**THE UNITED REPUBLIC OF TANZANIA**
**JUDICIARY**

**IN THE HIGH COURT OF TANZANIA**
**(DISTRICT REGISTRY OF MBEYA)**
**AT MBEYA**

**MISC. LAND APPLICATION NO. 45 OF 2022**
(From the Decision of the High Court of Tanzania at Mbeya in Land Appeal No. 70 of 2021. Originating from the District Land and Housing Tribunal for Mbeya at Mbeya in Land Application No. 118 of 2016)

**CHARLES JACKSON.....1ST APPLICANT**
**GODFREY KAPUNGA.....2ND APPLICANT**
**TIMOTH FAYA.....3RD APPLICANT**
**CLEMENCE LAMECK.....4TH APPLICANT**
**JAPHET KATANI.....5TH APPLICANT**

**VERSUS**

**S. H. AMON ENTERPRISES COMPANY LIMITED.....RESPONDENT**

**RULING**

Date of Last Order: 25/01/2023
Date of Ruling : 24/02/2023

**MONGELLA, J.**

In this application, leave to appeal to the Court of Appeal (CAT) is being sought by the applicants following dissatisfaction with the decision of this Court (Ebrahim, J.) rendered in Land Appeal 70 of 2021. In the said case the appellants had appealed against a decision of the District Land and Housing Tribunal for Mbeya (the Tribunal, hereinafter) rendered in Land Application No. 118 of 2016. Before the Tribunal, the appellants were sued

for trespass over the land in dispute by the respondent. The dispute involved a land located at Plot No. 32 Block "BB" Uyole Industrial area, which the respondent claimed ownership by purchase in 2011 from one, Century Properties Limited. The said Century Properties Limited had purchased the land in 2006 from one, Kaburutu Nyika Farm, who was allocated the land as the first owner way back in August 1987. The land in dispute features in the survey plan number 24260 registered on 25.09.1990. The respondent sued the appellants for encroaching part of the land in dispute whereby they had cleared it, cut down trees, and were making bricks.

On the other hand, the appellants also claimed to be the rightful owners through deemed right of occupancy as indigenous owners. The Tribunal ruled in favour of the respondent, a decision that was upheld by this Court, hence the application at hand for leave to appeal to the CAT.

The application was argued by written submissions. The applicants filed submission drawn *ex gratis* by a legal officer from Tanzania Knowledge and Aid Centre. In their submission they advanced four points of grievance to be determined by the CAT.

The first contains the issue as to whether a certificate of title can extinguish the title of the owner under customary right. In their argument they still claimed to be lawful owners under customary rites and thus even where a land is surveyed and a certificate of title is obtained thereof, the indigenous owners cannot automatically be rendered squatters or trespassers. In support of their argument they referred the case of

***Mettuselah Paul Nyagwaswa vs. Christpher Mbote Nyirabu*** [1985] TLR 103 (CA).

The second issue involves evaluation of evidence by the High Court. The applicants fault this Court for failure to re-evaluate the evidence on record. Specifically, they contended that the Tribunal decision based on documents not tendered during hearing to establish that the land in dispute was indeed surveyed in 1987. They added that the claimed letter of offer was not tendered in evidence and that the document referred to as Plot No. 32 Block "BB" Uyole alleged to be the offer was rectified (sic) but not signed. They argued further that the transfer deeds showing that the property was transferred to the respondent were rejected; the search report and certificate of right of occupancy were tendered in secondary documents and no sufficient reasons were advanced as to why the original document was not tendered.

Further, they challenged the court's evaluation of evidence on the ground that the respondent never tendered any payment receipt list though he claimed to be the owner and had been paying rent for a long time. That, he in fact, told the Tribunal that he had no payment records. In the premises, they challenged the High Court for failure to re-evaluate the evidence and resolve such issues.

Further, they argued that the sale agreement was not tendered by the respondent, and that the building permit and payment for building permit lacked Government seal, but was still tendered and admitted as exhibit in evidence. They cited the case of ***Salumu Mhando vs. Republic*** [1993] TLR

170, which empowers a second appellate court to re-evaluate the evidence where there are mis-directions and non-directions on apprehension of the evidence by the lower court. In that respect, they had the stance that the CAT can still re-evaluate the evidence on record with respect to the pointed out flaws by the lower courts in evaluating the same.

The third issue is on credibility and discrepancy in witnesses' testimonies. They argued that the Tribunal proceedings, at page 46, show that one Claudian James aged 28 years testified as PW2 and as Assistant Land Officer at Mbeya City, but the same witness appears at page 58 of the proceedings testifying as PW3, a Land Officer at Mbeya City, aged 29 years. They further argued that DW2, a street chairman, who testified that the disputed land was surveyed in 2012 as a planning area, however no development or compensation was made to the more than 100 natives who customarily owned the land in dispute to date. They faulted the High Court for failure to re-evaluate the evidence on these issues.

