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

**IN THE SUB-REGISTRY OF MWANZA**

**AT MWANZA**

**MISCELLANEOUS LAND APPLICATION NO. 2 OF 2021**

*(Arising from Land Appeal No. 32/2019 at The High Court of Tanzania-Mwanza Sub-Registry) at Mwanza and Original Land Application No 249/2014 from the DLHT Mwanza)*

**MUSSA SHADRACK KWIYUKWA (***Administrator of the Estate of the late Buzuka Mandago***) .....APPLICANT**

**Versus**

**1. MEKTRIDA NKINGA**

**2. ROSEMARY JOHN**

**.....RESPONDENTS**

**RULING**

*.....Feb. & 4th March, 2022*

***Kahyoza, J.***

This is an application for leave to appeal to the Court of Appeal of Tanzania against the decree and judgment of this Court. The application was instituted under Section 47(1) of the **Land Disputes Courts Act**, [ Cap 216 R.E 2019]. It is accompanied by the applicant's affidavit.

There is only one issue that is whether the applicant has disclosed grounds of appeal which merit serious judicial consideration by the Court of Appeal.

Briefly, the background is that; the administrator of the estate of the late Buzuka Mandago, unsuccessfully sued the respondents before

the District Land and Housing Tribunal (the **DLHT**). Aggrieved, the administrator appealed to this Court. The Court decided in favour of the respondents, thus, confirming the decision of the DLHT though on different ground. Dissatisfied, the applicant is seeking leave of this Court to appeal to the Court of Appeal. There is only one issue whether the applicant has disclosed grounds of appeal which merit serious judicial consideration by the Court of Appeal.

**Has the applicant disclosed grounds of appeal which merit serious judicial consideration by the Court of Appeal?**

It is settled position of the law that a person applying for leave to appeal, should prove among other things that, he had already filed a notice of appeal. See Rule 46 of the **Tanzania Court of Appeal Rules**, G.N. 368/2009 and **Oswald Mruma v. The Mbeya City Council Civil Appl. No. 2 Of 2015 Dsm [CAT unreported].,** where it was held that-

> *"The application before the Court is for leave to appeal. As already indicated, since the word **shall** is used, it was mandatory for the applicant to file the application after ensuring that **he had filed notice of appeal**." (emphasis is added)*

After making an inquire by requiring the applicant's advocate to address me on the competence of the application in want of the notice of appeal. It became evident that the applicant did file a notice of as the law requires. The applicant's advocate proved to this Court that the applicant filed the notice of appeal on 22nd December, 2020, thus, this application is properly before the Court.

The applicant was required to file the instant applicant within 30 days from the date of the Judgment, which is 27th November, 2020, as

provided under rule 45 (a) of the Court of Appeal Rules, G.N. No. 368/2009 (the Rules). Rule 45 (a) of the Rules stipulates as follows:-

> *"45. In Civil matters:-*
> *(a) notwithstanding the provisions of rule 46(l), where an appeal lies with the leave of the High Court, application for leave may be made informally, when the decision against which it is desired to appeal is given, or by chamber summons according to the practice of the High Court,* ***within thirty days of the decision****; or (emphasis is added).*

The record shows that the decision the applicant seeks to challenge was delivered on 27th November 2020 and instant application filed on 29th December, 2020 and filing fees paid on the 4th January, 2021. It is beyond dispute that 30 days expired on the 27th December, 2020, which was a Sunday. In computing time Rule 8(d) of the Rules excludes a ***day when the Court is closed.*** Rule 8(d) of the Rules states-

> *8. Any period of time fixed by these Rules or by any decision of the Court for doing any act shall be reckoned in accordance with the following provisions-*
> *(a)- (c)..... N/A*
> *(d) where any particular number of days is prescribed by these rules, or is fixed by an order of the Court, in computing the same, the day from which the said period is to be reckoned shall be excluded, and,* ***if the last day expires on a day when the Court is closed, that day and any succeeding days on which the Court remains closed shall also be excluded****."*

Excluding 27th December, 2020, which was a Sunday, the applicant was required to file the current application on the 28th December, 2020.

Unfortunately, he submitted the applicant on 29th December, 2020 and paid filing fees on 7th January, 2021.

I invited the applicant's advocate to address me on the issue whether the application was filed within the specified time.

The applicant's advocate submitted that the application was filed on 26th December,2020 so it was filed on time. He contended that he filed the application electronically. He submitted a print out from the electronic filing system showing that the document was submitted on the 26th December, 2020.

The Court's physical record shows that the applicant filed the application on the 29th December, 2020 and paid filing fees on 4th January, 2021. While electronic record shows that the application was created on 26th December, 2020 at 09.23 am, which is the date the applicant's advocate submitted the application for admission. It was submitted by Mr. Robert Neophitus. The Deputy Registrar admitted the application on 29th December, 2020. The applicant's advocate paid filing fees on 4th January, 2021. Thus, the applicant's advocate took **7 days** from the date the application was admitted on line to pay filing fees. The applicant's advocate did accounted for thevdelay.

