Unfortunately this was not done. In my view, it does not suffice to just state that a necessary party was not joined without showing how the said party was necessary, especially in execution of the court decree, in terms of the settled legal position. I therefore find no disturbing or serious question been posed to warrant grant of leave on this particular point.

In consideration of my observation hereinabove, the application succeeds on the first two issues concerning participation of assessors and time limitation. The applicants are therefore granted the leave to appeal to the Court of Appeal against the decision rendered in Land Appeal No. 07 of 2016. Each party shall bear his/her own costs of the application.

Dated at Mbeya on this 06th day of April 2022.

L. M. MONGELLA

JUDGE

Court: Ruling delivered in Mbeya in Chambers on this 06th day of April 2022 in the presence of Ms. Rehema Mgeni, learned advocate for the respondent.

L. M. MONGELLA

JUDGE