On the last issue they contended that the first appellate court erred in law when ruled out in favour of the respondent without considering the strong arguments advanced by the applicants. Elaborating on this point they argued that the Court did not consider their testimonies to the effect that the land in dispute previously belonged to their grandfathers since many years ago. That they inherited the same from their parents and were born in the said land and have been living in the land in dispute since "*Operation Sogea*" era until when they were shifted to Itezi area. That, though shifted to Itezi area they continued using the land for agricultural

purposes till to date, thus if the area was planned by the Government they retained their constitutional right to compensation. They concluded by praying for the application to be granted.

The respondent was represented by Mr. James Bedron Kyando, learned advocate. In his reply submission he first referred to the counter affidavit which challenged the applicant's supporting affidavit for containing conclusive and argumentative statements. He specifically referred to paragraph 6 (a), (b) and (c) of the applicants' supporting affidavit. He further challenged the statements in the said paragraphs for not containing issues, but rather grounds of appeal and for being verified as true statements according to the applicants' own knowledge. He added that since the applicants never filed any reply to counter affidavit it implies their concession to the challenge posed in the respondent's counter affidavit to the effect that the supporting affidavit contains conclusive and argumentative statements. He considered the said paragraph in the supporting affidavit defective in accordance with the position settled in the case of ***Uganda vs. Commissioner of Prisons Ex parte Matovu*** (1966) EA 514. He urged the Court to expunge the said paragraph for being offensive arguing further that when the same are expunged there shall remain no paragraphs carrying issues for determination before the Court of Appeal.

Concerning the issues argued by the applicants he contended that an application for leave to appeal is not automatic but granted upon meeting certain conditions. He invited the Court to be guided by the principles settled in the case of ***Kibelo Benjamin Ndondole T/A Kibelo***

***Agro Suppliers vs. Amos s/o Magaba***, Misc. Application No. 11 of 2018 (HC at Sumbawanga, unreported) while quoting in approval a number of other cases. The cases referred to are: ***Advocates Committee & 1 Another***, Civil Application No. 98 of 2010 (unreported) in which the CAT ruled that *"an application for leave is usually granted if there is good reason, normally on point of law or on point of public importance;"* that of ***Harban Haji Mosi & Another vs. Hilal Seif & Another***, Civil Reference No. 19 of 177 in which it was ruled that *"leave is grantable where the proposed appeal has reasonable chance of success or where, but necessarily the proceedings as a whole reveal such disturbing features as to require the guidance of the court of appeal;"* and that of ***British Broadcasting Cooperation vs. Erick Sikujua Ng'imaryo***, Civil Appeal No. 133 of 2004 in which it was ruled that leave to appeal is not automatic, it is granted where the grounds of appeal raise issues of general importance or a novel principle of law or where the grounds show a *prima facie* arguable appeal. It will not be granted where the grounds of appeal are frivolous, vexatious or useless or hypothetical.

Mr. Kyando continued his submission by challenging the applicants' submission for being tainted with anomalies. He argued that even if it is assumed that the mentioned grounds of appeal under paragraph 6 of the supporting affidavit are the framed issues for determination by the CAT, the presented submission by the applicants has introduced new grounds from the bar not reflected in their supporting affidavit. He contended that the new grounds have been submitted contrary to the legal position governing submission originating from applications supported by affidavits. The new issues he argued about are that: the

certificate of title cannot invalidate ownership of the legal owner under customary right of occupancy; the trial tribunal based on documents not adduced at the hearing; secondary documents were admitted and no sufficient reasons were advanced; and on credibility and discrepancy of witnesses. Mr. Kyando challenged these issues for not being reflected anywhere in the applicants' supporting affidavit. He urged the Court not to entertain the un-pleaded issues.

He further challenged the statement in the affidavit and submission to the effect that "*the first appellate court erred in law when ruled out in favour of the respondent without considering the strong arguments advanced by the applicants*." He considered the statement containing extraneous matters based on pure point of fact. He referred the case of ***Markus Kindole vs. Burton Mdinde***, Civil Application No. 137/13 of 2020 in which the CAT dismissed an application for leave to appeal to the CAT on ground that no point of law worth of consideration by the Court was demonstrated by the applicant. In the same lane he called for the Court to as well disregard the applicants' arguments regarding building permit, payment receipt, and sale agreement. Apart from arguing that the same were not in dispute he contended that they contain matters of facts and were not brought to the attention of the first appellate court for them to be determined. On this point he invited the Court to be guided by the decision in the case of ***Njile Samwel @ John vs. Republic***, Criminal Appeal No. 31 of 2018.

He as well challenged the appellants' contention that the first appellate court failed to re-evaluate the evidence on record. He found the

contention baseless as the first appellate court clearly re-evaluated the evidence on record as clearly demonstrated in its judgment.

