THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA
MISC. LAND APPLICATION NO. 50 OF 2022
(Arising from the High Court of Tanzania at Mbeya Land Appeal No. 81 of 2021 and originating from District Land and Housing Tribunal for Mbeya at Mbeya Application No. 213 of 2018)

RUCHANO NDANGALA.....APPLICANT

VERSUS

EMMANUEL MWAVELA.....RESPONDENT

RULING

Date: 22nd December, 2022 & 15th February, 2023

KARAYEMAHA, J

This ruling is in respect of an application, preferred by way of a Chamber Summons, filed by the applicant, substantively praying for leave to appeal to the Court of Appeal of Tanzania (CAT) against the decision handed down by Mongella, J. on 22/06/2022 in Land Appeal No. 81 of 2022. It was brought under section 47(2) of the Land Disputes Courts Act, [Cap 216 R.E 2019] (the LDCA). The application is accompanied by the affidavit of the applicant sworn by Mr. Justinian Mushokorwa duly

instructed on that behalf and it is setting out grounds on which the prayer for leave is based.

A brief account of the facts giving rise to the application is to the effect that the applicant vide Application No. 213 of 2018 complained before the District Land and Housing Tribunal for Mbeya at Mbeya (trial tribunal) that the respondent trespassed in his land. He unfortunately lost as the tribunal found the respondent the rightful owner and was ordered to vacate and demolish the buildings elected in the suit land. Aggrieved by the decision, the applicant unsuccessfully appealed to this Court. Undoubted, he desires to appeal to CAT. However, legally, it is a mandatory precondition that any person intending to appeal to CAT must obtain leave of this Court. This condition is accentuated under section 47 (2) of LDCA and it states as follows:

> *"47 (2) 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."*

The application was argued by way of written submissions. Mr. Justinian Mushokorwa, learned advocate featured for the applicant whereas the respondent appeared in person.

As the parties submitted in respect of the substantive aspects of the application, the respondent, raised an issue which touches on the competency of the application. He contended that the affidavit in support of the application is defective for containing prayers and conclusions.

The respondent argued citing a sentence contained in the supporting affidavit that it exposes a conclusive sentence because of the phrase, "*it is thus...*" and a prayer which is "*... prayed that the leave to be granted to the applicant*". The respondent argued that the affidavit contravened the law governing affidavits which abhor raising extraneous matters therein. To cement his position, the applicant cited the case of **Francis Eugen Polycarp v MS Panone & Co. Ltd**, Miscellaneous Civil Application No. 2 of 2021 HC-Moshi (unreported) which cited the case of **Uganda v Commissioner of Prisons, Exparte Matovu** (1966) EA 514.

Arguing in rebuttal, Mr. Mushokorwa contended that the preliminary objection was raised belatedly in the sense that it should be overlooked. He was guided by the case of **Francis Eugen Polycarp** (supra). He confidently held the view that a preliminary objection not taken at the outset of the pleadings is bad in law and cannot be introduced later in the pleadings.

Mr. Mushokorwa's argument holds water in my view. The law is settled on the manner in which the objection must be raised. The general rule is that an objection should be taken at the earliest stage of the proceedings, as that helps the litigants and the courts to save time and expenses associated with full trials. The exception is with respect to objections on jurisdiction and time limit which may be raised at any stage, including at the appellate stage. This position has been emphasized in numerous decisions. In **Betty Kassiri v Easter and Southern African Management Institute (ESAMI)** [2000] TLR 478 it was held:

> *"A point of law, like this one, touching on the lack of jurisdiction by the court, which may have the effect of disposing of the suit or proceedings without involving trial or full hearing, if successfully argued, should be raised as soon as it becomes apparent either from the pleadings or from statutory (be it parent or subsidiary) law which, if upheld, might dispose of the case."*

The contention by the counsel for the applicant is that the objection was raised haphazardly and late into the proceedings. The objection itself touched on the on the competency of the application because according to the respondent the affidavit is defective for containing prayers and conclusions. The contention is that the same was raised when the respondent was rebutting to the respondent's written submissions in this

Court. The argument in my view seems to mean that this objection was sneaked clandestinely and without affording the adverse party an opportunity to prepare and get to know the point of contention in advance. This view is supported by the decision in **Arafa Issa v Kassim Makame**, HC-Comm. Case No. 4 of 2019 (unreported)**.** While I fully agree with the essence of the respondent's complaint, it does not give me the impression or feeling of injustice on his part. This is so when a consideration is put to the fact that it was an objection that touched on the competency of the application and what the law requires. However, given the nature of the objection, I think this was to be raised in accordance with the law because it does not fall within the exceptions explained above.

However, I wish to give consideration to the raised objection given its importance in deciding this matter. I am actually called upon to decide whether the offending sentence in the supporting affidavit result into striking out the whole application.

