

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOB DISTRICT REGISTRY

AT BUKOBA

MISC. LAND APPLICATION NO. 92 OF 2021

(Arising from Land Case Appeal No. 49 of 2019 of the High Court of Tanzania, Original Land Application No. 150 of the DLHT for Kagera at Bukoba)

ALOYCE PASTORY APPLICANT

VERSUS

GAUDIOSE FRANCIS BIRO RESPONDENT

RULING

08/04/2022 & 11/05/2022

E. L. NGIGWANA, J.

The instant application has been preferred by the Applicant under Section 47 (2) of the Land Disputes Courts Act, [Cap 216 R: E 2019], seeking for leave to Appeal to the Court of Appeal of the United Republic of Tanzania against the judgment and decree of this honorable Court (Kilekamajenga J) in Land Appeal No.49 of 2019 delivered on 23rd day of July 2021. The application is supported by an affidavit sworn by the applicant. The respondent filed a counter affidavit resisting the application.

The brief facts giving rise to this application as per available records can be summarized as follows; it was alleged that the appellant bought the piece of land from Kobobo Kamuhabwa in 1994, but in 1996, the said

Kabobo died and his son inherited the remaining land which was next to the land bought by the applicant in 1994.

On the other side, it was further alleged that in 1999, the respondent bought two pieces of land from Protace Kobobo. The first piece was bought in two installments; on 10th day of May and 20th day of August 1999 while the second piece was bought on 13th December 2003. The respondent alleged that in 2010, the applicant encroached into his land claiming ownership whereas he did cut down trees and uprooted the boundaries set in 2003. The record further revealed that, the respondent took the matter to the Hamlet leader who settled it in the respondent's favor.

The applicant was aggrieved therefore, sued the respondent at Karabagaine Ward Tribunal vide Civil case No.4 of 2013 which also ended in favor of the respondent. From there, the applicant appealed to the District Land and Housing Tribunal vide Land Appeal No. 67/2013 in which the proceedings of the Ward Tribunal were quashed, and the judgment and orders thereto were set aside on legal technicalities.

From there, the respondent filed a fresh suit at the District Land and Housing Tribunal to wit; Land Application No.150/2016. At the end of the trial, the DLHT decided the matter in favor of the respondent.

Aggrieved by the decision of the DLHT, the applicant approached this court vide Land Case Appeal No.49 of 2019. After hearing the parties, the said appeal was dismissed with costs for being devoid of merit.

The applicant was aggrieved by the decision of this court thus intends to appeal to the Court of Appeal of Tanzania, hence this application. The Notice of Appeal was lodged on 20/08/ 2021

When the application came for hearing on 13th day of March 2022, the applicant was represented by Mr. Dionysius Pontian Mujuni, learned advocate while the respondent was represented by Mr. Lameck John Erasto, learned advocate.

Taking the floor, Mr. Mujuni adopted an affidavit supporting the application to form part of his submission. He argued that an appeal to the Court of appeal is not automatic, thus leave must be sought and obtained that is why the applicant has filed the present application. He further argued that paragraph 5 of the affidavit carries the grounds worthy of being considered by the Court of Appeal.

Mr. Mujuni further submitted that the trial court visited that locus in quo but the boundaries were shown by a wrong person one Francis Kabobo, the relative of the Protace Kababo, (seller), and according to him, the said person did mislead the court. He further argued that the sales agreements were written in **Kihaya**, the local language in which the Hon. Chairman was not familiar with it and they were not translated. He added that, the High Court in its judgment has used words which were not used in the documents tendered before the trial tribunal.

Opposing the application, Mr. Lameck Erasto submitted that, this application is baseless and unfounded because the respondent who was the Applicant in the trial tribunal had established ownership of the disputed

land vide Exh.p1, P2 and P3 and how he purchased the same from Protace Kabobo. He added that Francis Kabobo who is alleged by the applicant's advocate that he misled the trial tribunal, appeared in the tribunal and testified as PW2. Lameck argued that, PW2 was very conversant with boundaries. Mr. Lameck further submitted that the trial tribunal discharged its duty because it considered the evidence of both sides and arrived to a sound decision that was upheld by this court. He further argued that the assessors were the **Haya** by tribe and **Mr. F. Rutabanzibwa** assisted the court to know what was written in the documents.

