

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
LAND DIVISION
IRINGA REGISTRY
AT IRINGA**

MISCELLANEOUS LAND APPLICATION NO. 34 OF 2022

(Arising from Land Appeal No. 11 of 2022 in the High Court of Tanzania Land Division at Iringa and Originating from Application No. 16 of 2018 in the District Land and Housing Tribunal for Njombe district at Njombe)

NICHOLAUS THOMAS KIDUKO.....APPLICANT

VERSUS

KISSA KIANZIO SANGA.....RESPONDENT

RULING

Date of Last Order: 03/05/2023

Date of Ruling: 12/05/2023

A.E. Mwipopo, J.

Kissa Kianzio Sanga, the respondent herein, successfully sued Nicholas Thomas Kiduko, the applicant herein, in the Njombe District Land and Housing Tribunal for the dispute over the ownership of business kiosk No. 282 located at Mkambako Main Market in Makambako Town Council. It was deposed in the application that the applicant is claiming ownership of the suit premises while he rented it from the respondent. The trial Tribunal

heard the evidence from both parties and decided to favour the respondent. It declared that the kiosk was allocated to the late Kianzio Vahomile Sanga, and the respondent, as the administrator of the deceased estates, has the right to administer it. The trial Tribunal ordered the applicant to pay 4,000,000/= shillings as specific damages and 5,000,000/= as general damages to the respondent, to vacate from the kiosk No. 282 and hand it to the respondent, and to pay monthly rent from 01.08.2016 to the date of exiting from the kiosk.

The trial Tribunal's decision aggrieved the applicant, and he appealed to this Court. This Court dismissed the appeal for want of merits. The decision did not satisfy the applicant. He filed a notice of appeal, applied for a copy of the decision, decree and proceedings, and filed the present application for leave to appeal to the Court of Appeal. The application is made by chamber summons supported by the affidavit sworn by Dr. Ashery Utamwa, advocate for the applicant. The respondent filed the counter affidavit in opposition.

On the hearing date, both parties were represented by advocates. Dr. Ashery Utamwa, the advocate, appeared for the applicant, whereas Mr.

Mhagama, the advocate, appeared for the respondent. The matter was argued through written submissions.

Dr. Utamwa submitted that the principle in granting leave to appeal is underlined in the landmark case of **British Broadcasting Corporation versus Eric Sikujua Ng'maryo**, Civil Application No. 138 of 2004, Court of Appeal of Tanzania at Dar Es Salaam, (unreported), where it was held on page 7 that:-

"As a general principle, 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".

In the case of **Said Ramadhani Mnyanga vs. Abdallah Salehe [1996] T.L.R. 74**, the Court of Appeal highlighted that:-

"For leave to appeal to be granted, the applicant must demonstrate that there are serious and contentious issues of law or fact fit for consideration of appeal."

There are serious and contentious issues of general importance in Land Appeal No.11 of 2022 in this Court and Application No. 16 of 2018 in the District Land and Housing Tribunal fit for consideration in the intended

appeal. The interference of the Court of Appeal is required to determine them.

These issues are as follows:-

- i. That, the Appellate Court erred in law and fact by failing to reverse the decision of the trial Tribunal which was based on weak evidence.*
- ii. That, the Appellate Court erred in law and fact by failing to quash the decision of the trial Tribunal after finding out that one assessor gave his opinion without attending every hearing session.*
- iii. That, the Appellate Court erred in law and fact by disagreeing with the appellant's contention that the Makambako Town Council was a necessary part of this dispute.*

The applicant submitted in support of the 1st intended ground of appeal to the Court of Appeal that the party whose evidence is heavier than the other is the one who is supposed to win the case. The position was stated in the case of **Hemed Said vs. Mohamed Mbilu [1984] T.L.R. 113**. The respondent's evidence was very weak during the trial as the same was hearsay and secondary evidence. Besides, the respondent's evidence identified the suit property with different numbers. Thus, their testimonies still needed to collaborate.