As to the contention on credibility of witnesses he argued that neither the High Court as the first appellate court nor the CAT as the second appellate court can deal with the said issue as the assessment of credibility is best judged by the court before which that evidence is adduced and not by a court which merely reads a transcript of the evidence. He referred the case of ***Ibrahim Ahmed vs. Halima Guleti*** (1968) HCD 76 in support of his stance.

With regard to the contention on proof of ownership, Mr. Kyando argued that the same was well proved by way of necessary documents, such as, the Title Deed which was supported by the allocating authority (PW2). He as well found the contention on compensation immaterial as the land was surveyed prior to 1999. Without citing any authority, he argued that it is the legal position that prior to the year 1999 land had no value, thus the occupier or original owner had to be compensated for unexhausted improvements only. He argued further that it was undisputed fact that the suit land had no any infrastructure before it was developed by the respondent and in addition the applicants admitted that their parents used the suit land for cultivation only. Considering his submission, he prayed for the application to be dismissed with costs.

The applicants opted not to file any rejoinder. In that case I shall proceed to deliberate on the matter, but first I prefer to deal with the legal point argued by the respondent's counsel and also advanced in the counter

affidavit. This regards the contents of paragraph 6 (a), (b), and (c) of the applicants' supporting affidavit containing conclusive and argumentative statements. For ease of reference the challenged paragraphs state:

> *"6 That in the intended appeal there are many issue (sic) involved including:*
>
> *(a) That, the first appellate Court erred in law when holding in favour of the respondent while the respondent failed to prove legal ownership of the disputed land as required by the law.*
>
> *(b) That, the first appellate Court erred in law when holding in favour of the respondent while the respondent failed to prove legal ownership of the disputed land as required by the law.*
>
> *(c) That, the first appellate Court erred in law when ruled out in favour of the respondent without considering the strong arguments advanced by the applicants."*

The law on affidavits is governed under **Order XIX of the Civil Procedure Code**. Under **Order XIX Rule 3 (1)** affidavits are to be confined to such facts as the deponent is able of his own knowledge to prove. These must be facts/things that really transpired and are capable of being proved by the deponent and not opinions, arguments or conclusions. This was amplified in the celebrated case of ***Uganda vs. Commissioner of Prisons, ex parte Matovu*** (supra) in which it was held:

> *"... as a general rule of practice and procedure an affidavit for use in court being a substitute for oral evidence, should only contain statements of facts and the circumstances to*

*which the witness deposes either of his own knowledge or from information which he believes to be true. Such affidavit should not contain extraneous matters by way of objection or prayer or legal argument or conclusion."*

Upon observing the challenged paragraphs in the applicants' supporting affidavit, I agree with Mr. Kyando that the same contain arguments and conclusions. The phrases *"that, the first appellate Court erred in law when holding in favour of the respondent while the respondent failed to prove legal ownership of the disputed land as required by the law"* ... *"that, the first appellate Court erred in law when holding in favour of the respondent while the respondent failed to prove legal ownership of the disputed land as required by the law"* ... *"that, the first appellate Court erred in law when ruled out in favour of the respondent without considering the strong arguments advanced by the applicants"* contain personal observations/arguments and conclusions by the applicants.

Under the circumstances, it is trite law that an affidavit contravening the legal requirements, as settled in the case of ***Uganda vs. Commissioner of Prisons, ex parte Matovu*** (supra), stands to be struck out where the defects are consequential and cannot be saved with expunging the offensive paragraphs. In the matter at hand, I am at one with Mr. Kyando's argument that the offensive paragraph is the most crucial in the application as it carries the gist of the application. Therefore, if expunged the remaining paragraphs are incapable of holding the application. The affidavit thus ought to be struck out. See also: ***Rustamali Shivji Karim Merani vs. Kamal Bhushan Joshi***, Civil Application No. 80 of 2009; ***Phantom Modern Transport (1985) Limited vs. D.T. Dobie (Tanzania) Limited***, Civil

Reference No. 19 of 2001; and ***Stanbic Bank Tanzania Limited vs. Kagera Sugar Limited***, Civil Application No. 57 of 2007 (CAT, unreported).

Though the remedies after striking out the affidavit can include an order for filing of a fresh affidavit (See: ***Arbogast C. Warioba vs. National Insurance Corporation (T) Ltd. & Consolidated Holding Corporation***, Civil Application No. 24 of 2011 (CAT at DSM, unreported)), I am of the view that such an order cannot be issued at this stage of composing a Ruling on the main application. In the premises, the application is struck out with costs. The applicants are at liberty to file a fresh application in accordance with the law, after rectifying the anomaly and in accordance with the law, particularly on time limitation.

Dated at Mbeya on this 24th day of February 2023.

**L. M. MONGELLA**

**JUDGE**

**Court:** Ruling delivered in Mbeya in Chambers on this 24th day of February 2023 in the presence of the 1st to 4th applicants and Ms. Edna Mwamlima, learned counsel, holding brief for Mr. James Bedron Kyando, learned counsel for the respondent.

**L. M. MONGELLA**

**JUDGE**