

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(MOSHI SUB REGISTRY)
AT MOSHI**

MISCELLANEOUS LAND APPLICATION NO. 46 OF 2022

(C/F Land Appeal No. 13/2022, High Court of Tanzania, Moshi District Registry;
Original Application No. 139 of 2020, District Land and housing Tribunal of Moshi)

WILLIE J.O.E. MREMA.....APPLICANT
VERSUS
ABDILLAHI ALLY MSAKI.....RESPONDENT

RULING

Last Order: 27th April, 2023
Ruling: 30th May 2023

MASABO, J.: -

Aggrieved by a judgment of this court in Land Appeal No. 13 of 2022, the applicant intends to appeal to the apex court, the Court of Appeal of Tanzania. To get access to the Court, he came back to this court with the present application seeking for leave to appeal. His application is filed under section 5(1)(c) of the Appellate Jurisdiction, Act Cap 141 RE 2019, read together with Rule 45(a) of the Tanzania Court of Appeal Rules, 2009 and Section 47(1) of the Land Disputes Courts Act, Cap 216 RE 2019. He also prayed to be awarded costs. Bracing the application is the affidavit he personally deponed on 15th September 2022 in which he has narrated the background to the application and the grounds of appeal he intends to raise if the leave is granted. The respondent countered the application through a counter affidavit he personally deponed.

At per the request of the parties, hearing proceeded in writing. The applicant was unrepresented while the respondent was represented by Mr. Edwin Silayo, learned Advocate.

In prelude to the submission by the parties which I shall soon summarise, the factual background of the application is that, the applicant was the respondent in the original case, Land Application No. 139 of 2020 before the District and Land Tribunal for Moshi which I shall refer in abbreviation as DLHT or just the trial tribunal. The respondent had petitioned for a declaratory order as to ownership of a parcel of land with certificate of Title number 47981 located at Sango in Moshi District which he alleged to have purchased from Eunice Vincent Mrema and Gerald Luiwana Mrema who were the 2nd and 3rd respondent, respectively before the trial tribunal. On his party, the applicant contended that the duo had no right to dispose of the suit land as it was part of the estate of his father, the late Origenes Luiwana Mrema. His case was found weaker and the judgment was entered for the respondent. His appeal to this court also ended barren hence the present application.

Submitting in support of the application, the applicant adopted his affidavit and proceed to submit that, he intends to knock the doors of the apex court to invite it to cure the multiple irregulates apparent in the judgment of this court. Unveiling the illegalities, he submitted that when Eunice Vicent Mrema and Gerald Luiwana Mrema sold the land to the respondent they had no capacity to sell it as they were neither owners nor administrators of the estate of the late Origenes Luiwana Mrema who was the original owner of the suit land. It was thus a lucid misdirection for the trail tribunal and the first appellate court to bless the sell and ignore the fact that, the appellant was the administrator of the said estate in 2015 and the only person with capacity to sell any part of the said estate. He proceeded that, the error emanated from the trial tribunal and

the first appellate court's failure to keenly evaluate the evidence he had tendered as well as that of his witnesses. Had they objectively and keenly evaluated it they would have established that between 2015 to 2017, the land was under his control as he was still the administrator of the estate. He was revoked from that office in 2017. He further argued that, there illegalities in the participation of the assessors which the first appellate court ignored. Lastly, he argued that his right to be heard was abrogated as he was denied the right to call all the witnesses he wished to call without genuine reasons and was forced to close his case which weakened his case. He cited the case of **Margwe Erro and Others vs Moshi Bahalulu**, Civil Appeal No. 11 of 2014 (unreported) in which the Court of Appeal at Arusha held that the denial of the right to be heard in any proceedings will vitiate the proceedings.

Opposing the submission and having adopted the respondent's counter affidavit, Mr. Silayo submitted that, the applicant has not advanced sufficient reasons or fit points to warrant the grant of leave. He cited the decision of the Court of Appeal in **Rutagatina C.L vs the Advocate Committee and Another** Civil Application No. 98 of 2010 CAT, Dar es Salaam where the court held that leave is grantable where the proposed appeal stands reasonable chances of success or where, but not necessarily, the proceedings as a whole reveal disturbing features as to require guidance of the Court of Appeal. These conditions, he argued, are meant to spear the Curt the specter of unmerited matters and enable it to give adequate attention to cases of true public importance. Thus, it was incumbent for the applicant herein to demonstrate that the intended appeal raises issues of general importance or novel points of law or an

arguable appeal, a test he miserably failed. In further fortification of this point, Mr. Silayo cited the case of **British Broadcasting Corporation vs Erick Sikujua Ng'maryo** Civil Application No, 133 of 2004 in which the Court of Appeal stated that leave will be granted where the grounds of appeal raise issues of general importance or a novel point of law or where the grounds show prima facie or arguable appeal.

Relying on these authorities, Mr. Silayo argued that the leave should not be granted because; *one*, the complaint that Eunice Vicent Mrema and Gerald Luiwana Mrema had no capacity to sell the suit land as they were neither owners nor administrators of estate of the late Oregenes Luiwana Mrema, is without merit as both, Eunice and Gerald were his co-respondents in the DLHT. He did not sue them but they were all sued respondents herein. If he had any discontentment over their capacity to sell the suit land, he ought to have sued them but he did not. As the capacity of these two was not at issue in the trial tribunal and the Court of Appeal. Raising it the apex court would yield a confusion.