On the second intended ground of appeal, it was submitted that the appellate Court did not quash the decision of the trial Tribunal despite the failure of the proceedings of the trial Tribunal to show the names of assessors

or any clue that the trial was conducted with the aid of assessors. The Chairman acknowledged on page 19 of typed proceedings that on 18.11.2020, one assessor was absent during the hearing. The records show only one assessor gave an opinion without attending every day of the trial, which is legally fatal. Section 23 of the Land Dispute Court Act, Cap. 216 R.E. 2019 requires each assessor to participate fully in the tribunal's decision-making. Participating in the decision making involves, among other things, attending each and every hearing date to get the complete picture of the trial and exercising the right to ask questions for elaborative purposes. On 18/11/2020, the trade officer of the Makambako Town Council testified, and the trial was conducted with only one assessor whose name does not appear in the corum. The Chairman was wrong to proceed with the hearing on 18/11/2020 while one assessor was absent. Thus, leave is sought for the Court of Appeal to cure this issue.

On the 3rd intended ground of appeal, it was submitted that the significant issue was the double allocation of the disputed property, a business kiosk. The suit property belongs to neither party to this suit. The lawful owner of the kiosk is the Makambako Town Council, which was supposed to be joined in this suit by the respondent as a necessary party. Non- Joinder of the Makambako Town Council is fatal because this party was necessary to solve the issue of allocation of the suit property since each party claims that the suit property was allocated to them. If the verdict of this case turns out that the Makambako Town Council double allocated the suit property, the execution of that verdict will only be possible with Makambako Town Council being a party. This issue is of general importance to be

determined by the Court of Appeal. There is a prima facie appeal to be argued to the Court of Appeal against the decision of this Court in Land Appeal No. 11 of 2022.

In reply, advocate Mhagama submitted on the 1st ground of the intended appeal that the respondent's evidence was based on hearsay and secondary evidence. The ground has no legal issue. The law allows the secondary evidence to be admissible subject to some condition established under sections 67(1) to (5) of The Evidence Act, Cap. 6 R.E. 2019. The evidence was based on documentary evidence since there was a contract and a letter from the Director of Makambako Town Council showing the respondent as his tenant. The applicant's claim that the decision was based on the hearsay evidence has no legal issue for the Court of Appeal to interfere.

Regarding the second ground of the intended appeal, it was the respondent's submission that the issue of one assessor providing his opinion without attending every hearing session has already been determined by the High Court in the appeal. In his appeal at the High Court, the applicant did not raise this ground to give the respondent a right to reply. The applicant introduced this ground in his submission rather than in his petition of appeal.

Thus, this cannot be among the grounds for appeal to the intended appeal since it was not among the grounds for appeal in the High Court.

Regarding the third ground of the intended appeal, it was the respondent's submission that the issue of double allocation needed to be raised at the trial Court for the Makambako Town Council to be joined as a necessary party. The trade officer of the Makambako Town Council testified that the Town Council has only one contract with the respondent and denied having any agreement with the appellant. If the appellant believed to have rented the kiosk from Makambako Town Council, he was supposed to file a third-party notice so that the Makambako Town Council would come and defend their case. In the Njombe District Land and Housing Tribunal records, the appellant was a tenant of the respondent and not of Makambako Town Council. But, the appellant refused to pay rent to the respondent on the claim that he owns the kiosk. The applicant should have shown legal issues to be discussed by the Court of appeal.

In his rejoinder, the applicant's counsel reiterated his submission in chief.

Having heard the rival submissions by the parties, the issue to be determined herein is whether this application has merit.

Under section 47 (2) of the Land Disputes Courts Act, Cap. 216 R.E. 2019, a person aggrieved by the decision of the High Court in the exercise of its appellate jurisdiction may, with leave of the High Court or Court of Appeal, appeal to the Court of Appeal. The aggrieved person may appeal to the Court of Appeal on both grounds of facts and law when the case originates from District Land and Housing Tribunal. The law is settled in the application for leave to appeal to the Court of Appeal that leave to appeal may be granted where there is a point of law, the intended appeal stands a good chance of success, there is a point of public importance to be determined by the Court of Appeal, or where the grounds show a prima facie or arguable appeal.