It is settled that the date of filing is considered to be the date filing fees are paid, in case, the law provides for filing fees. Thus, date of filing the current application is 4th January, 2021 when the applicant paid filing fees. However, in the event pleadings are filed electronically, the law provides for different procedure for identifying a date of filing. Rule 22 of the Judicature and Application of Laws (Electronic Filing) Rules, 2018 implies that the time of filing pleadings when filed electronically, as

the date a party transmits the document into the system if that document is subsequently admitted by the Registrar. It stipulates-

> *22. Where a document is filed with, served on, delivered or otherwise conveyed to the Registrar or magistrate in-charge using the electronic filing service and is* ***subsequently accepted by the Registra****r or magistrate in-charge, it shall be deemed to be filed, served, delivered or conveyed-*
>
> > *(a) where the document is filed, served, delivered or conveyed by electronic transmission from the computer system of the authorised user or registered user,* ***on the date and at the time that the first part of the transmission is received in the electronic filing system****; (emphasis added)*
> >
> > *(b) where the document is remotely composed on the computer system of the electronic filing system, on the date and at the time that the first part of the transmission containing instructions from the authorised user or registered user to so file, serve, deliver or convey the document is received in the electronic filing service; and*
> >
> > *(c) where the document is filed, served, delivered or conveyed via a service bureau, on the date and at the time that the first part of the transmission is received in the electronic filing system of the court.*

The applicant's advocate submitted he filed the application on 26th December, 2020. The Deputy Registrar admitted it on 29th December, 2020. The applicant's advocate did nothing until after 7 days expired when he paid filing fees. It should be noted that after the Deputy Registrar admitted the application the Court did not create either an electronic or manual case filed. The Court created the record after filing fees were paid. Undeniably, before payment of filing fees, the applicant

had two options; **one**, to pay filing fees and proceed to prosecute the application on the date court fixes; **two**, to refrain from filing fees so the application admitted dies a natural death. A court of law cannot open a case file and fix a date for hearing where filing fees are payable and no such fees have been paid. It follows, therefore, that if a person who is required to pay filing fees, transmits any legal document without paying filing fees, the document cannot be said to be legally filed and no service can be provided, until fees are paid.

It is the payment of filing fees, which sets the court's machinery into action. For that reason, pleadings are legally filed on a date respective filing fees are paid. To hold otherwise would render laws providing for limitation period of institution of suits or application ridiculous. A party would submit an application, appeal or other pleadings and pay filing fees at any time as he wishes, even after a year or years. That party would not be challenged for late filing of pleadings or application or appeal because mere transmission of documents electronically once admitted are considered filed. I do not think that was the spirit of the Rules.

The applicant transmitted the application on 26th December, 2020, which the Deputy Registrar admitted on 29th December, 2020. The applicant paid filing fees on 4th January, 2021. As stated above, the applicant's advocate did not account 7 days delay from the date the application was filed until filing fees were paid. In the circumstance, I hold that the application was filed on 4th January, 2021 and that is the reason it was baptized Misc. Civil Appl. No 2/2021. I find that the instant application filed out of time, as thirty days, the time within which to file an application for leave to appeal, expired on 28th December, 2020.

There was yet another disquieting feature in this case. The application was filed under subsection (1) instead of subsection (2) of section of section 47 of the **Land Disputes Courts Act.** In the wake of the principle of overriding objective and the fact the Rules make the defect of wrong citation or non-citation of the provisions of the law a none fatal defect, I resolved to treat it as none fatal defect. I took that stance after considering the fact that this Court has jurisdiction to entertain an application for leave under section 47 of the **Land Disputes Courts Act,** regardless of the relevant subsection.

The above notwithstanding, I decided to consider the application on merit. It is settled that a person applying for leave to appeal should prove that there are grounds of appeal which merit serious judicial consideration. See **Sanga Bay Estates Ltd & Others Vs. Dresdner Bank** (1971) EA 17, where the defunct East African Court of Appeal stated that-

> *"Leave to appeal from an order in civil proceedings will normally be granted where prima facie, it appears that there are grounds of appeal which merit serious judicial consideration"*

The application proceeded in the absence of the respondents who could not be traced. They were served by substituted services through publication. The applicant's advocate, Mr. Buberwa submitted that the grounds for leave were stated under paragraph 4 of the applicant's affidavit. The grounds are that-

a) whether the court's findings that the 1st respondent had no capacity to sell the land can render the appeal baseless on the ground that the applicant did not show in the records whether the property in dispute forms party of the deceased's estate regardless of the evidence submitted to that effect.

b) whether the court's findings that exhibit D1 wa improperly admitted can render the appeal baseless on the ground that exhibit P1 was also improperly admitted.
c) whether it was proper for court to deploy evidence of the second respondent after the findings that it was irregular for the second respondent to be allowed to testify without vacating the ex-parte order made by the trial court.

