IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

MISC. LAND APPLICATION NO. 95 OF 2020

(Based on the High Court of the United Republic of Tanzania at Arusha, Land Appeal No. 44 of 2011 originating from Land Application No. 130 of 2006 at the District Land and Housing Tribunal of Arusha)

LOGOLIE LENGAISA ..... APPLICANT

VERSUS

PHILIPO LEVOOS ..... RESPONDENT

RULING

25/2/2022 & 6/5/2022

ROBERT, J:-

The Applicant, Logolie Lengaisa, seek to be granted leave to appeal to the Court of Appeal of Tanzania against the decision of this Court in Land Appeal No. 44 of 2011. The application is brought under section 5(1)(c) of the Appellate Jurisdiction Act, Cap. 141 (R.E.2019), Rule 45(a) of the Tanzania Court of Appeal Rules, 2009 and section 47 (1) of the Land Disputes Courts Act, Cap. 216 (R.E.2019).

On 15th December, 2020, the Applicant was granted extension of time to file an application for leave to appeal to the Court of Appeal of Tanzania against the entire decision of this Court. He proceeded to file this

application on 17th December, 2020. The application is grounded on the reasons stated in the affidavit sworn by Dr. Ronilick E.K. Mchami, learned counsel for the Applicant and resisted by the Respondent who filed his counter-affidavit to that effect.

At the request of parties, the application was argued by filing written submissions whereby the Applicant's submissions were prepared and filed by Dr. Ronilick E.K. Mchami, learned counsel whereas the Respondent's submissions were prepared and filed by Mr. E.F. Kinabo, learned counsel.

Submitting in support of the application, Dr. Mchami started by praying that the Respondent's counter-affidavit be disregarded for being untruthful. He maintained that, the Respondent is not a qualified lawyer and therefore he could not, based on his own knowledge, be well versed in legal matters as to state under oath that this application does not raise points of law worthy of consideration by the Court of Appeal, as he did in his counter-affidavit.

In response to this argument, Mr. Kinabo submitted that, the argument by the Applicant's counsel is misguided because the Respondent is not a layman, he is an educated man having attained the level of colonial

primary school in education and has acquired some legal education through distance learning and serving as Court assessor between the years 1993 to 2003. To that extent he is entitled to depone that the present application does not raise the points of law.

Highlighting on the grounds for this application, Dr. Mchami argued that, the Judgment of this Court in Land Appeal No. 44 of 2011 raises a number of points of law which needs to be looked at and decided by the Court of Appeal.

The first point of law as raised in the 4th paragraph of the affidavit faults this Court purportedly for deciding that, the provision of Order VIIIA of the Civil Procedure Code is not applicable to the District Land and Housing Tribunal. He quoted the impugned judgment of this Court from the middle of page 9 to the top of page 10 where this Court in deciding whether it was wrong for the District Land and Housing Tribunal not to comply with the mandatory requirement of Order VIIIA of the Civil Procedure Code, made reference to the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 which sets the practice and procedure for adjudicating on land matters and observed that:-

"Regulation 8 provide for the hearing date. It states: "Where a written statement of defence or counter-affidavit has been filed in any proceedings, the chairman shall proceed to fix hearing date for the application or chamber application as the case may be and no further pleadings shall be entertained". From the provisions of these Regulations, it is obvious that while the law under section 51(1) of the Land Disputes Courts Act requires the District Land and Housing Tribunal to apply the Civil Procedure Code in the exercise of its jurisdiction, the intention was not to apply the said law wholesale. The Land Disputes Courts Act in itself is a procedural law. The Civil Procedure Code would apply only to supplement where there is no specific provision to serve a situation under the Land Disputes Courts Act."

