

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

MISC. LAND APPLICATION NO. 103 OF 2022

(Originating from the judgment and decree of the high court of Tanzania at Mbeya in Land Appeal No. 47 of 2022 in original Application No. 6 of 2021 of the District Land and Housing Tribunal for Mbeya.)

EDWARD ASEJENYE MALANGOAPPLICANT

VERSUS

JOHN'S ANDONGOLILE MWAKABELARESPONDENT

RULING

Date of last order: 23rd March, 2023

Date of ruling: 29th March, 2023

NGUNYALE, J.

In this application the applicant is seeking leave to appeal the Court of Appeal against the decision of this court in Land Appeal No. 47 of 2022 which was dismissed by Hon. Karayemaha, J. in which he sought to challenge the judgment and decree of the District Land and Housing Tribunal for Mbeya in Application No. 6 of 2021. The application is made under section 47(2) of the Land Disputes Courts Act [Cap 216 R: E 2019].



It is supported by an affidavit sworn by advocate Faraja Msuya and opposed by the respondent who filed a counter affidavit.

When the matter came on for hearing Mr. Faraja Msuya and Amani Angolwisye, both learned counsels represented the applicant and respondent respectively.

Mr. Msuya was the first to take the ball rolling, he adopted the contents of the affidavit and made submission that the proceedings have some irregularities as PW1 John Andongolile in his evidence claimed plot 2585 Block X Mwakibete area at the same time PW3 John Andongolile Mwakabela asserted ownership on plot 2595. Plot 2595 is the same claimed by the applicant. He said that these irregularities goes to the root of the proceedings.

Another issue put forward by the applicant is that a letter tendered in the tribunal was issued by the Land Office of Mbeya allowing the applicant to develop plot 2590. Although it was admitted without objection it was not reflected in the judgment.

The third reason is that there was non-joinder of the Commissioner for Land as the necessary party. He referred the court to the case of **Leonard Peter vs Joseph Mabao & 2 Others**, Land Case No. 4 of 2020 High Court of Tanzania at Mwanza. He added that the surveyor from the

Regional Office one James Matulo was called as the tribunal witness and the decision was based on his testimony, to his view the Commissioner for Land was to be joined because the said land surveyor testified in respect of another plot as the one owned by the applicant.

Mr. Msuya further submitted that the evidence of the respondent had contradiction which went to the root of the case. From the submission he prayed the application to be granted.

In reply Mr. Angolwisye prefaced his submission by adopting the contents of the affidavit filed by the respondent and submitted that the application for leave is in the discretion of the court which is exercised upon establishing arguable grounds. He stated that the complaint in the first ground is about error committed by the tribunal and not the High Court, on that basis the applicant was supposed to comply first with the direction of the High Court. He supported the argument by the case of **Attorney General & Another vs Fatuma Aman Karume**, Misc. Civil Appel No. 8 of 2021.

Regarding contradictory evidence he submitted that the judgment of the tribunal is clear that plot 2590 had no dispute. He further added that there was no need to add necessary party because all it depends with cause of action. He distinguished the case of **Leonard Peter** (supra) relied by the



applicant. He contended that there were no arguable issues raised by the applicant which need to be tested by the Court of Appeal.

In rejoinder Msuya submitted that the Court of Appeal has power to consider irregularity even if it was not raised by parties and that what was decided by the first appellate court was not enough to dispose of the whole appeal. He went on to state that the issue of non-joinder of necessary party is a point of law which can be considered at any stage, and that a decision which affect a person not party to the decision is inexecutable.

Upon considering the entire record and submissions made by the parties' learned counsels, the central issue for determination is whether this application for leave to appeal to the Court is merited. I will start determination by stating the law applicable in applications of this nature. It is the settled law that in applications for leave to appeal to the Court of Appeal the High Court is supposed to be satisfied that the intended appeal on *prima facie*, has some merits, whether factual or legal. In **Henry Julius Nyela Sauda Mtunguja Rajabu**, Civil Application No. 514/17 of 2020 (Unreported) the court stated;

'... leave to appeal from an order in civil proceedings will be granted where, prima facie, it appears to the court seized with that application that there are grounds of appeal which merit serious judicial consideration.'



Similarly, in **Wambele Mtumwa Shahame vs Asha Juma**, Civil Application No. 45 of 1999 the court held that;

'Unfortunately, it is not provided what factors are to be taken into account when considering whether or not to grant leave whether or not to appeal to this court. However, it is obvious that leave will only be granted if the intended appeal has some merits whether factual or legal.'

