THE UNITED REPUBLIC OF TANZANIA
JUDICIARY

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

MISC. LAND APPLICATION NO. 61 OF 2022
(From the Decision of the High Court of Tanzania at Mbeya in Land Appeal No. 69 of 2019. Originating from the District Land and Housing Tribunal for Mbeya at Mbeya in Land Application No. 05 of 2019)

SOSTEN MBWAGHA.....APPLICANT

VERSUS

BIRIA SIMBWANGO.....1ST RESPONDENT
JUMA SAMSON.....2ND RESPONDENT

RULING

Date of Last Order: 02/12/2022
Date of Ruling : 23/02/2023

MONGELLA, J.

This is an application for leave to appeal to the Court of Appeal against a decision of this Court (Mambi, J.) rendered in Land Appeal No. 69 of 2019. The matter emanated from the District Land and Housing Tribunal in Land Application No. 05 of 2019 in which the applicant sought to be declared the lawful owner of a piece of land located at Mwantenga village in Mbarali district. He lost the case and the subsequent appeal to the High Court. Still persistent in pursuing his rights he now endeavours to knock the doors of the Court of Appeal of this land (the CAT, hereinafter).

Having obtained extension of time to lodge notice of appeal in the CAT and lodged the same accordingly, he filed the application at hand in terms of section 47 (2) of the Land Disputes Courts Act, Cap 216 R.E. 2019; section 5 (1) (c) of the Appellate Jurisdiction Act, Cap 141 R.E. 2019; and Rule 45 (a) of the Court of Appeal Rules, 2009.

The applicant was represented by Mr. Moses Mwampashe, learned advocate and the respondents appeared in person. The application was argued by written submissions.

Mr. Mwampashe first echoed the position of the law in granting leave to appeal to the CAT. He cited the case of ***Jireys Nestory Mutalemwa vs. Ngorongoro Conservation Area Authority***, Civil Application No. 154 of 2016 (CAT at Arusha, unreported), in which it was ruled that leave to appeal is granted where the grounds of appeal present issues of general importance or a novel point of law or a prima facie or arguable appeal. Establishing that the applicant's intended appeal manifests these criteria he advanced four issues in the impugned decision, for determination by the CAT.

The first is "*whether the mandatory requirements of active involvement of assessors and their opinion were met when the set of assessors who heard the evidence of appellant's side were different with* (sic) *the set of assessor's* (sic) *who heard the evidence of the respondents' side and give (sic) their opinion.*" Elaborating in this point, Mr. Mwampashe contended that the trial Tribunal record reveals that there were different sets of assessors involved in hearing the suit. He said that one set of assessors

namely "Kalongole" and "Sala" heard the testimonies of PW1, PW2, and PW3. Then one assessor, that is, "Kalongole" heard the testimony of PW4 and PW5. The on another session, a whole lot different set of assessors, namely "Musa Mwasapili" and "Vivian Chang'ombe" heard the testimonies of DW1, DW2 and DW3 and eventually read their opinion regarding the whole case.

Mr. Mwampashe faulted the High Court for upholding the Tribunal decision rendered in the circumstances above. He argued that the change of assessors is contrary to the dictates of the law and necessitates the intervention by the CAT. In support of his stance he referred the provisions of **section 23 (3) of the Land Disputes Courts Act**; and the holding in the case of ***Y. S. Chawalla & Co. Ltd vs. Dr. Abbas Teherali***, Civil Appeal No. 70 of 2017 (CAT at Tanga, unreported).

The second issue is "*whether the High Court properly considered to (sic) weigh/evaluate and balance the evidence adduced by the appellant against that of respondents which was in contradiction to itself, when it decided that the appellant did not tender any exhibit of ownership while he tendered exhibit P1 which is a sale agreement.*" (sic) Addressing this point, he contended that the trial Tribunal record shows that exhibit P1 "a sale agreement" was tendered by the applicant, however the same was treated as been tendered by the respondents against the appellant. He found the same erroneous.

Third, that "*whether legally it was proper for the High Court to bless the decision of the trial tribunal to hear and decide the matter without joining*

the necessary party who is the seller and if justice was met under such circumstance." (sic) On this point, he argued that the appellant purchased the land in dispute from one Mkomigumoyo Mponzi and in accordance with the decision in the case of ***Juma B. Kadala vs. Laurent Mnkande*** [1983] TLR 103 the buyer is to be joined with the seller, failure of which is fatal. He complained that in the matter at hand the seller was not joined and the flaw needs to be addressed and rectified by the CAT.

Lastly, "*whether the High Court was right when it ignored other grounds of appeal.*" With regard to this issue he contended that the High Court addressed only two grounds of appeal leaving out the rest of the grounds. He found the situation erroneous necessitating intervention by the CAT.

The application was resisted by the respondents. In their written submission, they first raised a legal issue in relation to the time limit in serving the opponent party with the notice of appeal. They argued that the law as stipulated under **Rule 84 (1) of the Court of Appeal Rules, 2009** requires a copy of the notice of appeal to be served to all persons to be directly affected by the appeal within 14 days from the date of lodging the notice of appeal. In that respect they challenged the application at hand calling for the same to be struck out with costs for failure of the applicant to serve them with the copy of the notice of appeal as directed under the law.