He argued that, the quoted paragraph had the effect of deciding that, the provisions of the current Order VIII Rule 24 of the CPC which in 2014 was Order VIIIA of the Civil Procedure Code, Cap.33 (R.E. 2019), which are mandatory, are not applicable in the District and Land Housing Tribunal and further that, the District Land and Housing Tribunal has a discretion to apply the mandatory provisions of section 51(1) of the Land Disputes Courts Act, Cap. 216 (R.E.2019). He faulted this Court's interpretation of the said provisions and prayed for the same to be decided by the Court of Appeal.

In response, the learned counsel for the respondent argued that the Applicant's argument wants the Court of Appeal to decide whether the Civil Procedure Code, Cap. 33 R.E.2019 is wholly applicable in proceedings before the District Land and Housing Tribunal. He maintained that this is not a noble point of law to be determined by the Court of Appeal. He argued that the provisions of section 51 of the Land Disputes Courts Act, R.E. 2019 is very explicit that the Civil Procedure Code is only applicable at the District Land and Housing Tribunal where there is a lacuna in itself. To support his argument, he referred the Court to the case of Salimu Nkalango and Another versus Sophia Bunzali Msukuma and Another, Consolidated Misc Land Appeal No. 25 of 2020, CAT, at Mwanza (unreported). He maintained that this issue has been determined by the Court of Appeal and it does not need to be addressed any further.

The second and third points of law are raised in paragraph 5 and 6 of the affidavit respectively. Dr. Mchami argued that, the two grounds relate to failure of the Respondent at the trial tribunal to have the sale agreement admitted at the trial tribunal and the plea of non est factum. He faulted this Court for rejecting the argument of the learned counsel for the applicant that the sale agreement which took place between Lorinyu Kisiri

and the respondent was invalid because the purported sale agreement was not tendered and admitted in evidence before the District Land and Housing Tribunal and further that, even if there was such an agreement by a plea of non est factum the agreement could not be binding as the said Lorinyu Kisiri did not know Kiswahili.

He clarified that, due to the fact that no valid contract deed tendered and admitted as exhibit, it follows that there was no proof of any agreement of sale of the piece of land in dispute between the late Lorinyu Kisiri and the respondent. In the absence of such a proof it cannot be decided that there was a valid sale agreement of the piece of land in dispute between the two.

He submitted further that, in addition to that, the land in dispute is a family land owned under Arusha Customary Land Law and the late Lorinyu Kisiri never knew and he never spoke Kiswahili language. A sale of such piece of land under the said laws must be known and consented by other family members of the seller. According to the evidence of RW1 and RW2, the said sale was not known and consented by the family members of the late Lorinyu Kisiri. Therefore, he argued that, the holding of this Court that there was a sale agreement of the disputed piece of land and that the plea

of non est factum was not open and cannot help the late Lorinyu Kisiri in this case needs to be looked at by the Court of Appeal.

In response, Mr. Kinabo submitted that, first, the argument on whether there was a valid sale without a written contract being tendered and application of the plea of *non est factum* refers to matters of fact and not law. Secondly, the plea of non est factum is irrelevant since the matter was decided on the basis of an oral contract based on the evidence as reflected in the judgment of the trial Court and that of the first appellate Court. Thus, the raised arguments cannot form the basis for grant of leave to appeal to the Court of Appeal.

Coming to the fourth point of law, he faulted this Court for deciding that, section 202 of the Local Governments (District Authorities) Act, Cap. 287 repealed the Local Government Ordinance to which the rules on the requirement of approval of the Natural Resources Committee of the Arusha District Council was required for disposition of the land held under Arusha Customary law and therefore the said rules ceased to exist and are no longer applicable. He maintained that the cited law did not bring the said changes because under section 203 (1)(c) of the said law all the subsidiary legislation made under the repealed law were saved and the Court of

Appeal had an opportunity to interpret and use the same in the case of **Titos Kornelio versus Geofrey B. Mshana and Bi. Bertha A. Hassan** (1981) TLR at page 129 and held that:-

> *"where a transaction of land does not comply with the statutory provisions the sale is rendered invalid or in other words "inoperative" (R.14 of Arusha Native Authority (Consolidation) Order, 1959 i.e. null and void and cannot pass any legal title"*

Dr. Mchami insisted that since the decision of this Court is different from the decision of the Court Appeal on the quoted point, this application needs to be allowed in order to allow the Court of Appeal to decide on this matter.

