

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF BUKOBA)

AT BUKOBA

MISC LAND APPLICATION NO. 106 OF 2022

(Arising from HC Bukoba in Misc. Land Case Application No. 66 of 2019 and Original Application No. 46 of 2015 Bukoba District Land and Housing Tribunal)

BRIGHTONI LAUREAN..... APPLICANT

VERSUS

PISI KAMUKURU..... RESPONDENT

RULING

Date of Ruling: 17.02.2023

Mwenda, J.:

The applicant, has, by way chamber summons made under Section 47 (2) of the Land Disputes Court Act, [Cap 216 RE 2019] applied for the following orders, viz;

(i). Application for leave to appeal to the court of appeal;

(ii). Any other further relief this court may deem just to grant.

This application is supported by an affidavit sworn by the Applicant. Served with this application, the respondent contested it through a counter affidavit sworn by herself.

When this application was called on for hearing, the applicant was represented by Mr. Alli Chamani, learned counsel while the respondent enjoyed the legal representation from Mr. Zephurine Derick, learned counsel.

In a bid to submit in support of the present application Mr. Alli Chamani began with a prayer before the court to adopt the contents of the chamber summons and affidavit to form part to his oral submissions. Further to that the learned counsel for the appellant submitted that leave to appeal to the court of appeal is grantable where there are contentious issues. In support to that, he cited the case of SAID RAMADHAN MNYANGA V. ABDALLAH [1996] TLR 74 at page 75. Further, he submitted to the effect that leave is also grantable where the application is not flivorous, vexatious or useless and to support this point he cited the case of BBC V. ERIC SIKUJUA NG'MARYO, CIVIL APPLICATION NO. 138 OF 2004. Also, the learned counsel submitted that in applications such as the present one, it is not the duty of this court to examine the details of the proposed issues. To substantiate the point Mr. Chamani cited the case of BULYANHULU GOLD LIMITED AND TWO OTHERS V. PETROLUBE (T) LIMITED AND ANOTHER, CIVIL APPLICATION NO. 364/16 OF 2017 (unreported).

While making reference to the applicant's affidavit, Mr. Chamani submitted that reasons which triggered them to file the present application are contained in paragraph 10. He said at para 10 (ii) of the applicants affidavit there are legal issue fit to be placed before the court of appeal. He said legally, the judgment is required to comply to Regulation 20 (1) of GN. 174/2003 where brief statement of facts, findings on the issues, the court's decision and reasons thereof need be reflected. He said failure to do so renders the judgment's rejection and to support

this point he cited the case of AG V. PHARES KABUYE [1982] TLR 338. The learned counsel submitted that in Application No. 46 of 2015, none of the requirements were met even though the applicant did not challenge the said application before the District Land and Housing Tribunal.

Further to that, Mr. Chamani submitted that at para 10 (iii), the purported ruling of the District Land and Housing Tribunal assessors were neither involved nor had their opinion recorded. He said that this was contrary to legal principle as stipulated in the case of SIKUZANI SAID AND ANOTHER V. MOHAMED RUBLE, CIVIL APPEAL NO. 197 OF 2018 CAT (unreported).

Also the learned counsel for the applicant submitted that at para 10 (i) the applicant was subjected to technical delay. To sum up, the learned counsel was of the view that all that he has stated are contentious matters (issues) which need be tabled before the court of appeal.

In response to the submission by the learned counsel for the applicant, Mr. Zephurine Derick, learned counsel for the respondent opposed the present application by firstly, praying to this court to adopt the contents of his client's counter affidavit to be adopted as part to his oral submission.

Further to that the learned counsel submitted that since the intended appeal seek to challenge the judgment dated 5/1/2016, the remedy by the applicant ought to be filing an appeal against it or lodge an application to seeking to set it aside. He

said that in the said matter, the applicant sought leave to set aside an exparte judgment and the ruling of which was delivered on 18/7/2017. After that, he said, the applicant filed Appeal No. 5/2019 to challenge the ruling which declined to set aside the said order. The learned counsel said, it was wrong to seek extension of time to lodge an appeal as this act is functus officio. The learned counsel added that it is wrong for the applicant to allege he is pursuing this matter on the reasons that he previously opted a wrong forum. Mr. Zephurine was of the view that entertaining this application while the applicant have previously dealt with this issues in attempting to set aside exparte order is like one person riding two horses which can never be successful.

With regard to Mr. Chamani's argument that the ruling in question does not align with the law, Mr. Zephurine submitted that, under the circumstances which surrounded the hearing of the same, the applicant was not prejudiced in anyway. He said under Reg. 12 (3) (a) of the Land Disputes Courts, regulation GN. No. 174/2003 if the respondent admit the claim, the tribunal shall record his words and proceed to make orders as the chairman thinks fit. The learned counsel was of the view that by virtue of the above Regulation, the Hon. Chairman was justified to make such orders.