The applicant's advocate submitted regarding the first ground that after this Court held that the first respondent had no capacity to sell the disputed land it was a sufficient reason to overturn the decision of the DLHT. He complained that the Court should not have gone ahead and held that the applicant did not prove that the disputed land was the part of the deceased's estate. He concluded that the issue that is whether property constituted the deceased's estate was not an issue to that Court.

I considered the first ground to find out if it merits *serious judicial consideration* by the Court of Appeal. The answer is negative. I went through the judgment of this Court and found that the Court found that the applicant did not establish that land belonged to his late father, hence whether the first respondent had title or not it was not the applicant's business. It stated-

> *"It was expected of him to bring evidence to establish that the said land belonged to his late father and therefore formed part of the estate of his late father. Now looking at the evidence of the appellant, given the evidence and witness called by both parties, that the evidence weighed on the scale, it goes without saying that, the 1st respondent called witness to explain how did she come into possession of the land the fact, which if we believe that the land was given to her mother, then, definitely did not form part of the estate of the deceased's father."*

Given the above holding I see nothing worthy to be considered by the Court of Appeal. The applicant suing as the administer of the deceased's estate, had a duty to prove that the disputed land belonged to the deceased's estate. I find that the first ground for leave did not pass the test.

I, now consider the second ground. The applicant submitted regarding the second complaint that after the Court accepted the appellant's contention that Exhibit D1 was not properly admitted as the applicant was not given an opportunity to comment, it was a sufficient ground to expunge it from the record. He contended that the Court should not have held that Exh.P.1 was also admitted without following the procedure. He added that Exh.P.1 was just Form No. IV, which had no effect to the case.

To say the least, I do not find the second complaint establishing a *prima facie case which merit serious judicial consideration* of the Court of Appeal. The appellate court found that the applicant failed to prove that the disputed land belonged to the deceased's estate. The law is clear, he who alleges must prove and prove to the required standard. It is also settled that the duty of the party defending to prove his allegation comes after the alleging party has proved his case. The applicant did not prove his case. For that reason the respondent had no duty. Exhibit D1 was sale agreement between the respondents. It did not in any way affect the applicant's title to the disputed land or establish the first respondent's title to the disputed land. Even if the judge expunged the same it would not have strengthened the applicant's case.

In addition to that, the law is settled that not every procedural irregularity renders the proceedings a nullified. It is the procedural irregularities, which occasion injustice render the proceedings and a subsequent judgment or order a nullity. This position is clearly stated under section 45 of the **Land Disputes Act**, [Cap. 216 R. E. 2019].

> *45. No decision or order of a Ward Tribunal or District Land and Housing Tribunal shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the proceedings before or during the hearing or in such decision or order or on account of the* ***improper admission or rejection of any evidence unless such error, omission or irregularity or improper admission or rejection of evidence has in fact occasioned a failure of justice****.*

It is my firm opinion that failure to observe the procedure of admission of exhibit and the exhibit which was not a fulcrum of this Court's decision cannot be a ground to grant leave to appeal. The second ground for applying leave, like the first ground, has no merit.

Lastly, the applicant submitted that he is applying for leave so that the Court of Appeal may determine whether it was proper for court to deploy evidence of the second respondent after the findings that it was irregular for the second respondent to be allowed to testify without vacating the *ex-parte* order made by the trial court. The applicant's advocate submitted that after the Court found that the DLHT wrongly admitted the evidence it was required to expunge that evidence. The judge held that since there was no proof that the disputed land was part of the deceased's estate the evidence of the second respondent, the buyer of the disputed land from the first respondent, had no any defect. I do not find any reason to call upon the Court of Appeal to determine trivial issues.

As stated above a person applying for leave to appeal must establish that *there are grounds of appeal which merit serious judicial consideration.* I am of the firm view that a leave to appeal to the Court of Appeal cannot be grounded on trivial issues, which are not decisive. It is settled that leave to appeal may be granted where but not necessarily the proceedings as whole reveals such disturbing features as to require the guidance of the Court of Appeal. **Harban Haji Moshi and Another v Omar Hilal Seif and Another** Civ. Ref. No. 19/1997 (unreported).

In the upshot, I find that the there are no grounds of appeal which merit serious judicial consideration. Consequently, I dismiss the application. I make no order as to costs.

It is ordered accordingly.


**J.R. Kahyoza**

**JUDGE**

**3/03/2022**

**Court**: Ruling delivered in the presence of the applicant and Mr. Buberwa, the applicant's advocate and in the absence of the respondents. B/C Ms. Martina (RMA).

**J.R. Kahyoza**

**JUDGE**

**3/03/2022**