

**THE UNITED REPUBLIC OF TANZANIA**

**JUDICIARY**

**IN THE HIGH COURT OF TANZANIA**

**MBEYA DISTRICT REGISTRY**

**AT MBEYA**

**MISC. LAND APPLICATION NO. 64 OF 2021**

*(Originating from Mbeya High Court, Land Appeal No.19/2015 and original from Mbeya DLHT, Land Case No. 137/2013)*

**DOROTHEA AUGUSTINO MAJIMOTO..... APPLICANT**

**VERSUS**

**GEORGE MWAITONGOLE MWAMALE..... RESPONDENT**

**RULING**

Date of last order: 08/12/2021

Date of ruling: 24/02/2022

**NGUNYALE, J.**

The applicant by way of chamber summons supported by her affidavit has filed this application under section 47(2) of the Land Dispute Courts Act, Cap 216 R. E 2019 as amended by Misc. Amendment (No.3) Act No.8 of 2018 seeking the relief which will give her access to appeal against the decision of this Court. She is applying for leave to appeal to the Court of Appeal of Tanzania, costs and any other orders the Court may deem fit and necessary to grant.

In response the respondent resisted the application by filing counter affidavit sworn by him, the same is against the averments of the applicant. He avers that there is no novel point of law for leave to be granted for appeal purposes to the Court of Appeal.

Before I venture to the merit of the application let me state the brief history to appreciate the relevancy of the present application as stated in the applicant affidavit. The applicant was the appellant in Land Appeal No. 19 of 2015 which was decided by this Court against her on 24<sup>th</sup> October 2016 (Ngwala, J). She intended to appeal but she could not lodge an application for leave to appeal due to sickness of her Counsel one Mr. Mkumbe. Later, she applied for extension of time which was granted by this Court on 14<sup>th</sup> October 2017 (Levira, J). Then, the applicant filed Misc Land Application No. 112 of 2017 seeking leave to appeal to the Court of Appeal. Leave was granted on 31<sup>st</sup> day of May 2019 (Mongella, J) subsequently, she lodged to the Court of Appeal Civil Appeal No. 160 of 2017. However, the appeal was struck out on 25<sup>th</sup> November 2020 for technical reasons.

The applicant while still determined to find her right, she filed Misc Land Application No. 39 of 2020 seeking extension of time to relaunch appeal

processes to the Court of Appeal. The application was granted on 16<sup>th</sup> July 2021 (Karayemaha, J) hence the present application.

At present, the applicant moves this court to grant orders prayed in the chamber summons on the following grounds as reads in para 5 of her affidavit;

- (a) *Whether the Tribunal and High Court were right at law to hold that a portion of Appellant's under feasible estate held under registered granted right of occupancy on plot No.1648 Block X (CT NO.14316MBYLR) belonged to the Respondent who himself held an adjacent unregistered smaller plot no. 1210 Block X whose size did not extend to plot No.1648.*
- (b) *The Tribunal and High Court erred to misconstrue the evidence in relation to the acquisition of land by the parties.*
- (c) *Whether customary right of occupancy allegedly held by the respondent was superior to the registered granted right of occupancy held by Appellant in a planned area.*
- (d) *Whether it was not incumbent for the Tribunal or High Court to order the joinder of Mbeya City Council as a necessary party in this case.*
- (e) *The entire proceedings of the DLHT were vitiated by non-participation of assessors in not giving out their individual opinions publicly.*

As already stated, the respondent resisted the application through his counter affidavit that the applicant has no point of law warranting the Court to grant leave to appeal to the Court of Appeal. The judgements of both courts were sound. Leave ought to be granted if there is a novel point of law to which the Court of Appeal shall have the venue to deal

with. In the present application the applicant has failed to establish such points.

In arguing the application, the parties argued it by written submission which were timely filed. The applicant through the service of Mr. J. Mushokorwa learned counsel argued basing on contents of paragraph 5 of the affidavit. Under paragraph 5(e) of the affidavit that the decision of the District Land and Housing Tribunal did not involve the two assessors who assisted the chairman to decide the case according to the dictates of the law i. e Land Disputes Courts Act, Cap 216 R.E,2019, hence there is illegality, the same illegality was noted by this Court in the ruling of Hon. Karayemaha, J. where leave to appeal to the Court of Appeal was granted due to that illegality which was noted. The same illegality was conceded by the respondent, but he argued that the issue was not raised before the High Court. But the law is settled that legal issues may be raised *suo mottu* at any stage of the case, the points of law may be raised even on appeal stage. He cited the case of **Agrovert Vs. Kleb (1995)TLR at 171** and the case of **Tz Pharmaceutical Industries Vs. Dr. Ephraim Njau(1999) TLR 299**. Only this ground may cause leave to be granted.