Before dwelling on that task, I wish to restate the principles guiding affidavits which have been emphasized in various decisions of this Court and Court of Appeal.

The law on what the affidavit should contain is well settled. In **Jacquiline Ntuyabaliwe Mengi & 2 others v Abdiel Reginald Mengi**

& 5 others, Civil Application No. 33/01 of 2021 CAT-DSM (unreported) the CAT held that:

> *"It is well settled that affidavits are to be confined in facts and have to be free from extraneous matters."*

In **Uganda v Commissioner of Prisons, Exparte Matovu** [1966] 1EA514, the court had similar position and stated that:

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

Generally, the affidavit must contain those matters to which the deponent would have deposed orally as a witness in court in the case and not extraneous matters. In the matter at hand, the impugned sentence is couched in the following manner:

> *"It is thus prayed that leave to appeal be granted to the applicant."*

Unhappy with this sentence, the respondent emerged with a preliminary objection that the affidavit contains a prayer and conclusion.

Examining the said sentence, indeed there are prayers and conclusion. This alone makes the affidavit defective.

The vexing question now is what is legal effect on the affidavit which is defective. It follows that the inevitable conclusion is as spelt out in the case **Jacquiline Ntuyabaliwe Mengi & 2 others** (supra). In this case the CAT held that:

> *"It is well settled that affidavits are to be confined in facts and have to be free from extraneous matters – (see **Ignazzio Messina v Willow Investment SPRL,** Civil Application No. 21 of 2001 (unreported) where the remedy to the affidavit which contains such extraneous matters is to expunge such offensive paragraphs or disregard them to allow the Court to proceed with the hearing and determination of the application basing on the remaining paragraphs."*

I also gain guidance from the decision in the case of **Phantom Modern Transport (1985) Limited v D. T. Dobie (Tanzania) Limited**, Civil References No. 15 of 2001 and 3 of 2005 (unreported) at page 6 which quoted with approval the general rule of practice and procedure on affidavits stated in **Uganda v Commissioner of Prison ex parte Matovu** (supra) at page 520, thus:

> *"Where defects in an affidavit are inconsequential, those defective paragraphs can be expunged or overlooked, leaving*

the substantive parts of it intact so that the court can proceed to act on it. If, however, substantive parts of the affidavit are defective, it cannot be amended in the sense of striking off the offensive parts and substituting thereof correct averments in the same affidavit."

My take of the above quoted verbum is that where the affidavit contains offensive paragraphs but the same are not substantive parts of the affidavit, they can be expunged or overlooked leaving the substantive parts intact. Since the law permits offensive paragraphs to be expunged from the affidavit, I, therefore, hold that the sentence in the supporting affidavit offending the law is expunged.

The settled principle is that after expunging the offensive paragraphs, an application can remain standing if the rest of the paragraphs have strong roots to hold it. See; **Stanbic Bank Tanzania Limited v Kagera Sugar Limited,** Civil Application No. 57 of 2007; **Phantom Modern Transport (1985) Limited** (supra) and **Peter Lucas v Pili Hussein and another**, Misc. Civil Application No. 33 of 3003 (all unreported).

I have closely examined the remaining paragraphs in the applicant's affidavit. A clear picture I get is that the gist of the applicant's application is not contained under the expunged paragraphs. The remaining ones are

substantial to hold the application. For the foregoing conclusion, I am warranted to determine the application for leave to appeal to the Court of Appeal of Tanzania.

In a bid to solicit a grant of the application, Mr. Mushokorwa had two concerns. **Firstly**, the High Court Judge misconstrued the evidence before her and eventually reached to a wrong conclusion on the boundary between the rival parties. **Secondly**, he faulted the High Court Judge for considering the fact that neither of the parties led evidence to show how much of the appellant's land was taken away by the road construction and contradictions fetched from the evidence, the issue which according to him was raised *suo motto* and that parties were not invited to address on it.

On the basis of these two points, Mr. Mushokorwa was firm that this application graduated the qualifications to grant leave.

Responding, the respondent stressed that leave is granted when the impending appeal stands a good chance of success or there is a point of public importance to be determined by the Court of Appeal. He sought aid of the decision in the case of **Theobald Rugambwa v Rugumbana Divo Rugaibura**, Miscellaneous Land Application No. 04 of 2018 HC-Bukoba (unreported). The respondent did not see anything in the applicant's submission resembling these factors. It was his contention that

the High Court Judge made a just and fair construction of the evidence from the trial tribunal's record which led her to a fair and just decision.

On the second aspect, it was the respondents reply that the High Court Judge invited parties to address parties the court on the whole of the suit and give evidence. The applicant found the affidavit containing untruthful facts and guided by the decision in the case of **Uganda v Commissioner of Prison** (supra) asked this court to refrain from relying on the supporting affidavit.