With regard to the gist of the application at hand, they as well articulated the legal position that leave is granted where there are triable issues

needing attention of the CAT. However, they challenged the application for lack of such triable issues to be determined by the CAT.

Addressing the first issue on change of assessors, they first did not dispute the assertion that there was change of the set of assessors in the course of hearing the matter before the Tribunal. However, they found the same not fatal on the ground that no injustice was occasioned to the parties by the change of assessors. They argued that the applicant failed, in his submission, to show how the parties' rights were prejudiced by the change of assessors.

They further argued that it is the position of the law that not every procedural omission or error can vitiate proceedings. They cited the decision in the case of ***Tongeni Naata vs. Republic*** [1991] TLR 54 to buttress their point. They further claimed that since the assessors participated in the trial and gave their opinions before the parties in the end as guided under **section 23 (3) of the Land Disputes Courts Act**, no injustice occurred to the parties. They further referred the case of ***Amani Rabi Kalinga vs. Republic***, Criminal Appeal No. 474 of 2019 to support their position and called for the issue to be disregarded by the Court.

As to the issue concerning evaluation and consideration of evidence, particularly exhibit P1, they first admitted the assertion that the said exhibit was indeed tendered by the applicant. However, they challenged the applicant for misconstruing the High Court decision on the same. Explaining further, they contended that the High Court opined that the

document tendered did not prove the issue of ownership of the suit land thereby concurred with the reasons advanced by the trial Tribunal.

In the alternative, they argued that even if there is such contradiction in the appellate court's decision then the same is just a typing error having nothing to do with the verdict of the court as the record shows that all lower courts declared the respondents the lawful owners of the suit after evaluating and assessing all the evidence presented before it. They found the ground lacking merit and called for its dismissal.

Concerning the third issue which is on joining a necessary party, they challenged the applicant's contention on three grounds, to wit: **First**, that the law, under **Order I Rule 9 of the Civil Procedure Code, Cap 33 R.E. 2019**, provides that no suit shall be defeated for non-joinder or mis-joinder of parties. In the case at hand they were of the stance that the suit cannot be defeated for non-joinder of parties. Further, they referred to **Order I Rule 13 of the Civil Procedure Code** arguing that objections on the ground of non-joinder or mis-joinder of parties have to be taken at the earliest possible opportunity, to the contrary, they said, the applicant has brought up the objection late at this stage. That, if the same was brought up early as directed under the law, the trial Tribunal would have dealt with it accordingly.

Second, that the applicant being the one who filed the suit in the Tribunal was in a good position to choose who to sue. Thus if he wanted redress from the seller he should have sued him as well.

Third, that the applicant alleged to have bought the land from the seller but failed to present the alleged seller to testify in his favour during the hearing or to even call the neighbours to the land in dispute to testify in his favour. In the premises, they found the trial Tribunal correctly reasoned that the failure to call or join the seller suggested that there was no such sale or that the applicant was deceived. They further challenged the sale agreement for not describing the land in dispute. Citing the case of ***Pelesi Sikaluzwe vs. Patrick Simkonda***, Land Appeal No. 49 of 2019 they called upon the Court not to rely on the appellant's mere allegations.

On the last issue whereby the applicant faults the High Court for failure to deliberate on all the grounds of appeal, the respondents contended that the appellant raised mere allegations with intent to mislead the Court. They contended that all the grounds of appeal were dealt with by the High Court. They further challenged the appellant for failure to even point out the grounds of appeal that were left out by the Court. They prayed for the application to be dismissed with costs.

Mr. Mwampashe made a brief rejoinder. First he replied to the legal issue advanced by the applicant regarding service of the notice of appeal within 14 days. He vehemently disputed the respondents' assertion arguing that the notice of appeal was served to the respondents within time and through the Village Executive Officer (VEO) of Mwatenga Village. He said that the VEO served the respondents in person whereby the 1st respondent acknowledged receipt by putting her thumb print. Referring to **Rule 84 (1) of the Court of Appeal Rules**, he further contended

that the law requires the applicant to serve notice of appeal to persons to be directly affected by the intended appeal.

In the matter at hand, he had the stance that the 1st respondent is the person who is directly affected by the intended appeal and not the 2nd respondent and that is why he was duly served. In support of his argument he further referred the case of ***Bakari Ali Msenga (As Administrator of the Estate of the Late Ali Suleiman Msenga) vs. Hadua Rashidi & Another***, Civil Appeal No. 37 of 2021 (CAT at Tanga, unreported). He added that the 1st respondent was the one declared the lawful owner of the suit land and therefore he is the one the applicant intends to appeal against.

With regard to the main application, he reiterated his position that the issues addressed in his submission in chief are arguable and worth of consideration by the CAT. He found the cases cited by the respondents, that is, of ***Tongeni Naata vs. Republic*** (supra); ***Aman Rabi Kalinga vs. Republic*** (supra); and that of ***Pelesi Sikaluzwe vs. Patrick Simkonda*** (supra) being distinguishable and inapplicable in the case at hand (though never stated how distinguishable the cases are).