Arguing paragraph 5 sub (a), (b), (c) and (d) of the affidavit, the applicant counsel submitted that there are other legal issues which may attract consideration of the Court of Appeal of Tanzania. He cited the case of **Said Mnyange Vs. Abdalah (1996) TLR 74**. The issue of non-joinder of parties was fatal, the same was held as fatal in the case of **Juma Kadalah Vs. Laurent Mkande (1983) TLR 103**.

The issue of status of granted right of occupancy and deemed right of occupancy was not well settled, it needs the attention of the superior Court of the land. The applicant had granted right of occupancy and the respondent had customary right of occupancy. Thus, there are competing titles. The competing titles need to be settled by the Court of Appeal of Tanzania.

The applicant counsel prayed the court to grant the present application as a positive move to uphold justice, there are points of law which are worth to be considered by the Court of Appeal.

In response the respondent argued that, he wishes to adopt in toto the contents of his counter affidavit as forming part of his submission. He submitted that the laws of Tanzania provide the Court with discretion to grant leave to appeal to the Court of Appeal but are bound to act judiciously. He cited the case of **Gaudencia Mzungu V. The IDM**

**Mzumbe, Civil Application No. 94 of 1999(CA), Wambele Mtumwa Chamte Vs. Asha Jume, Civil Application No.45 of 1999, Harban Haji Mosi and the case of Shauri Haji Mosi Vs. Omar Hilal Seif Omar, (CAT) Civil Reference No.19/97** where reference was made from the case of **Cowi Consult (T) 2 others V. Pius Kuhanagaika &Others;Civil Revision No.8 of 2004.**

The respondent further argued that he did not concede with the applicant in the issue of assessors. He totally disputed it. That the issue was not raised in the High Court, he was of the view that raising the same at this stage is illegal. But he concedes with the applicant in the legal issue that the Court may raise legal issues *suo mottu* at any stage of the Court proceedings. But this Court may not raise this issue *suo mottu*, because there is no point of law. The cited cases namely **Agroverty(supra)** and **Tz Pharmoutical Industries (supra)** as cited by the applicant are distinguishable from this case at hand.

Regarding the issue of non-joinder of parties under paragraph 5(a), (b), (C) and (d) that there are contentious legal issues especially in the issue of non-joinder of parties, the respondent submitted that what is important is whether there is prima facie ground meriting an appeal to the Court of Appeal. He cited the case of **Gaudencia Mzungu(supra)**

and **Cowi Consult(supra)**. Thus, non joinder of necessary party is not fatal as it did not vitiate the proceedings.

The legal issue about status of granted right of occupancy and customary right of occupancy is not pressing because ownership was properly determined. In concluding his submission, he submitted that, there is nothing to consider about ownership because ownership has already been determined that the respondent is the lawful owner of the suit land. The respondent prays the application to be dismissed with costs.

In rejoinder the applicant submitted that, he cited the case of **Said Mnyanga (supra)** to support his submission, because he was unaware of the cited case by the respondent. The substantial point of law can be raised at any stage. He still insists that, there are contentious legal issues that the Court of appeal would find of sufficient interest.

Having considered the written submissions made by both parties, the Court finds that, there is one issue to be determined. **Whether there is good cause to grant the application.** Before determining the merits of the application I wish to refer the relevant provision which gives power this Court to grant leave i. e section 47 (2) of the Land Disputes Act Cap 216 R. E 2019 which reads: -

*"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."*

In determining this application, I have considered the submissions for and against the application and the raised issues by the applicant as to whether they are issues worth to labour the minds of the Justices of Appeal. Having in mind of the above provision which gives jurisdiction to this Court to determine the application, I think the said provision to not predicate on any conditions contrary to the submissions by the applicant. The said provision gives the applicant chance to appeal to the Court of Appeal so long as she is aggrieved with the decision of the High Court subject to seeking leave to this Court. The applicant has demonstrated in her affidavit that she is aggrieved with the decision of the High Court in Land Appeal No. 19 of 2015, the respondent has raised opposition to the application. I avoid to deal with the said opposition because they might take me to challenge the decision of this Court of which I have no jurisdiction. It is enough to say that the applicant has managed to demonstrate that there are points of law and fact substantial and worth to call the attention of the Court of Appeal. In the Case of Hamisi Mgida & Another vs. Registered trustee of Islamic Foundation, Civil Appeal No. 323 of 2018, the court pointed out that: -



*"...the application for leave must state succinctly the factual or legal issues arising from the matter and demonstrate to the court that the proposed ground of appeal- merits an appeal. The court concerned should decide whether the said proposed grounds are prima facie worth of consideration of the court of appeal"*

In a similar vein this Court has been satisfied that the grounds raised by the applicant on prima facie basis are worth of consideration by the Court of Appeal. Consequently, the application for leave to appeal to the Court of Appeal of Tanzania is granted with no order as to costs.

Dated at Mbeya this 24 day of February, 2022.

  
**D. P. Ngunyale**  
**Judge**  
**24/02/2022**

Delivered this 24<sup>th</sup> day of February in presence of both parties in person.

  
**D. P. Ngunyale**  
**Judge**  
**24/02/2022**