In response, Mr Kinabo argued that, this matter should not waste the time of this Court because the cited case was reported in 1981 and the Local Governments (District Authorities) Act, Cap. 287 R.E. 2019 came into force in 1982 and abolished the customary law in question and therefore there is not any conflict as proposed by Applicant's counsel.

On the fifth and sixth points of law as raised in the 8th and 9th paragraphs of the Applicant's affidavit, he faulted this Court for deciding that the respondent had a good title to the disputed land because due to

his long occupation of the same from 1992 to 2005. He maintained that this holding is not supported by the evidence on record. He argued that the effect of the testimony of AW3 and AW7 at the Tribunal is that the Respondent has not been occupying the piece of land in dispute from 1992 to 2005 and he never farmed it. Further to that, the decision of this Court on that point was made without giving the Applicant a chance to be heard on this point of limitation.

In response, Mr Kinabo maintained that the Applicant's argument with regards to limitation is based on matters of fact and evidence as he is only referring to the evidence on record against the years that were mentioned in the testimonies of witnesses. Thus, he raises matters of fact and not law and cannot therefore form the basis for grant of leave to appeal.

On the basis of the arguments raised, Mr. Kinabo maintained that the applicant has not raised points of law sufficient to warrant the intervention of the Court of Appeal and prayed for this Court to decide that this application has no merit.

In his rejoinder submissions counsel for the applicant elaborated on why the respondent's submissions were devoid of merit and reiterated the points raised in his submissions in chief.

Having heard submissions from both parties I will now proceed to make a determination on the merit of this application. However, I will first have to deal with the issue raised by the learned counsel for the Applicant regarding the Respondent's verification in the counter-affidavit. The learned counsel submitted that the Respondent is not a qualified lawyer therefore he cannot depose based on his own knowledge that this application does not raise points of law worthy of intervention by the Court of Appeal of Tanzania, as he did in the third paragraph of the counter-affidavit. The learned counsel seems to have a strong opinion that to have a knowledge that points raised are not worthy of intervention by the Court of Appeal you must be a qualified lawyer. On his part, counsel for the Respondent maintained that the Respondent is an educated man who attained colonial primary school education and has acquired some legal education through distance learning and serving as Court assessor. However, counsel for the Applicant was quick to rejoin that the said qualification does not make him a qualified lawyer.

As a general rule of practice and procedure, an affidavit being a substitute for oral evidence for use in Court should contain statements to which the deponent deposes either of his own knowledge or otherwise.

Considering that an affidavit is a substitute for oral evidence in Court and the respondent did not give a statement in the counter-affidavit in respect of his legal qualification, it is difficult for this Court to determine the objection raised by the learned counsel based on a mere argument that the Respondent is not a qualified lawyer. Similarly, the Court cannot buy the argument made by the learned counsel for the Respondent with regards to the Respondent's legal education since there is no statement in the counter-affidavit to that effect. The Court is of a considered view that these are statements from the bar which do not qualify as a substitute for oral evidence. Even if, for the sake of argument, the Respondent is not a qualified lawyer, Counsel for the Applicant did not address this Court on who is a qualified lawyer for purposes of knowing the points of law worthy of determination by the Court of Appeal and whether it is a requirement of the law that unqualified lawyer or a non-lawyer cannot acquire that knowledge. I therefore find no merit in the raised objection.