Regarding the allegation that there was an abrogation of the applicant's right to be heard, he submitted that such claim is untrue as records of the lower court show that he brought his witnesses hence not denied the right to be heard. The case of **Margwe Erro and 2 Others vs Moshi Bahalulu** (supra) is inapplicable as its facts are distinguishable from the ones at hand. Moreover, he argued that the assertion as to illegalities in the participation of the assessors is also unfounded as it has been raised for the first time. Besides, the applicant has not elaborated the specific

illegality he intends to challenge in the apex court. Winding up his submission, he prayed that the application be dismissed with costs.

In rejoinder, the applicant elaborated on the participation of assessors whereby he submitted that there were dates where the matter was heard with assessors but the same was not reflected in the coram but they were allowed to give their opinion which was legally wrong. He proceeded that the proceedings exhibit disturbing features which need be corrected by the Court of Appeal and he has a right to raise them. The argument that he raised new issues not reflected in the affidavit should not be accorded any weight as it is a lucid misapprehension of requirements of the law.

With these rival submissions from the parties which I have painstakingly considered, I now delve into determining the application. From the submissions, the fact that the instant appeal requires leave to appeal is not contested. The parties are in common that as per section 47(1) of the Land Disputes Act, Cap 216 RE 2019, an appeal against a decision of this court exercising its appellate jurisdiction, as was the case in Land Appeal No. 13/2022 in whose decision the instant application emanates, do not automatically go to the Court of Appeal. They can only get there upon a leave been granted by this court pursuant to section 5(1)(c) of the Appellate Jurisdiction Act. They similarly agree that, leave is granted upon the applicant fulfilling the conditions set out in the of **British Broadcasting Corporation vs Erick Sikujua Ng'maryo** (supra), **Rutagatina C.L vs the Advocate Committee and Another** (supra) and other subsequent authorities from the apex court among them, **Henry Julius Nyela vs Sauda Mtunguja Rajabu** (Civil Application No.

514 of 2020) [2023] TZCA 115; **Airtel Tanzania Limited vs KMJ Telecommunications Limited** (Civil Application No. 393/16 of 2021) [2023] TZCA 26 and **Hashimu Juma Napepa vs Bakari Ahmadi Ng'itu and Another** (Civil Application No. 7 of 2021) [2023] TZCA 146 (all from Tanzlii). Expounding this principle in **Rutagatina C. L. vs Advocates Committee** (supra), the Court instructively held;

"Needless to say, leave to appeal is not automatic. It is within the discretion of the court to grant or refuse leave. The discretion must; however judiciously exercised and on the materials before the court. 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 or arguable appeal (see: **Buckie v 10 Holmes** (1926) ALL E. R. 90 at page 91). However, where the grounds of appeal are frivolous, vexatious or useless or hypothetical, no leave will be granted."

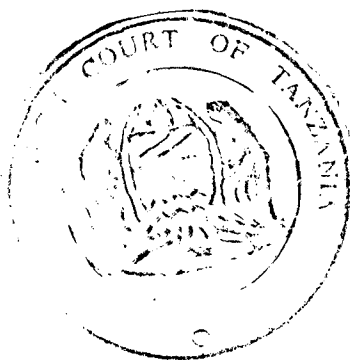
Cementing this principle in a subsequent decision in **Lightness Damian and others vs Said Kasim Chageka** (Civil Application No. 450 of 2020) [2022] TZCA 713 (Tanzlii), the court instructively stated that;

"In the light of the above stance of the law, and with respect to the learned judge, it seems clear to us that all that applicants are required to do in applications of this kind is simply to raise arguments whether legal or factual which are worth consideration by the Court. Once they pass that test, the court is obligated to grant leave to appeal. It is not the duty of the judge to determine whether or not they have any merit. By doing that it is to overstep into the mandate of the Court to which the appeal lies. It is to prejudge or predetermine the appeal."

Considering the three grounds raised by the applicant and while trying not overstep my limits and prejudge the appeal, I have observed that, there appear to be an arguable point with regard to the validity of the disposition of the suit land to the respondent. In particular, if the leave is granted, the Court will consider whether the suit land was part of the estate and if so, whether the said Eunice Vincent Mrema and Gerald Luiwana Mrema from whom the respondent bought the suit land had a good title over it and the capacity to dispose it by way of sale. On the other hand, the alleged abrogation of the applicant's right to be heard and his lamentation on the illegalities in the participation of assessors, I am at one with Mr. Silayo that they are alien to the application as they were not deponed in the affidavit supporting the application. Being raised from the bar, they certainly attract no weight.

In the upshot of the above, the application is allowed to the extent that, leave if granted to the applicant to file his appeal before that Court of Appeal challenging the legality of the sale which has been found to encompass an arguable ground. The applicant is to file his appeal in the prescribed time. Each party shall bear its own costs.

DATED and DELIVERED on this 30th day of May 2023.



A handwritten signature in black ink, consisting of stylized, overlapping loops and lines, positioned above the printed name.

J.L. MASABO
JUDGE