

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

TANGA DISTRICT REGISTRY

AT TANGA

MISC. LAND APPLICATION NO 17 OF 2020

(Arising from Land Appeal No 29 of 2018 of the High Court- Tanga, originating from the District Land and Housing Tribunal of Tanga at Tanga in Land Dispute No.102 of 2007)

ZAHARA SHABANI.....APPLICANT

Versus

FATUMA SHABANI1ST RESPONDENT

JOHN JOSEPH MAGAYANE.....2ND RESPONDENT

RULING

MANSOOR J

The applicant Zahara Shabani and the first respondent Fatuma Shabani are siblings. Fatuma Shabani was appointed an administratrix of estates of the late Shabani Mustafa (their father) who died intestate leaving behind two heirs namely Zahara Shabani (The Applicant) and Fatuma Shabani (The first Respondent). The cause of action ensued when the first respondent in her capacity as an administratrix of estates entered into a sale agreement of a house on plot no "130" Block "NN" Duga Area in Tanga City with one John Joseph Magayane

who is now the second respondent without the consent of her co-heir Zahara Shabani (applicant). The applicant filed an application contesting that sale in the District Land and Housing Tribunal of Tanga at Tanga without success (Land Dispute No.102 of 2007). The applicant being aggrieved, she filed Land Appeal No 29 of 2018 in this court. This appeal was as well dismissed on 18th February, 2020 (Mruma J.). Still undaunted, Ms. Zahara Shabani filed a notice of appeal in terms of Rule 83 (1), (3) of the Court of Appeal Rules, 2009 and also filed the present application for leave to appeal to the Court of Appeal against the said Judgment. The application is brought by way of chamber summons under Section "47(1)" of the Land Disputes Courts Act, "Cap 216 R.E 2002" and supported by an affidavit sworn by Mr. Mohamed Kajembe, learned advocate.

In his affidavit, the learned counsel deposed that the applicant intended to raise four issues for determination by the Court of Appeal, namely:

- 1. Whether the sale of the suit property by the 1st Respondent to the 2nd Respondent was lawful in absence of a sale agreement.*

- 2. Whether the appellate court was right in finding that land forms No 29, 30 and 35 can stand as a sale agreement in absence of a proper sale agreement*
- 3. Whether there was forgery involved in the whole sale process especially the transfer deed with respect to the suit land with regard to heir's consent.*

Mr. Kajembe submitted that the proposed issues by the applicant are sound legal issues for consideration and determination by the Court of Appeal.

In this matter, it was only the second respondent John Joseph Magayane who filed a counter affidavit in opposition to the application. In it, he submitted that the judgment in appeal was concerning the second respondent only because the 1st respondent did on 03rd April 2019 explain to court that she did not intend to challenge the appeal by her sister, now the applicant. In the counter affidavit, Mr. Magayane disputed the application and stated that the trial Judge had properly examined evaluated and determined the evidence and thus arrived at a proper and just decision. He insisted that there was no error whatsoever made by the trial Judge in deciding the appeal.

In this application Mr. Mpandangongo, learned advocate from Tanga Law Attorneys, appeared for the applicant while the second respondent appeared in person. I have however found out from record that Mr. Mpandangongo did on 19th May 2021 before Mkasimongwa J, for reasons not stated in record, pray to recuse himself from representing the applicant in this matter. The prayer was subsequently granted by this court and it was ordered that the applicant be served notice to appear in person so as to pursue with the application on her own. Mysteriously, on 14th September 2021, Mr. Kajembe from the same law firm appeared for the applicant and without moving the court to vacate its orders rendered on 19th May 2021, continued to pray for service of the 1st respondent by way of substituted service. I must say that advocates as officers of the court ought to observe rules of procedure and must strive to assist the court to keep proper record. In the circumstance, since the applicant has since then been represented by the advocates from Tanga Law Attorneys this court takes cognizance that the order to recuse from representation was impliedly vacated.

This application was argued by way of written submissions and parties are commended for having filed their written arguments in tandem with the Court's scheduling Order given on 14th March 2022.

