

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(BUKOBIA DISTRICT REGISTRY)**

**AT BUKOBA**

**MISC. LAND APPLICATION NO. 88 OF 2021**

**AMELIA MASUDI .....APPLICANT**

**AND**

**REV. INNOCENT MUZINDUKI.....1<sup>ST</sup> RESPONDENT**

**BOARD OF REGISTERED TRUSTEES OF CHURCH**

**OF GOD OF PROPHECY KIBETA.....2<sup>ND</sup> RESPONDENT**

**RULING**

**Date of Last Order: 31/01/2022**

**Date of Ruling: 11/02/2022**

**A.E. Mwipopo, J.**

This is application for leave to appeal to the Court of Appeal against the decision of this Court dated 06<sup>th</sup> August, 2021 in the Land Case Appeal No. 08 of 2020. The application is made under section 47(2) of the Land Disputes Court Act, Cap. 216 R.E. 2019. The application is made by Chamber Summons supported by Affidavit of Alli Chamani, who is Applicant's Advocate. Respondents namely Rev. Innocent Muzinduki and Registered Trustees of Church of God of Prophecy opposed the application for leave through Counter Affidavit deposed by Mr. Aaron Kabunga, who is their Advocate.

Submitting in support of the application, Advocate Alli Chamani said that there are six matters in total to be referred to the Court of Appeal as they are found in Annexure "F" to the Affidavit. The first matter is whether there was legal and complete disposition of the suit land to third party which has resulted into losing the status of that land. In page 6 of the typed judgment of the High Court it was held that the land bought for the 3<sup>rd</sup> party is not a clan land therefore there is no right to redeem it.

The second matter to be referred to the Court of Appeal is the legal representation by the 2<sup>nd</sup> Respondent in the Trial Tribunal. The Applicant's Counsel stated that the person who represented the 2<sup>nd</sup> Respondent was not member of the board of Trustee. DW5 Bernardo Petro who testified on behalf of 2<sup>nd</sup> Respondent after he was given special power of attorney. The said special power of attorney was not properly stamped or registered. The said power of Attorney tendered had no quality to be power of attorney as it was held by Court of Appeal in the case of **Ilela Village Council v. Ansens Mushi Youth Centre and Another**, Civil Appeal No. 317 of 2019, CAT at Iringa, (Unreported), at page 14.

The applicant third matter to be referred to the CAT is the legal disposition of the suit land between the 2<sup>nd</sup> Respondent and the vendor. The Counsel for the Applicant said that the 2<sup>nd</sup> Respondent is legal entity, and a vendor is a natural person. The legal entity is not allowed to own land without getting approval from

Registration, Insolvency and Trustees Authority (RITA) according to section 8 (1) (c) of the Trustees Incorporation Act, Cap. 318, R.E 2002. The section provides for conditions for board of trustees to be in position to have interest on the land. The consent of Administrator General was never tendered to prove that the Respondent complied with the provision of the law.

The Applicant Counsel did not submit on the fourth matter to be referred to the Court of appeal and proceeded to make submission on the 5<sup>th</sup> matter to be referred to the Court of Appeal. He said that the tribunal assessors did not actively participate in determination of the suit. The principle to be followed in participation of assessors before the District Land and Housing Tribunal was provided by the Court of Appeal in the case of **Sikuzani Said Magambo v. Mohamed Rable**, Civil Appeal No. 197 of 2018, Court of Appeal of Tanzania at Dodoma, (Unreported), where at page 9 the Court held that the opinion of assessors has to be recorded in the tribunals proceedings and has to be read to the parties before judgment. The same was not followed by the trial tribunal.

The last matter to be referred to the Court of Appeal is the role of the appellate court of re-hearing, re-assessing and re- evaluating of the trial tribunal decision. The first appellate court did not do that. The Appellant's witnesses were not considered by the first appellate court during the appeal. There is no findings whether or not appellant's case has more weight over Respondent's case. He

added that the application is not frivolous or vexatious. He prayed for the Court to consider the case of **Saida Said v. Said Mohamed** [1989] TL.R. 206 in granting the application.

In response, Advocate Aaron Kabunga who appeared for Respondents objected the application for want of merits. He said that the matters referred by the Applicant to be heard by Court of Appeal have been raised for the first time in the matters to be referred to the Court of Appeal in this application. The Applicant was not aggrieved by the decision of the District Land and Housing Tribunal as result there was not reason whatsoever for him to appeal to the Court of Appeal challenging the decision of the trial tribunal which was given in his favour.

He said that the applicant filed a case before the trial tribunal alleging that the Respondent trespassed into his land. Another issue before the trial tribunal was that the Applicant wanted to pay as redemption Tshs. 6,000,000/= from the person who bought the land from Anna Mushumbushi. The evidence in record proves that the 2<sup>nd</sup> Respondent was bonafide purchaser as result the Applicant wanted to redeem the land from the 2<sup>nd</sup> Respondent for Tshs. 6,000,000/=. As the land has already passed to the third party the issue of redemption was not possible.

Regarding the case laws cited by the counsel for Applicant, the counsel for the Respondent argued that they are not applicable in this case as they are

governing principles of granting leave to appeal to the Court of Appeal. What is important is whether there are sufficient reason for the court to grant the leave as it was applied by the Applicant. Leave to the Court of Appeal is not an automatic right and the same is obtained by fulfilling certain conditions. The aim is to filter the cases which need to be heard and determined by the Court of Appeal. The High Court is not a conduct pipe to transfer cases without merits to the Court of Appeal. In the case **Dadu Kidedei v. NMB PLC and Another**, Misc. Land Application No. 18 of 2021, High Court Mwanza District Registry, (Unreported), the same position was stated by this court. The Applicant did not state if he has already complied with procedures for appealing to the Court of Appeal after he was aggrieved by the decision of this court. The Applicant is submitting on the issue as if it is certificate on the point of law.

