

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

MISC. LAND APPLICATION NO 10 OF 2022

(Arising from Land Application No 27 of 2021 the same originating from Land Application No 11 of 2020 of the District Land and Housing Tribunal for Tarime at Tarime)

AMBROSE GWASI MUKOHI1ST APPLICANT

FERDINAND JOSEPH MUKOHI 2ND RESPONDENT

VERSUS

BESTLINE LUXURY COMPANY LIMITED 1ST RESPONDENT

JUSTIN MWITA MUKOHI 2ND RESPONDENT

RULING

9th March & 20th March , 2023

F. H. MAHIMBALI, J.

The applicants in this case have been aggrieved by the decision of this Court in Land Appeal No. 27 of 2021 dated 14th January, 2022 overturning the decision of the District Land and Housing Tribunal, thus, intends to appeal to the Court of Appeal. This application for leave is in compliance with the law under section 47(2) of the Land Disputes Courts Act, Cap 216 R.E 2019.

According to the reasons contained into the affidavit and supplementary affidavits of the applicant, the grounds of appeal that this Court is called upon to grant leave for appeal to Court of Appeal are five, namely: -

- 1. The High Court delivered a contradictory judgment.*
- 2. That having observed by this Court that disposition of the suit property from administrator to the 2nd Respondent was a nullity, the same position would have been maintained in respect of disposition of the suit property from the second respondent to the 1st respondent.*
- 3. That the High Court erred in holding that since the 1st respondent had caused registration of the suit property there was no need of disturbing her occupation.*
- 4. That the High Court erred in holding that the mandate to give decision which has the effect of rectifying land register is only vested to High Court.*
- 5. That the High Court erred in not considering that ownership of property in dispute had already been dealt with in probate and administration court seized with such mandate.*

During the hearing of the application, Mr. Mahemba learned advocate prayed to adopt applicants' joint affidavit to form basis of this application and then prayed for the application to be granted as prayed.

On her part, Ms Rosemarry Makori learned advocate for the respondents, resisted the application and vehemently argued as follows.

That as per paragraph 6 of this applicants' joint affidavit, there is none ground meeting the legal conditions for the grant of the said leave.

With ground no 1, she argued that there is no any contradiction pointed out in the said judgment as raised. How is Hon. Kisanya's Judgment contradictory, there is no clarification on any useful submission on that. Buttressing her point well, she cited the case of **Honorable Minister for Finance and Planning and Honorable Minister Communication, Information Technology, vs Legal and Human Right centre, Misc.** Civil Application No 16 of 2021, page 18, High court Dar es Salaam making reference to the case of **British Broadcasting Corporation vs Eric Sikujua Ng'maryo**, civil Application no 1388 of 2004. That there must be clear arguable issue.

With grounds b, c, and e, in which she argued them jointly, stated that as per page 17 of the impugned judgment of the High court, the Judge was very clear that this court could not interfere with the probate's case judgment in which he is not in proper forum. Thus, it was not proper for the applicants to argue/question that the High Court erred in not

considering that ownership of the property in probate and administration court seized with such mandate. When Probate Case 5 of 2020 was filed, already the said property was transferred to the 2nd respondent who later transferred it to the 1st respondent. Thus, any sale of probate property prior to the revocation, the buyer is a bonafide purchaser. With the issue that the High Court erred in holding that since the 1st respondent had caused registration of the suit properly there was no need of disturbing her occupation (see **Dativa Nanga vs Jibu Group company Limited and Emmanuel Kombe**, Civil Appeal No 324 of 2020, at page 23 citing the case of **Suzan S. Waryoba vs Shija Dalawa**, civil Appeal NO 44 of 2017. Therefore, in the circumstances of this case, the 1st respondent being bonafide purchaser, he is protected by law as that. Therefore, the applicants' case has failed to point out three important things for CAT's considerations: Issues of general importance, a novel point of law or prima facie case/ arguable appeal.

In ground (e) since the respondents were not parties to the probate case, the same cannot be challenged by appeal before CAT. Even Honorable Kisanya, J pointed out in his judgment that the respondents

were not parties to the probate appeal, therefore, can be only channeled via probate court forum.

With ground "d", she submitted that it is clear under section 99 of the Land Register Act, the power to rectify the Land Register in respect of courts is only vested to High Court and no other courts. Others are the Registrar of Title. In the case of **Mama Twiga Limited and Edith Brinkers vs Jeroen Hamis Bruins and 3 others**, Land case no 72 of 2016, High court Arusha at pages 8 and 9 clarified so.

So long as the first respondent is the registered owner, the law is, once the registration process is completed, no search behind the register is needed to establish a claim of titles to the property, for the register itself is conclusive proof of the title (see **Leopold Mutemba vs Principal Assistant Registrar of Titles**, Ministry of Lands, Housing and Urban Development AG, Civil Appeal No 57 of 2017, CAT at Mwanza.

On this account, she prayed that leave to appeal to the CAT not be granted for lack of merits.

In his rejoinder submission, Mr. Mahemba submitted that, the legal issues in the affidavit of the applicants are legally arguable. He therefore

maintains them as being worth arguable before the CAT. In anything, this court cannot correct itself but the CAT. In his considered view, what Hon Kisanya, J has decided is legally per incuriam and needs CAT's intervention.

The argument that the bonafide purchaser is protected, has to be relooked by CAT whether in the circumstances of this case is relevant. Since all the duties of the said administrator have been nullified, then the 1st respondent cannot in anyway be valid owner on the basis of being legally protected as bonafide purchaser.

The central issue for consideration is whether, this application is meritorious. In consideration of the application, the supporting affidavit, the submissions by the both parties, it appears to me that there are arguments which are going to the merits of the issue which is an indication that the issues are arguable. It is not the duty of this Court now to discuss the merits of the issues but to find out whether there is merit in the issues which require the determination of the Court of Appeal. In **Jireyes Nestory Mutalemwa vs. Ngorongoro Conservation Area Authority** Application No.154 of 2016 (Unreported), the Court of Appeal observed that;

"The duty of the Court at this stage is to confine itself to the determination of whether the proposed grounds raise an arguable issue(s) before the Court in the event leave is granted - it is for this reason the Court brushes away the requirement to show that the appeal stands better chances of success a factor to be considered for the grant of leave to appeal. It is logical that holding so at this stage amounts to prejudging the merits of the appeal".

Guided by the above authority, it is my view that it is not within the power of this Court to go into further details of the case in which appeal is sought but rather find whether there are arguable grounds for appeal and not whether there are chances for the appeal to succeed.

In the upshot, I am convinced that the application meets the legal threshold for its grant. Accordingly, I grant it as prayed pursuant to section 47(2) of the LDCA. Each party to bear own costs.

DATED at MUSOMA this 20th March 2023.



F.H. Mahimbali

JUDGE

Court: Ruling delivered this 20th day of March, 2023 in the presence of Mr. Mhagama learned advocate for the applicants also holding brief of Ms

Rosemarry Makori learned advocate for the respondent and Mr. Kelvin Rutalema – RMA.



F.H. Mahimbali

JUDGE