

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**BUKOBA DISTRICT REGISTRY**

**AT BUKOBA**

**MISC. LAND CASE APPLICATION NO. 101 OF 2021**

*(Arising from Land Case Appeal No. 113 of 2020 of the High Court of Tanzania, Originating from Application No 67 of 2014 of the DLHT)*

**HELLEN BYERA NESTORY.....APPLICANT**

**VERSUS**

**TANZANIA ELECTRIC SUPPLY COMPANY LTD.....RESPONDENT**

**RULING**

28/02/2022 & 04/03/2022

**NGIGWANA, J.**

This is an application for leave to appeal to the Court of Appeal of Tanzania brought along by the applicant one Hellen Byera Nestory against the respondent, Tanzania Electricity Supply Company Ltd (TANESCO).

The said application was brought under the provisions of Section 47 (2) of the Land Disputes Courts Act, Cap. 216 R: E 2019) and Section 5 (1) of the Appellate Jurisdiction Act [Cap. 141 R: E 2019]. The supporting affidavit is sworn by Hellen Byera Nestory who is applicant herein.

The brief background of the matter is that, the applicant is the administratrix of the estate of the late Suzana Mukagilage Jonathan. Before her demise, the deceased had instituted the land dispute through Application No. 67 of 2014 before the District Land and Housing Tribunal for Kagera at Bukoba

against the respondent for trespass and illegal survey of Plot No. 3 and 4 Block A Kibeta Bukoba Municipality.

Unfortunately, the deceased passed away before the matter was determined. The applicant stepped into her shoes as administratrix and proceeded with the matter until the District Land and Housing Tribunal passed a judgment and decree in her favor in the administratorship capacity. The respondent was aggrieved and therefore appealed to this court through appeal No. 113 of 2020 which was decided on her favor. Now, the applicant seeks to impugn the said decision of this court (Kilekamajenga, J) to the Court of Appeal of Tanzania after had dully filed a notice of appeal. Hence, the current application seeking a leave to appeal.

At the hearing, Advocate Zedy Ally who represented the applicant submitted that, they have filed application for leave to appeal to the Court of Appeal of Tanzania to challenge the judgment and orders of the High Court decided on 13/08/2021 in Land Case appeal No. 113 of 2020.

Mr. Zedy prayed his affidavit to be adopted as part of his submission. He elaborated that paragraph 9 of the sworn Affidavit consists of the grounds sought to be challenged to the Court of Appeal and that since the respondent filed no counter affidavit, does not challenge the application.

Advocate Theresia Masangya, responded in her reply, that they do not object the application that is why they did not file a Counter affidavit. She contended that if it pleased the court let the application be granted without costs.

In rejoinder, advocate Zedy reiterated by praying the application to be granted with costs.

Now, the task of this court is to determine the merit of this application Paragraph 9 of the applicant 's Affidavit which is adopted in the submission consists of five grounds which the applicant wants to challenge before Court of Appeal. Let the record speak for itself: -

- (i) *That, the Hon. Judge of the High court of Tanzania erred in law to proceed determining other grounds of appeal after nullifying the proceedings and decision of the trial District Land and Housing Tribunal for failure to involve Assessors;*
- (ii) *That, the learned Judge grossly erred in law for failure to order retrial of the case after finding that the proceedings and decision of the trial District Land and Housing Tribunal was nullity;*
- (iii) *That, the learned Judge of the High Court erred in law to decide that the case before the trial District Land and Housing Tribunal was time barred;*
- (iv) *That, the High court grossly erred in law for deciding that the Applicant (intended Appellant) has no good case against the Respondent;*

- (v) *That, the Hon. Judge of the High Court erred in law for deciding that Assessors before the trial District Land and Housing Tribunal were not accorded to give their opinion while the said opinion are found in the Tribunal's file and the judgment and that action did not cause injustice to Respondent.*

The grounds were not disputed by the respondent neither by counter affidavit nor during reply.

It must be noted that the task and duty of this court is not to correct errors of its own as this court is not a Court of Appeal neither is this court mandated to conduct re-hearing of challenging the judgment of this court. The only task is to see if they are arguable issues which if taken to the Court of appeal of Tanzania as second Appeal, will not amount to wasting time rather must reveal issues of substantial importance.

I have considered the affidavit and argument of the applicant's counsel and as well, I passed through the judgment of this court on page 16 (typed judgment of this court) of which I feel obliged to quote the last orders as follows:-

*"--- the proceedings of the trial tribunal are nullity for lack of assessors' opinion. Also under the law of limitation, this suit was time-barred because the respondent claimed the recovery of the land after the expiry of Twelve (12) years. Over all the evidence and other information contained in the court file do not suggest, even on mere balance of probability that, the land belongs to the respondent, I hereby allow the appeal and nullify the proceedings of the trial tribunal and the decision thereof. In my view, it may*

*be wastage of time and resources to order retrial of the case because the respondent has no good case to against the appellant---".*

What is viewed to be the applicant's problem with the judgment of this court, as revealed in paragraph Nine (9) of the applicant's affidavit, is that, since this court had found that the matter was time barred would not have proceeded to determine the issue of assessor's opinion because the matter conducted was nullity for being time barred. Proceeding determining the issue of non-involvement of assessor's opinion triggers or compels the court to order a retrial. Besides, the applicant complains that the court was not supposed to determine the merit of the appeal by concluding that the applicant had no good case against the respondent since the matter was already held time barred and the proceedings were quashed by this court. The orders which according to the applicant's counsel remains as confusing orders.

The principles that the High Court applies in deciding whether or not to grant leave to appeal to the Court of Appeal in first and second appeal is different from that of the third appeal where a matter originates from Primary Courts or Ward Tribunals as in third appeals to the Court of Appeal what is normally looked is a point of law but in first and second appeal even matters of facts are appealable, of importance, the intended appellant must disclose that there are arguable issues or grounds of appeal which merit serious judicial consideration to be considered by the Court of Appeal. The case of **SIMON KABAKA DANIEL VS. MWITA MARWA** [1989] T.L.R. 64 and **SANGO BAY ESTATES LTD AND OTHERS VS DRESDNER BANK** [1971] E.A. 17 at pp 20-21 draw such a distinction.

Upon my careful consideration of the applicant's affidavit, oral submission made by the learned advocate Mr. Zedy Ally and upon careful reading the whole judgment for the purpose of seeing whether there are disturbing features or whether there is an arguable case worth consideration by the Court of appeal of Tanzania, I am convinced that there is an arguable case based on two issues; **One**, whether this court had jurisdiction of determine the merit of the case to wit; land Case Appeal No. 113 of 2020 after it held that the matter was time barred, bearing in mind that the issue of time limitation is fundamental in the sense that it goes to the jurisdiction of the court to adjudicate on the matter before it. **Two**, whether there was any necessity of determining the procedural aspect of assessor's involvement, and then, think ordering retrial in the circumstances where the court had already held that the matter was time barred.

In the event, leave to appeal to the Court of appeal of the United Republic of Tanzania against the impugned judgment is hereby granted. Each party shall bear its own costs since none them bears the blame worthiness in causing this application.



E.L. NGIGWANA

JUDGE

04/03/2022

Ruling delivered this 4<sup>th</sup> day of March 2022 in the presence of the applicant in person, Ms. Masangya, learned counsel for the respondent, but also

holding brief for Mr. Zeddy Ally, learned advocate for the applicant, Mr. E. M. Kamaleki, Judges Law Assistant and Ms. Tumaini Hamidu, B/C.



~~E. L. NGIGWANA~~

JUDGE

04/03/2022