He added that it was wrong for the Applicants argument that DW5 was no supposed to testify for the reason that he was not a board members of Board of Trustees of the Respondent. The Law Evidence provides in section 147 that no member of witness is required to prove the case. The same was stated in case of **Godrevick Kyando v. Republic** [2006] T.L.R 363. It was the Applicant who instituted the case in the trial tribunal against the Respondents. The sale agreement was not challenged when it was tendered. Thus, there is no reason for the same to be raised at this stages. The Counsel was of the opinion that the

decision of this court are justified. The application is vexatious and frivolous as the same has no basis. He prayed for application to be dismissed with cost.

In his brief rejoinder, the Counsel for the Applicant said that the Respondent counsel has not pointed out which matter among the listed matter to be referred to the Court of Appeal was not raised at the 1<sup>st</sup> appellate court. The grounds raised by the Applicant are points of law which can be raised at any time. The Affidavit in paragraph 4 stated that the Applicant has filed Notice of Appeal and has applied for copies of necessary document. Thus, the issue that the applicant failed to prove that the process to appeal has not initiated by the Applicant has no basis.

After hearing the submissions and reading the affidavits and the record available, the main issue for determination is whether the application for leave to appeal to the Court of Appeal has merits.

It is the discretion of this to grant or refuse application for leave. In **Rutagatina C.L. V. The Advocates Committee and Another**, Civil Application No. 98 of 2010, Court of Appeal of Tanzania, at Dar Es Salaam, (Unreported), the Court held that:-

*"An application for leave is usually granted if there is good reason, normally on point of law or a point of public importance that calls for Court's intervention."*

It was rightly submitted by both parties that, as a general principle 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. Leave will not be granted where the grounds of appeal are frivolous, vexatious or useless or hypothetical as it was held by the Court of Appeal in the case of **British Broadcasting Corporation (BBC) V. Eric Sikujua Ngamaryo**, Civil Application No. 138 of 2004, Court of Appeal of Tanzania at Dar es salaam, (unreported), at page 6. The matter is frivolous where it has no substance or it is fanciful or where a party trifling with the court or to put up defence is wasting court's time or when is not capable of reasoned argument. This interpretation was provided by this Court in the case of **Jebra Kambole v. The Attorney General**, Misc. Civil Cause No. 27 of 2017, High Court at Dar Es Salaam Registry, (unreported) at page 14 of the Judgment.

The role of this court in application for leave was stated by this court in the case of **Joseph Ndyamukama v. NIC Bank and 2 Others**, Misc. Land Application No. 10 of 2014, High Court Mwanza District Registry, (unreported), in page 3. Where the application for leave brought by the applicant is not frivolous or vexatious the same could be granted leave to be heard by Court of Appeal.

The Applicant in the present case has attached as anexture "F" in his affidavit a total of 6 matters to be referred to the Court of Appeal. But, in his

submission he argued only five matters to be referred to the Court of Appeal. The said points to be referred to the Court of Appeal submitted by the Applicant are as following hereunder:-

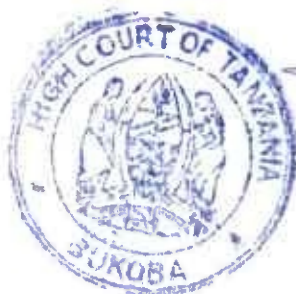
1. Whether there was a legal and complete disposition of the suitland to the third party which resulted into losing the status of the clan land.
2. Whether there were a legal representation by the 2<sup>nd</sup> Respondent in the trial tribunal.
3. Whether there was a legal disposition of the suitland between the second respondent and the vendor to the extent of acquiring good title by said respondent.
4. Whether the trial tribunal erred in law and fact to order compensation of 6 million shillings as the land value rises from time to time.
5. Whether the trial tribunal assessors did actively participate in the determination of the suit.
6. Whether the first appellate Court did perform her duty for re – hearing, re-assessing and re-evaluation of the trial tribunal.

As I said earlier herein, the applicant submitted on all points to be referred to the Court of Appeal save for the point No. 4. The applicant's points to be referred to the Court of Appeal appears to be arguable. Also, it cannot be said that the points are frivolous, vexatious or useless as it was argued by the Counsel for the



Respondent. These points' raises issues which need to be determined by the Court of Appeal as the Applicant explained in his submission. I agree with the Respondents' submission that it is very strange for the party who instituted the suit at trial tribunal and was successful to seek leave to file appeal to the court of Appeal against the same decision which was in his favour after the decision was overturned by the first appellate court. The proceedings shows that the applicant did not appeal against the decision of the trial tribunal after it was delivered in his favour. It was the Respondents who were aggrieved and filed appeal to the High Court. The Respondents may raise this issue during the hearing of the intended appeal at the Court of Appeal. Some of the Applicant's points to be referred to the Court of Appeal are against the decision of this Court. These are point No, 1, 3 and 6, hence not all points to be referred to the Court of Appeal raised by the Applicant were against the decision of the trial tribunal.

For that reason, the application is allowed. The leave to appeal to the Court of appeal is granted as sought. Each party has to take care of its own cost.



A. E. Mwipopo

**JUDGE**

11/02/2022

The ruling was delivered today, this 11.02.2022 in chamber under the seal of this court in the presence of the 1<sup>st</sup> Respondent and Advocate Frank John for the Respondents.



A. E. Mwipopo

**JUDGE**

11.02.2022