The courts have all along been wary to withhold leave to appeal to a superior court if there are grounds meriting the attention of that superior court.

I have taken the issues raised by the applicant particularly under paragraph 4 of the founding affidavit. The first issue is presence of irregularity in the Tribunal's proceedings. During submission Mr. Msuya submitted that PW1 claimed to be the owner of plot 2585, PW3 plot 2595 but it seems one person testified twice. In reply the issue was not specifically countered. I have considered the affidavit and submission, and found that the affidavit was scant as it did not disclose what irregularities the proceedings of the DLHT had. What Mr. Msuya said in his submission was statement from the bar which could not be taken as evidence to substantiate the irregularity complained of. It is now settled that as a matter of general principle, submissions by counsel, as opposed to an affidavit, are not evidence. In the case of **Registered Trustees of the**



Archdiocese of Dar es Salaam vs The Chairman, Bunju Village

Government & 11 Others, Civil Appeal No. 147 of 2006 that;

" . . submissions are not evidence. Submissions are generally meant to reflect the general features of a party's case. They are elaborations or explanations on evidence already tendered. They are expected to contain arguments on the applicable law. They are not intended to be a substitute for evidence.

The question whether John Andongolile who testified as PW1 and claimed plot 2585 or John Andongolile Mwakabela (PW3) who testified to own plot 2595 was a statement from the bar not reflected in the affidavit. The first ground is tested negatively.

Coming to the issue of joining necessary party, Mr. Msuya submitted that Commissioner for Land was a necessary party the point which was strongly resisted by the respondent. The law regarding joining of necessary party is that if a trial court notes that some issues raised in the pleadings call for addition of a party whose absence will lead to such issues of importance to remain unresolved, then the court cannot fold its arms and assume a role of an onlooker, a bystander or a passer-by only because parties are resistant or unwilling to apply to join a necessary party or parties. The court has a duty to take an active role by taking matters on itself and add such a party or parties to the proceedings in order to facilitate effective and complete adjudication and resolution of all issues



of controversy presented before it. Any decision reached is liable to be set aside on appeal and the said party ordered to be joined. see the case of **Tanzania Railways Corporation (TRC) vs GBP (T) Limited**, Civil Appeal No. 218 of 2020 (Unreported).

The question whether the Commissioner for Land is/was a necessary party cannot be determined at this stage because apart from being a point of law which can be raise at any stage of proceedings. Non-joinder of a necessary party in my view is a serious question that merits the attention of the Court of Appeal.

The third point as discerned in the affidavit is failure to consider and rule that evidence of the respondent had contradiction which went to the root of the matter. Without going in details of the submission of the parties it suffices to say that the settled law is that leave to appeal from land matter originating from the DLHT can be on point of law of facts. Apart from that the question of law on appeal includes also a question of failure to evaluate evidence as it was decided in the case of **National Microfinance Bank Ltd (NMB) vs Neema Akeyo**, Civil Appeal No. 511 of 2020 (unreported) in which the Court quoted with approval a Kenyan case of **Gatirau Peter Munya vs Dickson Mwenda Kithinji & Three**



Others [2014] eKLR, which defined the phrase "question of law" among other interpretations as follows:

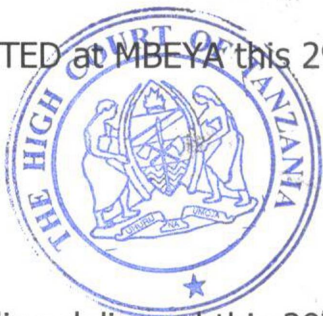
'a question on a conclusion arrived at by the Tribunal where there is failure to evaluate the evidence or if there is no evidence to support it or that it is so perverse or so illegal that no reasonable tribunal would arrive at it.'

[see also; **Jane Kasambala vs National Bank of Commerce Limited**, Civil Application No. 198/18 of 2021(Unreported)].

The question that the respondent's evidence had contradiction requires evaluation of evidence which as it can now be dealt by the Court of Appeal.

In the up shot, I find the application meritorious and hereby grant the applicant leave to appeal to the Court of Appeal against the High Court's decision in Land Appeal No. 47 of 2022. Costs shall abide the results of the intended appeal.

DATED at MBEYA this 29th day of March, 2023



D.P. Ngunyale
Judge

Ruling delivered this 29th day of March, 2023 in presence of both parties in person.

D.P. Ngunyale
Judge