

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF BUKOBA

AT BUKOBA

MISCELLANEOUS LAND APPLICATION NO. 107 OF 2022

(Arising from Misc. Land Applications No. 33/2022 and No. 15/2022 and Land Appeal No. 53/2019 High Court of Tanzania at Bukoba Originating from Land Application No. 139/2018 District Land and Housing Tribunal for Kagera at Bukoba)

SIMON KAJUGUSI BANDAULA..... APPLICANT

VERSUS

1. STEWATH PETRO

2. MERNA EZERA

3. KOKUSIMA LAURIAN

..... RESPONDENTS

RULING

21st and 28th April, 2023

BANZI, J.:

In February, 2022, the Applicant after being dissatisfied with the decision of this court in Land Case Appeal No. 53 of 2019 filed Application for extension of time within which he can apply for leave to appeal to the Court of Appeal. Unfortunately, his application was dismissed with costs by Hon. Kilekamajenga, J for being drawn by unqualified person contrary to sections 42, 43 and 44 of the Advocates Act. A month later, the Applicant returned to this court with the same prayers via Application No. 33 of 2022. However, its competence was challenged through preliminary objection

raised by counsel for the Respondents on two points; one that, this court is not competent to act upon the Application after had already dismissed the same on 28th February, 2022 vide Miscellaneous Land Application No. 15 of 2022 and two that, the Application is omnibus seeking for the two distinct reliefs. Having heard both parties, this Court (Hon. Ngigwana J) upheld the first point and dismissed the Application with costs. Aggrieved with that decision, the Applicant lodged notice of appeal and as required by law, he preferred this application under sections 47(2) (4) and 48 (2) of the Land Disputes Courts Act [Cap. 216 R.E. 2019] read together with section 5 (1) (c) of the Appellate Jurisdiction Act [Cap. 141 R.E. 2019] ("the AJA") and rule 45 (a) of the Tanzania Court of Appeal Rules, 2009 seeking leave to appeal to the Court of Appeal. The application is supported by an affidavit of the Applicant. The Respondents opposed the Application through the counter affidavit of Mr. Lameck John Erasto, learned counsel.

At the hearing, the Applicant appeared in person, unrepresented whereas, Mr. Lameck John Erasto, learned counsel appeared for the Respondents. By consent, the Application was argued by way of written submissions and both sides complied with scheduling order.

The Applicant began his submission by adopting his affidavit which contains seven contentious issues intended to be placed before the Court of Appeal for determination. Explaining further, the Applicant challenged the decision of this court for upholding the first point of preliminary objection which was not the point of law. He further submitted that, it was an error for this court to raise and determine the issue of *functus officio* on the matter which was not determined on merit and without giving parties an opportunity to be heard on that issue.

It was also his contention that, upon dismissal of his Application No. 15 of 2022, he had no room of appeal to the Court of Appeal contrary to what had been held by Hon. Ngigwana J because, according to him, such dismissal order was as good as struck out order as the matter was not finally determined on merit. To support his points, he cited a number of reported and unreported decisions of the Court of Appeal and High Court including the case of **Musangang'andwa v. Chief Japhet Wanzagi and Eight Others** [2006] TLR 351, **Maria Chrysostom Lwekamwa v. Placid Richard Lwekamwa and Another**, Civil Application No. 549/17 of 2019 CAT, **Mary Agnes Mpelumbe v. Shekha Nasser Hamad**, Civil Appeal No. 136 of 2021 CAT, **Ngoni-Matengo Co-operative Marketing Union Ltd v. Alimohamed Osman** [1959] EA 577, **Tella Bupamba v. Elisha Abel**

Shija, Civil Application No. 438/08 of 2017 CAT, **Mathias Rweyemamu v. General Manager KCU (1990) Ltd**, Civil Application No. 72/4 of 2021 CAT, **Masolwa D. Masalu v. The Attorney General and Another**, Civil Appeal No. 21 of 2017 CAT, **Tanzania Standard (Newspaper) Limited v. The Honourable Minister for Labour Employment and Youth and Two Others**, Civil Appeal No. 46 of 2016 CAT, **Nurbhai N. Rattansi v. Ministry of Water Construction Energy Land and Environment and Another** [2005] TLR 220 just to mention a few. In that regard, he prayed that the Application be granted with costs as there are legal points worth the consideration of the Court of Appeal.