I have carefully considered the submissions from both sides, therefore the issue for determination is whether the applicant has been able to satisfy the court that he deserves to be granted leave to Appeal to the court of Appeal of Tanzania against the decision made by this court in the above-mentioned matter.

Section 47(2) of the Land Disputes Courts Act Cap 216 R: E 2019 provides that;

"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".

It is common understanding that leave to the Court of Appeal is not automatic. It is granted where the court is satisfied that the intended grounds of appeal raise issues of general importance or where the grounds show that there is an arguable issue of law, facts or mixed facts and law which need to be determined by the Court of Appeal.

In the case of **British Broad Casting Corporation versus Erick Sikusieas Ngimaryo**, Civil Application No. 138 of 2004, CAT at DSM (unreported) cited in the case of **Hamis Mdida and Another versus the Registered Trustees of Islamic Foundation**, CAT at Tabora, Civil Appeal No. 232 of 2018 it was held that;

As a matter of general Principle, leave to appeal will be granted where the grounds of appeal raise issue of general importance or a novel point of law or where the grounds show a prima facie case or arguable appeal”.

Furthermore, in the case of **Ramadhani Mnyanga versus Abdala Selehe** [1996] it was held that;

“For leave to be granted, the application must demonstrate that there are serious and contentious issues of law or fact fit for consideration of appeal”

However, where the grounds of appeal are frivolous, vexatious or useless or hypothetical, no leave will be granted. See the **case of Broad Casting Corporation** (supra).

At the outset, I would like to state very clearly that I have no mandate to go into the merits or deficiencies of the judgment or orders of the Hon. Judge or to analyze the grounds of the proposed appeal as to whether the intended appeal will succeed or not because this is not the Court of Appeal, and application of this nature does not mean re-hearing of the appeal.

All what I am duty bound to do is to consider whether there is real prospect of success, or arguable issues or compelling reasons, or disturbing

features, or point of law or point of public importance requiring the Court of Appeal intervention in the intended appeal.

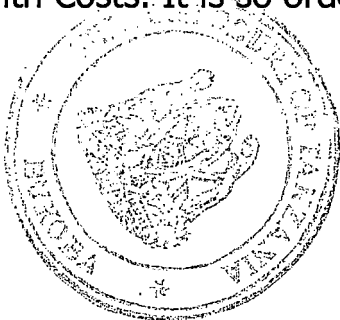
In application proceedings, the applicant must set out sufficient facts in his founding affidavit which will entitle him to the relief sought. In the matter at hand, Mr. Mujuni, advocate for the applicant strongly argued that, paragraph 5 of the applicant's affidavit carries the reasons as to why the intervention of the Court of Appeal is needed. The same was coached as follows;

"The Court of Appeal shall be invited to determine the issue as to whether the respondent was right to buy the suit land from the person whom the right of occupancy of the suit land had never been passed to him in accordance with the testimony of the respondent in the District Land and Housing Tribunal".

The record revealed that the trial tribunal was satisfied that the applicant now respondent had a piece of land that is bordering the land owned by the respondent, now applicant, and that the respondent had crossed the boundary and encroached into the land the applicant. The respondent now applicant was ordered to vacate the land he encroached and pay the costs of the suit, the decision which upheld by this this court. Indeed, reading the evidence adduced in the trial tribunal, and the memorandum of appeal filed in this court on 29/08/2019, it is very easy to see that the central controversy was not ownership but boundaries. Reading the judgment of this court as a whole, it goes without saying that the issue of boundaries was extensively and exhaustively discussed. In the

memorandum of appeal there was no ground challenging the trial tribunal on the way it addressed the issues framed.

In the event, I find the applicant has failed to satisfy the court that there is a prima facie case or arguable appeal which deserve to be determined by the Court of Appeal of Tanzania against the decision of this court in Land Appeal No. 33 of 2019. In other words, I am convinced that the application does not meet the legal threshold for its grant. Accordingly, I dismiss it with Costs. It is so ordered.




E. L. NGIGWANA

JUDGE

11/05/2022

Ruling delivered this 11th day of May 2022 in the presence of the applicant and his advocate Mr. D. Mujuni, Ms. Erieth Barnabas, learned advocate for the respondent, E. M. Kamaleki, Judges' Law Assistant, and Ms. Tumaini Hamidu, B/C.




E. L. NGIGWANA

JUDGE

11/05/2022