

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

MISC. LAND APPLICATION NO. 88 OF 2022

(From Land Appeal No. 48 of 2022 of the High Court of Tanzania at Mbeya before Hon. Ngunyale, J. originating from Application No. 38 of 2018 of the District Land and Housing Tribunal for Mbeya)

PARTSON SHUNGUAPPLICANT

VERSUS

CASTONE JIMSON.....1ST RESPONDENT

GOD CHRISTOPHER MPANGALA2ND RESPONDENT

TUMAINI MPANGALA3RD RESPONDENT

MUNYA MBUYA4TH RESPONDENT

RULING

Date of last Order: 3/5/2023

Date of Judgment: 30/5/2023

Nongwa, J.

In the District Land and Housing Tribunal for Mbeya at Mbeya through Application No. 38 of 2018, the applicant instituted a suit for trespass against the respondent of undescribed land located at Kalobe within the City and Region of Mbeya. He was unsuccessful on ground that he failed to prove his claim.

He appealed to this court via Land Appeal No. 48 of 2022 which was dismissed for want of merits.

Unsatisfied and determined to assail the judgment on appeal, the applicant per the record has filed notice of appeal to the Court of Appeal, of which an appeal thereto is not automatic, it has to be preceded by leave of this court or the Court of Appeal under section 47(2) of the Land Disputes Courts Act [Cap 216 R: E 2019] (the LDCA), hence this application.

Efforts to serve summons to the respondent was not successful and the substituted way of summons, by publication was ordered. The summons was then published on highly circulated newspaper *Nipashe* issue of Friday 31st March, 2023, however there was no response to the call, hence hearing of the application ex parte. At the hearing, the applicant prayed that the application be disposed by way of written submission, the prayer was granted.

Praying to adopt the contents of his affidavit to form part and parcel of his submission, the applicant contended that he has been aggrieved by the decision of the High Court, hence this Application. That, it is the settled position of the Law that, the right to be granted with the leave to Appeal to the Court of appeal in our jurisdiction is not automatic, it is conditional upon Applicant showing that the intended appeal has some merits whether facts or legal or that there are grounds of Appeal which merit

serious judicial consideration. The applicant submitted further that being a settled position of the law that, the parties are bound by their pleadings, the consequence of failure to file written statement of defence, is the case to be heard ex parte. The 1st Respondent at the trial Tribunal gave evidence without filling Written statement of defense on Amended application and that as an intended ground of appeal, it creates a sufficient arguable point for determination before the Court of Appeal.

Secondly, the applicant referred this court to paragraph 7 (b) of the applicant's affidavit, which emanates from the holding of the High Court at page eight of the judgement, where the Court of Appeal is invited to determine on whether, the High Court properly interpreted the requirement of the description of the suit Land. Citing the decision in **Pelesi Pumzi Mbwilo and 4 Others versus Simon Charles Sayota Land Appeal No. 82 of 2021** (Unreported) at page 13, the applicant submitted that the description of the suit land was not properly interpreted hence raising arguable point as interpretation of the requirement of the description of the suit land, thus he be allowed to file his Appeal before the Court of Appeal.

I carefully considered the submission from the applicant and after going through the affidavit, the only issue to determine in this application

is whether the applicant has managed to satisfy this court to be granted leave to appeal to the Court of Appeal.

It has been stated in number of decided cases by this court and the Court of Appeal that, in an application for leave to appeal to the Court of Appeal the court is required to be satisfied that the grounds of appeal intended to be taken to the Court of Appeal show prima facie case or arguable appeal before granting the application.

This was the position in the case of **British Broadcasting Corporation V. Eric Sikujua Ngyimaryo**, Civil Application No. 138 of 2004, CAT at Dar es salaam (unreported) cited with approval in the case of **Hamis Mdida and Another V. The Registered Trustees of Islamic Foundation**, CAT at Tabora, Civil Appeal No. 232 of 2018, (unreported) where the Court of Appeal stated that;

"As a matter of 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 case or arguable appeal."