In his reply Mr. Erasto submitted that, the dismissal order by Hon. Kilekamajenga, J was not interlocutory order because it determined the rights of the parties to its finality and thus, the Applicant missed the track by filing a fresh Application instead of lodging an appeal against the dismissal order to the Court of Appeal. He added that, the fresh Application was wrongly filed because it was outside the jurisdiction of the High Court to set aside or re-determine the same matter which was already determined by the same court. He supported his arguments by citing unreported decisions of the Court of Appeal in the cases of **Samuel Kobelo Muhulo v. National Housing Corporation**, Civil Application No. 442/17 of 2018, **Abdallah Ally**

Selemani t/a Ottawa Enterprises (1987) v. Tabata Petrol Station Co. Ltd and Another, Civil Appeal No. 89 of 2017 and **Maria Chrysostom Lwekamwa v. Placid Richard Lwekamwa and Another** (supra). He concluded his submission by citing the cases of **Godwin Lyaki and Another v. Ardhi University**, Civil Application No. 491/01 of 2021 CAT (unreported) and **Sango Bay Estates Ltd and Others v. Dresdner Bank** [1971] EA 17 and urged this court to dismiss the application with costs for want of *prima facie* grounds of appeal which merit serious judicial consideration.

In his rejoinder, the Applicant reiterated that, the dismissal order by Hon. Kilekamajenga, J did not determine the matter to its finality, thus, it was proper for him to file the fresh application. He further insisted that, the matter at hand qualified to be granted leave as there are grounds of appeal which merit serious judicial consideration as it was stated in a number of cases including **Nurbhai N. Rattansi v. Ministry of Water Construction Energy Land and Environment and Another** (supra), **Harban Haji Mosi and Another v. Omari Hilal Seif and Another** [2001] TLR 409 and **Sango Bay Estates Ltd and Others v. Dresdner Bank** (supra). Thus, he prayed for the application to be granted.

Having carefully considered the record, affidavit, counter affidavit and submissions by both sides, the central issue for determination is whether the present Application raises arguable issue(s) meriting the appeal.

According to section 5 (1) (c) of the AJA, an appeal to the Court of Appeal is not automatic right but it requires leave of the High Court or the Court of Appeal for before the same is lodged. But this section does not provide explicit factors to be taken into account in deciding whether to grant leave or not. However, there are various authorities which laid down some factors to be considered such as existence of legal point worth the consideration of the Court of Appeal, existence of arguable issue or *prima facie* ground meriting the appeal, whether the proceedings as a whole reveal disturbing feature as to require the guidance of the Court of Appeal just to mention a few. See the cases of **Nurbhai N. Rattansi v. Ministry of Water Construction Energy Land and Environment and Another**, (supra), **British Broadcasting Corporation v. Eric Sikujua Ng'maryo**, Civil Application No. 133 of 2004 CAT (unreported), **Harban Haji Mosi and Another v. Omari Hilal Seif and Another** (supra), **Sango Bay Estates Ltd and Others v. Dresdner Bank** (supra) and **Godwin Lyaki and Another v. Ardhi University** (supra).

Moreover, it is also established principle of law that, in any application for leave, the Court is not expected to determine the merits or otherwise of the substantive issues before the appeal itself is heard. This principle was stated in the case of **The Regional Manager TANROADS Lindi v. DB Shapriya and Company Ltd**, Civil Application No. 29 of 2012 CAT (unreported) where it was held that;

"It is now settled that a Court hearing an application should restrain from considering substantive issues that are to be dealt with by the appellate Court. This is so in order to avoid making decisions on substantive issues before the appeal itself is heard."

The same position was also stated in the cases of **Murtaza Mohamed Viran v. Mehboob Hassanali Versi**, Civil Application No. 168 of 2014 CAT (unreported) and **Victoria Real Estate Development Limited v. Tanzania Investment Bank and Three Others**, Civil Application No. 225 of 2014 CAT (unreported) In another case of **Jireys Nestory Mutalemwa v. Ngorongoro Conservation Area Authority**, Civil Application No. 154 of 2016 CAT (unreported) it was emphasised 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 brushed away the requirement to show that the appeal stands better chances of success as 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.”

Reverting to the matter at hand, looking closely at paragraph 6 (a) to (g) of the affidavit, the Applicant has raised various issues including denial of right to be heard on the issue of *functus officio*. Having perused the submissions of both parties in Miscellaneous Land Application No. 33 of 2022, it is apparent that, parties did not specifically submit in detail on the issue of *functus officio*. This complaint concerning denial of right to be heard raises legal point worth the consideration by the Court of Appeal. Apart from that, from submissions of both sides, there is rival argument between the Applicant and counsel for the Respondents concerning the dismissal order of Hon. Kilekamajenga, J which was the basis of the objection raised in Application before Hon. Ngigwana, J. The contentious issue between the parties is whether or not the order in question determined the matter on merit. This also rises arguable issue for judicial consideration by the Court of Appeal. In that regard, it is the considered view of this court that, the present Application raises arguable issue(s) meriting the appeal.

That being said, I grant the application by granting leave to the Applicant to appeal to the Court of Appeal of Tanzania and each party shall bear its own costs.

It is accordingly ordered.



I. K. BANZI
JUDGE
28/04/2023

Delivered this 28th day of April, 2023 in the presence of the Applicant in person and Mr. Lameck John Erasto, learned counsel for the Respondents.



I. K. BANZI
JUDGE
28/04/2023