In the case of **Kadili Zahoro (Administrator of the Estate of the late Bahati Ramadhani Mponda) and Another vs. Mwanahawa Selemani**, Civil Application No. 137/ 01 of 2019, (unreported), on page 6, the Court of Appeal referred its previous decision in the case of **Harban Haji Mosi and Another versus Omar Hilal Seif and Another**, Civil Reference No. 19 of 1997, (unreported), where it held that:-

"Leave is granted where the proposed appeal stands reasonable chances of success or where, but not necessarily, the proceedings reveal such disturbing features as to require the guidance of the Court of Appeal. Therefore, the provision's purpose is to spare the Court the

spectra of unmeriting matter and enable it to give adequate attention to cases of true public importance."

The same principle was reiterated in the case of **British Broadcasting Corporation vs. Eric Sikujua Ng'maryo**, (supra), where it was stated that 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. Leave will not be granted where the grounds of appeal are frivolous, vexatious, useless or hypothetical.

The applicant raised three grounds of intended appeal to be determined by the Court of Appeal. The first ground is that the appellate Court (High Court) erred by failing to reverse the decision of the trial Tribunal which was based on weak evidence. The applicant's counsel submitted that the respondent's evidence was found in hearsay and secondary evidence, and the respondent's witnesses identified the suit property with different numbers. Thus, their evidence needed to collaborate. The respondent's contention on this ground was that his evidence was based on documentary evidence since there was a contract and a letter from the Director from Makambako Town Council, which showed his tenant as the respondent. Looking at this ground of intended appeal, I'm satisfied that it is arguable. It

is not frivolous, vexatious, useless or hypothetical. The same could be ground for an intended appeal to the Court of Appeal.

Regarding the second ground of intended appeal, the applicant said that after finding out one assessor gave his opinion without attending every hearing session, the appellate Court was supposed to quash the decision of the trial tribunal. The respondent replied that the first appellate Court had already resolved the issue and that it was not among the grounds for appeal. I agree with the respondent that the issue of the involvement of assessors during the trial was not among the grounds for appeal raised before this Court in the appeal. However, in the intended appeal, the applicant is seeking to challenge the conclusion of this Court after its findings that one assessor gave an opinion without attending each and every hearing. The applicant is not raising the issue of the involvement of assessors during the trial Tribunal. Instead, he is challenging the conclusion of this Court resulting from the findings. The same is arguable ground.

Turning to the last ground of the intended appeal, the applicant averred that non-Joinder of the Makambako Town Council is fatal because the Council was necessary to solve the allocation of the suit property since each party claims that the suit property was allocated to them by the Council. On the

other side, the respondent believed that the issue of double allocation should have been raised at the trial Tribunal for the Makambako Town Council to be joined as a necessary party. The trade officer of the Makambako Town Council testified to having only one contract with the respondent, and the Council do not have any contract with the applicant. The applicant was supposed to file a third-party notice so that the Makambako Town Council would be joined if he believed that the Council was a necessary party.

This issue also appears arguable. It is not frivolous, vexatious, useless or hypothetical. In this issue, the applicant intends to move the Court of Appeal to determine whether the owner of the suit premises was a necessary party. The applicant is not satisfied with the decision of this Court on appeal that Makambako Town Council was not a necessary party. He believed that there was sufficient evidence to prove that the Town Council was a necessary party in the suit. Thus, the issue qualifies to be determined by the Court of Appeal in the intended appeal.

Generally, looking at the present application, the applicant has filed a notice of appeal and applied for a copy of the judgment, proceedings and decree within time. The applicant has elaborated on the ground of the intended appeal. The applicant's grounds of appeal intended to be referred

to the Court of Appeal appears arguable. These grounds of intended appeal to the Court of Appeal are sufficient for this Court to grant the leave to appeal.

For that reason, the application is allowed. The leave to appeal to the Court of Appeal is granted on the three intended grounds of appeal to be referred to the Court of Appeal found in the applicant's affidavit. Each party to take care of his own cost. It is so ordered accordingly.



A handwritten signature in blue ink, appearing to read "A. E. Mwiipo", is written over a horizontal line.

A. E. MWIPOPO

JUDGE

12/05/2023