In his submission, Mr. Mpandangongo elaborated why he seeks to go to the Court of Appeal so that the lawfulness of the sale agreement by the 1st respondent to the second may be re-determined. He also advanced the issue of Land forms No 29, 30 and 35 that they are mere notifications of the transfer to the Commissioner for Lands and could not stand as sale agreement. He also reiterated about the issue of forgery of the applicant's signature as a co-heir in the forms.

On his part, the second respondent asserted that the appellate Judge had well considered and determined the issues placed before him and as such, the Judgment was sound in law. Being a layperson, the respondent applied much effort in submitting on the merit of the intended appeal instead of giving reasons as to why this application should not be granted.

Having considered rival submissions for and against this application, I think the main issue for determination in this

application is whether the applicant has sufficiently moved this court for a grant of leave to appeal to the Court of Appeal.

While recollecting the provision of law that the applicant used to move this court, I came to discover that notwithstanding that the Land Disputes Courts Act, Cap 216 was revised in 2019 and came into force by virtue of Government Notice No. 140 published on 28/2/2020, this application was filed on 19th March 2020 under Section 47(1) of The Land Disputes Courts Act, Cap 216 Revised Edition of 2002 and not that of 2019. It would not be infuriating if these mistakes were done by a layperson, but lawyers are expected to be conversant with proper provisions of law in moving courts. As if that is not enough, the citation under which this court is moved to grant leave to appeal is Section 47(1) of the Land Disputes Courts Act, Cap 216. Sub Section 1 of section 47 of the Act provides; -

47.-(1) A person who is aggrieved by the decision of the High Court in the exercise of its original jurisdiction may appeal to the Court of Appeal in accordance with the provisions of the Appellate Jurisdiction Act.

It turns out that this cited section deals with situations where a party is aggrieved by the decision of the high court, exercising original jurisdiction and there is no leave required in such a situation as the Court of Appeal would be the first appellate court hence a party is bestowed with an automatic right to appeal. This is not the case in this matter.

Gathering from the title of the decision sought to be challenged, it is **Land Appeal** No. 29 of 2018 (although not annexed). This only means that the High Court in the decision sought to be impugned in the Court of Appeal was not exercising its original jurisdiction but an appellate one. Disappointed as this court is by the mischiefs exhibited by learned counsel in this case, the principle of overriding objective of the courts that is to deal with substantive justice will be taken on board and as the Court of Appeal did in the case of **Yakobo Magoiga Gichere vs. Penina Yusuph, Civil Appeal No. 55 of 2017**, I shall treat the anomaly as inconsequential and proceed to determine the merit of the application.

That said, the proper section that was to move this court was Section 47(2) of the Land Disputes Courts Act, Cap 216 R.E 2019. This Section provides.

(2) 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.

The above provision undoubtedly establishes a requirement for leave to appeal in land cases. What should be considered in granting such leave to appeal was laid down in **SANGO BAY ESTATE V DRESDNER BANK (1971) EA 17** wherein the defunct East Africa Court of Appeal held that:

"Leave to appeal should be granted where there is an arguable appeal"

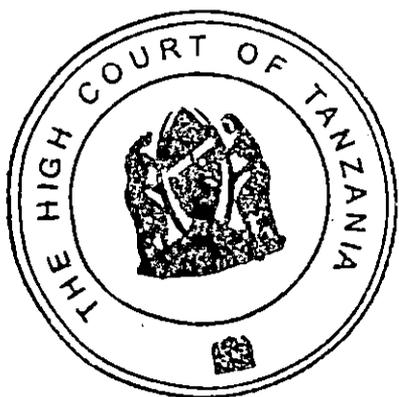
Therefore, in granting leave to appeal to the Court of Appeal, one of the important factors to be assessed is whether there are points of law worthy of consideration by the Court of Appeal.

In the present application, in my view, there are some proposed issues fit for consideration by the Court of Appeal as

itemized in the applicant's affidavit. While avoiding to enter into the gist of the intended appeal, I think that the legality or otherwise of the sale agreement without co heirs' consent, the allegations of forgery of signature, the sufficiency or otherwise of land Forms No 29, 30 and 35 to stand in the place of a sale agreement, comprise an arguable appeal before the Court of Appeal.

In the upshot, the application is granted with no order as to costs.

DATED AND DELIVERED AT TANGA THIS 11TH DAY OF APRIL 2022




LATIFA MANSOOR

JUDGE

11TH APRIL 2022