

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE SUB - REGISTRY OF MWANZA)**

AT MWANZA

MISCELLANEOUS LAND APPLICATION NO. 23 OF 2022

LUDOVICK MICHAEL MASAWE -----APPLICANT

VERSUS

SAMSON HERMAN-----RESPONDENT

RULING

May 2nd and 9th, 2023

Morris, J

Mr. Ludovick Michael Masawe, has preferred this application moving the Court to grant him leave to appeal to the Court of Appeal. The Application is lodged vide the Chamber Summons under rule 45(a) of ***the Tanzania Court of Appeal Rules***, 2009; section 5(1)(c) of ***the Appellate Jurisdiction Act***, Cap 141 [R.E. 2019]; and section 47 of ***Land Court Disputes Act***, Cap 216 [R.E. 2019]. The affidavit sworn by Ludovick Michael Masawe supports the application. The respondent, however, objects the application vide his affidavit in contest. He also filed a notice of preliminary objection; which objection he, however, successfully prayed to and did abandon later.



Both parties appeared for hearing of this application in person and unrepresented. The applicant submitted in support of his application in brief. He stated that, he is applying for leave on his mission to appeal to the Court of Appeal because he is dissatisfied by the decision of this court. He argued further that, documents which otherwise support his claim and/or prove his case, especially sale agreement and letter of offer, were stolen and/or mutilated from the court record. Thus, he submitted that his intention is to get an opportunity to tender them during the prospective court proceedings and ultimately prove his ownership of the suit land.

On his part, the respondent naturally submitted in opposition. He was somewhat curt that the leave should not be granted to the applicant. According to him, records alleged by the applicant as having been stolen were analyzed by the appropriate court after loss reports were tendered in lieu thereof. He, thus, submitted further that the proof of ownership of the suit property was completely discharged by parties. The respondent maintained that the applicant has nothing left to prove his title over the subject property. To conclude, he argued that his opponent keeps lying now and again in a plot to get an unjust gain of the suit land.

From the above rivalry submissions, the Court is, thus, required to determine whether or not the applicant meets the threshold of the law necessary in granting leave to appeal to the Court of Appeal. To determine this issue, I am unassumingly guided by the provisions of the law under which the application has been made; and principles in case law. The cases in my mind include, ***Suleiman Nchambi v Sunny Auto Works***, Misc. Civil Application No.89 of 2019; and ***Cosmas Anton Itungulu v Timoth M. Irunde***, Misc. Land Application No. 69 of 2021 (both unreported).

Section 5(1)(c) of ***the Appellate Jurisdiction Act***, (*supra*) provides that:

"In civil proceedings, except where any other written law for the time being in force provides otherwise, an appeal shall lie to the Court of Appeal—

(a)

(b)

(c) *with the leave of the High Court or of the Court of Appeal, against every other decree, order, judgment, decision or finding of the High Court. "*

Principally, the quoted section does not specify factors to be considered by courts in granting or disallowing the application for leave to appeal to the Court of Appeal. However, court precedents do. For instance, in ***British Broadcasting Corporation v Erick Sikujua Ng'maryo***, Civil Application No. 138 of 2004 (unreported) requisite conditions were firmly set. Such prerequisites are contained in the excerpt below:

"... leave to appeal is not automatic. It is within the discretion of the court to grant or refuse leave. The discretion must, however, be judiciously exercised and on the materials before the court...leave to appeal will be granted where the grounds of appeal raise issues of general importance or a novel point of law or where the grounds show a prima facie or arguable appeal...However, where the grounds of appeal are frivolous, vexatious or useless or hypothetical, no leave will be granted"(emphasis added).

In view of the foregoing pronouncement, leave of this court to appeal is to be granted on sound legal bases. Reading the affidavit of the applicant I find that, all that the applicant does, is to narrate historical account of events and to supply copies of previous decisions regarding

this matter. Paragraph 5 thereof is even more interesting. The same reads, I quote:

"5. Kwamba Muombaji **anastahili kibali** cha kufungua Rufaa yake mbele ya Mahakama ya Rufaa ya Tanzania ndani ya siku thelathini (30) kuanzia (tarehe) **21-02-2022** kama **ilivyoamriwa** na Mahakama ya Rufaa ya Tanzania (katika) *Shauri la Madai Maombi Na. 259/2021*" (bolding is rendered for emphasis, as explained later).

From the above paragraph, two aspects call for the honest dense analysis here. **One**, the applicant is portraying that leave is a matter or right. That is, so long as he is intending to appeal to the Court of Appeal, he must be granted leave by this court. This approach is, to me, wrong. The requirement of leave was not legislated for cosmetic purposes. Not every person who wishfully wants to appeal against the decision of this court is given a *carte blanche* by the law to do so. The case of **BBC v Erick Sikujua Ng'maryo** (*supra*) is followed.

Amongst the validations of the foregoing restriction is to assure finality in litigation. That is, litigants should be expected to consume justice in its exact taste: bitter, sour, weird or sweet. Lest, court rooms change into battle rooms of endless disputes. I subscribe further to judicial

holding in ***Registered Trustees of CCM v Mohamed Ibrahim Versi and Sons & Another*** CA Civil Appeal No 16 of 2008; and ***Umoja Garage v NBC Holding Corporation***, CA Civil Appeal No. 3 of 2003 (both unreported).

Two, the applicant, by the deposition quoted above is labouring in the impression that the Court of Appeal, ordered this court to grant him the envisioned leave. I have taken liberty to read the ruling of the Court of Appeal (Hon. Fikirini, JA) in Civil Application No. 259/08/2021 involving the parties herein. I have not found, even by an ambitious imagination, pronouncement by the said court close to ordering the High Court to grant leave to the applicant. To the contrary, it was the applicant who was ordered to file the notice of appeal within thirty (30) days of pronouncement of the subject ruling.

Hence, as pointed above, the applicant is not exhibiting; in his affidavit, the justification for this court to grant him leave. That is, he raises no ground to support/warrant leave to be granted to him by this court. He should have expressly accounted for what he considers as necessary matters to be raised at and/or for the attention of the Court of Appeal.



However, during hearing of the application, the applicant submitted and relied on documents which he alleged to had been mutilated from files (sale agreement and letter of offer). I think this tactic is unhelpful to him either. Firstly, the said allegations, do not feature in the affidavit. Secondly, apart from the fact that he is not statutorily allowed to tender additional documents in the Court of Appeal, the allegations are matters of facts.

The foregoing assertions, in my considered opinion, should have been deposed by him in the affidavit. In law, submissions are not evidence. See, for instance, the cases of the ***Registered trustees of Archdiocese of Dares Salaam v The Chairman, Bunju village Government***, Civil Appeal No.147 of 2006; and ***Ison BPO Tanzania Limited v Mohamed Aslant***, CoA Civil Application No. 367/18 of 2021 (both unreported). That is, a matter of facts cannot be proved in the course of making submissions in court.

In the circumstances of this matter, I am satisfied that no any fault in the judgement of this court has been stated for the attention of Court of Appeal. Therefore, the application is devoid of any merit. I dismiss it. Each party is ordered to shoulder own costs hereof.



It is so ordered. Right of appeal fully explained to the parties.



C.K.K. Morris

Judge

May 9th, 2023

Ruling is delivered this 9th day of May 2023 in the presence of Ludovick Michael Masawe and Samson Herman, applicant and respondent respectively.

C.K.K. Morris

Judge

May 9th, 2023