Having examined the application and submissions, I think, the issue for this Court to determine is whether the applicant has raised a point of law or the intended appeal stands good chance of success or there is a point of public importance to be determined by the Court of Appeal.

The principle of law governing grant of leave to appeal to the Court of Appeal is well settled. In a proper application, the duty of this court is just to gauge out whether there are contentious issues needing determination by the Court of Appeal. On this point, I am guided by two decisions by the Court of Appeal in **Harban Haji Mosi and Another v Omar Hilal Seif and Another**, Civil Reference No. 19 of 1997 of (unreported) and in the case of **British Broadcasting Corporation v**

Erick Sikujua Ng'maryo, Civil Application No. 138 of 2004 (unreported). In the former case the Court of Appeal *inter alia* said:

> *"Leave is grantable where the proposed appeal stands reasonable chances of success or where, but not necessarily the proceedings as a whole reveals such disturbing feature as to require the guidance of the Court of Appeal. The purpose of the provision is therefore to spare the court the spectre of un-meriting matters and enable it to give adequate attention to cases of true public importance."*

In the latter case the Court of Appeal, insisting on discretional use of powers in granting leave, said:

> *"Needless to say, leave to appeal is not automatic. It is within the discretion of the work of the court to grant or refuse leave. The discretion should 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 raise issues of general importance or novel point of law or where the grounds show a prima facie or arguable appeal... However, where the grounds of appeal are frivolous, vexatious, useless or hypothetical, no leave will be granted."*

From these cases six grounds can be deducted for consideration by the court when deciding to grant or not to grant leave to appeal to the Court of Appeal. **Firstly**, that the intended appeal raises issues of general

importance or novel point of law, **secondly**, that the grounds show a prima facie or arguable appeal, **thirdly**, that the grounds are not frivolous, vexatious, useless or hypothetical, **fourthly**, that the appeal stands reasonable chances of success, **fifthly**, that the proceedings reveal that there is disturbing feature(s) which require the guidance of the Court of Appeal and **sixthly**, where there are contentious issues needing determination by the Court of Appeal. A worthy note point is that, these grounds must be clearly seen in the proceedings, impugned decision and records of the case.

In my opinion, the applicant has met all the above requirements. **Firstly,** the impugned judgment of Hon. Mongella J. in the Land Appeal No. 81 of 2021 is appealable, and there are proposed grounds of appeal calling for determination as to:

1. *Whether the appellate court misconstrued the evidence hence reached to a wrong decision.*
2. *Whether the appellate Judge decided the appeal on grounds taken suo motto without giving parties a chance to air their views.*

Secondly, the intended appeal raises issues of general importance and novel point of law. **Thirdly**, these grounds show an arguable appeal and are not frivolous, vexatious, useless or hypothetical. **Fourthly**, there are contentious issues needing determination by the Court of Appeal.

I have noted that the respondent attempted to argue the substance of the grounds listed above instead of whether there are prima facie grounds meriting an appeal to the Court of Appeal. This is not the task of this court at this juncture. I am mentored by the decision in the case of **Gaudensia Mzungu v IDM Mzumbe**, Civil Application No. 94 of 1999 (unreported) where the Court of Appeal said that:

> *"Again, leave is not granted because there is an arguable appeal ... What is crucially important is whether there are prima facie grounds meriting an appeal to this Court.*

What is to be done by the High Court, in my view, is not rehearing of the appeal, it is only required to decide whether the said proposed grounds are prima facie worth of consideration of the Court of Appeal. The guidance is also found in the case of **Hamisi Mdida and Another v the Registered Trustees of Islamic Foundation,** Civil Appeal No. 232 of 2018 (unreported) where the Court of Appeal *inter alia* said;

> *"Secondly that* ***an application for leave does not involve a rehearing of the matter*** *for which leave to appeal is being sought While the application for leave must state succinctly the factual or legal issues arising from the matter and demonstrate to the court that the proposed grounds of appeal merit an appeal, the court concerned should decide whether the said proposed grounds are prima facie worthy of the consideration*

of the Court of Appeal. The court would generally look at the judgment or ruling sought to be appealed against to assess whether there are arguable grounds meriting an appeal. ***Certainly, such a determination will be made at the end of the day after some deliberation but not an adjudication on the merits of the proposed grounds."***

(Emphasis added)

With the foregoing, I am satisfied that the raised grounds intimate that there may be a chance of success, hence intervention by the Court of Appeal is needed. In the end, leave is hereby granted. It is so ordered. Costs to be in the due course.

DATED at MBEYA this **15th** day of **February, 2023**

THE HIGH COURT OF TANZANIA

J. M. Karayemaha
JUDGE