With regard to Mr. Chamani's submissions that his client's delay fall in the category of technical delay, Mr. Zephurine was of the view that the applicant's failure to take a proper recourse by filing application to set aside exparte judgment does not

amount to technical delay. The learned counsel concluded his submission praying the present application to be dismissed.

In rejoinder Mr. Chamani asserted that illegality regarding failure to involve assessors and failure to record their opinion was not discussed at all by Mr. Zephurine. On assertion by Mr. Zephurine that filing the present application while, previously, the applicant had attempted to set aside the Hon. Chairman's decision is like riding two horses at ago, Mr. Chamani said that when the Hon. RM with extended jurisdiction ruled out that the applicant was pursuing his right in a wrong forum and suggested him to file appeal subject to the Law of Limitation, the door to proceed in that channel was already closed and for that matter there is no two matters at ago.

With regard to submission by Mr. Zephurine that the decision of Hon. Chairman was in alignment to Reg. 12 (3) (a) of the Land Disputes Courts (The District Land and Housing Tribunal Regulation GN. No. 174, 2003 Mr. Chamani rejoindered that the said Regulation is irrelevant with this matter as there is nowhere the applicant ever admitted the facts. He thus concluded by repeating to his previous prayer in chief that this court be pleased to grant extension of time.

The foregoing being the summary, of the matter at hand, this court is now obliged to determine the merits of the present application.

At the outset, it is important to note that leave to appeal to the court of appeal is not automatic, but within discretion of the court to grant or refuse leave. Despite this legal proposition there is however conditions set for consideration by the court in exercise of its discretion. In the case of BRITISH BROADCASTING CORPORATION V. ERIC SIKUJUA NG'MARYO, CIVIL APPLICATION NO. 138 OF 2004, CAT (unreported) the court had thus to say, that;

*"Needless to say, leave to appeal is not automatic. It is within the discretion of the court to grant or refuse leave. The discretion must, however be judiciously exercised and on the materials before the court. As a matter of general principle leave to **appeal will be granted where the grounds of appeal raises issue of general importance or a novel point of law or where the grounds show prima facie or arguable appeal.**"*

Having outlined the above legal position, the court described conditions under which the court can refuse leave. The court used the following words as follows, that;

"However, where the grounds of appeal are frivolous, vexatious or useless or hypothetical, no leave will be granted."

In the instant application, the issue is whether the grounds raised by the applicant are in alignment with the conditions set out in the above decisions of the court of appeal.

As I have stated earlier, the applicant intends to challenge the ruling of this court which refused his client extension of time to lodge appeal. In the said application, the applicant advanced illegality as the ground for extension of time but this court overruled him on the ground that not every allegation of illegality should warrant the court to extend time.

At the hearing of this application the learned counsel for the applicant insisted that this court ought to have granted his client's prayer on the alleged illegality. The said illegalities are covered under para 10 of the applicants affidavit. Opposing the said application. Mr. Zepherine was of a firm view that granting leave to appeal will lead to existence of two matters in court. He said that the decision Land Case Appeal No. 5 of 2019 by Hon. Resident Magistrate with extended jurisdiction was never challenged but strangely the applicant opted to take another recourse by bringing the present application. I have considered Mr. Zepherine's argument and by looking at the judgment in Land Case Appeal No. 5 of 2019, the Hon. SRM rejected his application to set aside *ex parte* judgment on the reasons that the applicant, instead of appealing against the tribunal's decision, chose a wrong forum.

That being the case, as it was rightly submitted by Mr. Chamani, the Hon. Magistrate's reasoning meant to put the matter to an end and the applicant took the advise of the court to pursue his rights through a proper channel. In other words, with this matter at hand, it cannot be said that there is another pending matter before the court.

As regard to illegalities raised by Mr. Chamani, since this court agreed on their existence and the principles surrounding them but rejected them (illegalities) as grounds for extension of time on the ground that not every allegation of illegality should warrant, I think this issue is arguable appeal fit to be tabled before the court of appeal. This is so because this point (issue) is not frivolous or vexatious.

From the foregoing, I find merits in the present application and I thus allow it.

Each party shall bear its own costs.




A.Y. Mwenda

Judge

17.02.2023

Ruling delivered in chamber under the seal of this court in the presence of Mr. Brightoni Laurean the Applicant and in the presence of Mr. Derick Zephurine learned counsel for the Respondent.




A.Y. Mwenda

Judge

17.02.2023