After considering the arguments by the parties, I shall first deliberate on the legal issue advanced by the respondents in their reply submission. They claimed that the notice of appeal was not served upon them within 14 days as directed under the law, that is, under **Rule 84 (1) of the Court of Appeal Rules, 2009**. To the contrary, the applicant, through his counsel, argued that the notice of appeal was duly served to the 1st respondent

whom the appeal is intended to lay against as he is the one declared the lawful owner of the suit land.

The notice of appeal annexed to the affidavit in support of the application and pleaded under paragraph 5 of the affidavit shows that the same was lodged on 18.01.2021 and served to the parties, through the 1st respondent, on 27.01.2021. Computing the time, I find that the service was within 14 days. The 2nd respondent appears to have signed the notice with a thumb print, but the date is not indicated. However, as argued by Mr. Mwampashe, it was the 1st respondent that was declared the lawful owner of the suit land and thus the applicant's intended appeal is directed mainly to the 1st respondent as the party to be directly affected by the intended appeal. In the premises, I find the legal issue advanced devoid of merit and dismiss it.

With respect to the main application, the requirement under the law for an application for leave to appeal to the Court of Appeal to be granted is that the applicant must demonstrate presence of an arguable issue or arguable appeal, or a novel point, or a point of general public importance. See: ***Harban Haji Mosi & Another vs. Omari Hilary Sefu & Another*** [2001] TLR 409; and ***British Broadcasting Corporation vs. Eric Sikujua Ng'maryo***, Civil Application No. 138 of 2004 (CAT, unreported). Further, in the case of ***Gaudencia Mzungu vs. IDM Mzumbe***, Civil Application No. 94 of 1999 (CAT, unreported) it was held that leave to appeal is granted where there are prima facie grounds meriting an appeal to the Court of Appeal and not only an arguable appeal. The Court specifically stated:

> *"... leave is not granted because there is an arguable appeal. There are always arguable appeals. What is important is whether there are prima facie, grounds meriting an appeal to this Court. The echo stands as guidance for the High Court and Court of Appeal.*

The issue to be considered is therefore whether the applicant has demonstrated presence of an arguable issue, a novel point, or a point of general public importance constituting *prima facie* grounds for intervention by the Court of Appeal. In the spirit of the holding in ***Gaudencia Mzungu*** (supra), the Court, in my opinion, needs to scrutinize the impugned judgment in relation to the arguments by the parties, to reach a fair decision.

The applicant advanced four main points: first on procedural irregularity whereby he claims that there was change of assessors during hearing. He averred that one set of assessors heard the applicant's witnesses and another set heard the respondents' witnesses and in the end the second set gave their opinion on the whole case. The respondents in essence confirmed the applicant's assertion, but contended that the change did not prejudice the rights of the parties. In my view, whether the procedural irregularity is fatal or not or whether the same occasioned injustice to the applicant, is not something to be deliberated upon by this Court, but the CAT in an appeal.

I hold the same view on the applicant's contention regarding joinder of the seller of the disputed land as a necessary party to the suit. This is because for a party to be termed necessary or not it depends with the

circumstances of each case in consideration of execution of the decree to be issued by the Court. In the premises, I find it a matter to be determined by the CAT as well, which is mandated to consider the circumstances in the case at hand and make a decision.

The applicant further complained on evaluation and consideration of the evidence on record, to wit, a sale agreement, presented by him during trial. Among the issues that can warrant grant of leave, is apprehension of the evidence by the lower courts. This is because in granting leave, the court is not only confined to legal questions, but also to questions of fact that pose serious arguable points. Proper evaluation of evidence is one of them. See: ***Harban Haji Mosi & Another v. Omari Hilal Seif & Another*** (supra); and ***Faustina Kanyasa v. Neva Kanyasa and Richard Kanyasa***, Misc. Land Application No. 108 of 2016 (HC at Mbeya, unreported).

Lastly, the applicant complained on failure of the High Court in determining the rest of the grounds of appeal. Though this issue touches the right to fair hearing, particularly the right to be heard, I agree with the respondents' contention that for not stating which grounds were specifically left out by the Court, this Court is in no position to deliberate on the issue raised to determine on its truthfulness to warrant grant of leave on this point.

To this juncture, considering the issues raised by the applicant on change of assessors, joinder of a necessary party, and evaluation of evidence, I find that the applicant has demonstrated serious arguable grounds for determination by the CAT on the intended appeal. I therefore grant the

applicant leave to appeal to the CAT as prayed. Each party shall bear his/her own costs of the application.

Dated at Mbeya on this 23rd day of February 2023.

L. M. MONGELLA

JUDGE

Court: Ruling delivered in Mbeya in Chambers on this 23rd day of February 2023 in the presence of the respondents and one, Simon Mwalembwa on behalf of the applicant.

L. M. MONGELLA

JUDGE