Under section 47(2) of the Land Disputes Courts Act, leave to appeal is granted on a point of law and facts. This position was emphasized in the case of **Henry Julius Nyela vs Sauda Mtunguja Rajabu**, Civil Application No. 514/17 of 2020, CAT at Dar es Salaam (Unreported) where

the court held that it is conditional upon that person showing that the intended appeal has some merit whether factual or legal or that there are grounds of appeal which merit serious judicial consideration.

It is noted as rightly submitted by the applicant 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* case or arguable appeal.

In **Airtel Tanzania Limited vs KMJ Telecommunications Limited**, Civil Application No 393/16 of 2021, CAT at Dar es Salaam (Unreported) the court put it clear that;

'... a determination of an application for leave to appeal to the Court should not be mistaken for a rehearing of the matter from whose decision leave is sought in considering an application for leave to appeal to the Court, the High Court is precluded, in the most unlikely event from reducing itself into a mere conduit pipe which lacks safety valves such as, existence of an arguable legal point, a point of general importance or whether there is a prima facie arguable appeal.'

The significance of the above is that the court hearing leave must abstain itself from determining merits of the proposed grounds or points. The other point is that the court should not sit back as a watcher, it has

to make some deliberation on the points so as to extract out if *prima facie* arguable issue is made out fit for determination on appeal.

In the instance application, applicant has raised two issues for deliberation of the court as per paragraph 7 of the affidavit. **One;** whether a party who fails to file written statement of defence to amended application has a right of hearing and **two;** whether the requirement to describe the land in dispute was properly interpreted by the court.

The first point concerns filing pleadings in the tribunal which is the basis of the case of each party in any court where pleadings is applicable. Should anything go against the pleadings, the court is precluded from considering it. In **The Registered Trustees of Islamic Propagation Centre (IPC) vs The Registered Trustees of Thaaqib Islamic Centre (TIC)**, Civil Appeal No. 2 of 2020, CAT at Mwanza (Unreported) where the court held that;

'At this point, we are constrained to recall the time-honoured principle of law that parties are bound by their own pleadings and that any evidence produced by any of the parties which does not support the pleaded facts or is at variance with the pleaded facts must be ignored.'

In the questioned judgment, the court did not discuss the effect of failure to file Written Statement of Defence to amended application rather by way of introduction, they noted that the first respondent did not file Written Statement of Defence but testified in the tribunal. Be that it may the question that arises is whether a party to a case who has not filed defence to the amended pleading is allowed to adduce evidence against the claim. This in my view, gauging from the rule of pleadings which I have just discussed above, as stated by the applicant raises an important and arguable issue which need to be addressed by the court.

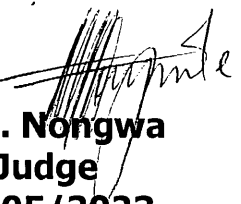
Regarding description of the suit land, in its judgment the court had a glance at regulation 3(2)(b) of the Land Disputes Court (The District Land and Housing Tribunal G.N 174 of 2003 and cited the case of **Martin Fredrick Rajab vs Ilemela Municipal Council & Another, Civil Appeal No. 197 of 2019, CAT at Mwanza (Unreported)** to the effect of failure to describe the suit property by size or neighbouring owners of pieces of land among others in the plaint was improper. To convince the court to find the issue arguable, the applicant has cited the case of **Pelezi Pumzi Mbwilo & Others vs Simon Charles Sayota, Land Appeal No. 82 of 2021** in which mentioning the place where the suit land is located was held to be sufficient for identification of the suit premises. The court's

power in this application is limited to only being convinced that there is a real point warranting a good appeal. Whether the decision relied by the court in the impugned decision is correct or what was held in the case of **Pelezi Pumzi Mbwilo** (supra) is the matter not to be decided by this court, rather Court of appeal which will look on the circumstance in the impugned decision and that decision relied by the applicant. Moreover, this court is not ceased with all records to make informed decision for obvious reason that it is the domain of the court hearing the appeal. I also find the second point has been established.

In view of the above, I find that the applicant has managed to established arguable issues. The application is hereby granted.

Dated and delivered at Mbeya this 30th May, 2023




V. M. Nongwa
Judge
30/05/2023