Coming to the merit of this application, the applicant lodged his application under section 5(1)(c) of the Appellate Jurisdiction Act, Cap. 141 (R.E. 2002), Rule 45(a) of the Tanzania Court of Appeal Rules, 2009 and section 47(1) of the Land Disputes Courts Act, Cap. 216 (R.E.2019) which requires a party seeking to appeal to the Court of Appeal of Tanzania to obtain leave of this Court or Court of Appeal of Tanzania.

As stated in the case of **British Broadcasting Corporation vs Eric Sikujua Ng'maryo**, Civil Application No. 138 of 2004, in an application for leave to appeal to the Court of Appeal, the general principle is that leave to appeal will be granted where the grounds of appeal raise issues of general importance or a novel point of law or where the grounds show a prima facie or arguable appeal.

In the present application, counsel for the Applicant submitted that the Applicant has six points of law worthy of consideration by the Court of Appeal. This Court will now look at the raised points in a regular order.

Starting with the first point, there is no dispute that by virtue of section 51 (2) of the Land Disputes Courts Act, Cap. 216 R.E. 2019, the provisions of the Civil Procedure Code are only applicable at the District

Land and Housing Tribunal where there is inadequacy in the Regulations governing proceedings at the District Land and Housing Tribunal. However, the contention raised by the applicant seek to resolve whether the procedure employed under Order VIIIA of the Civil Procedure Code is mandatory to the Tribunal. The response to this question depends on whether the Regulations made under section 56 of Cap. 216 to govern proceedings at the Tribunal provides for matters stipulated under Order VIIIA of the Civil Procedure Code so as to make it unnecessary to apply the provisions of Order VIIIA of the CPC or, if such a procedure is not provided for, whether the said procedure was not intended to be applicable in the proceedings of the Tribunal. That said, this Court is of the view that the Applicant deserves an imposing interpretation of the law in that regard from the highest Court of the Land.

Coming to the second and third points of law. This Court is in agreement with the Respondent that, the argument on whether there was a valid sale without a written contract being tendered in Court is not a novel point of law for determination by the Court of Appeal because the alleged sale agreement was proved on the basis of the oral evidence adduced in Court. However, this Court considers that the point raised by

the Applicant brings an arguable issue worth of determination by the Court of Appeal given that sale agreements involving land are required to be written.

However, since the written sale agreement was not admitted in evidence, this Court is of the view that the applicant cannot rely on the plea of *non est factum* to deny or challenge a document which was not admitted in Court because the plea of non est factum carries with it a legal implication that a written contract is void because the applicant was mistaken about it. Accordingly, I find that the argument raised in respect of the plea of *non est factum* cannot form the basis for grant of leave to appeal to the Court of Appeal.

Coming to the fourth point of law, while it is generally true that upon coming into operation of the Local Governments (District Authorities) Act, 1982 certain written laws including the Local Government Ordinance were repealed under section 195 of the Act, it is also true that all subsidiary legislation made prior to the commencement of the Act in relation to the area of the local government authority by a District Development Council remained effective and in force in the area of the authority for a period not exceeding twelve months from the commencement under section 196 of

the Act. Thus, since the alleged disposition of land took place in 1992, the requirements imposed by subsidiary legislation made under the Local Government Ordinance such as the Arusha Native Authority (Consolidation) Order, 1959 were not applicable. That said, I find this matter to have been addressed and there is no point of law to be determined by the Court of Appeal in respect of this point.

On the fifth and sixth points of law, while the argument on limitation seems to be based on matters of fact and evidence as noted by the learned counsel for the respondent, this Court finds merit on the concern raised by the learned counsel for the applicant that the decision of the Court on this point was made without giving the Applicant a chance to be heard. In the circumstances, this Court finds the point raised worthy of consideration by the Court of Appeal.

Based on the foregoing analysis, this Court finds that the Applicant has raised points of law warranting intervention of the Court of Appeal as indicated hereinabove. Consequently, I proceed to grant leave to the Applicant to appeal to the Court of Appeal.

It is so ordered.

K.N. ROBERT
JUDGE
6/5/2022