

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

MISC. LAND APPLICATION No. 69 OF 2022

*(Arising from the Land Appeal No. 65 of 2021 of the High Court of Tanzania
Originating from Land Appeal No. 07 of 2020 of the District Land and Housing Tribunal of
Chaa at Chaa)*

MATHAYO ENOS (the Administrator of the Estate
of the Late **ENOS GAKUBA**) **APPLICANT**

VERSUS

- 1. BUSANGI MGANGA**
- 2. MAGINA MAKEJA**
- 3. LAMECK BUSANGI**
- 4. METHOD BAHATI**
- 5. DAUDI LUGWISHA**
- 6. KESI BUTA**
- 7. EMANUEL MADARAKA**
- 8. KASANGA MKONONG'WILUNDE**

RESPONDENTS

RULING

Last Order date: 23.05.2023

Ruling Date: 29.05.2023

M. MNYUKWA, J.

The applicant filed this application for leave to appeal to the Court of Appeal by way of a chamber summons under Section 47(2) of the Land Dispute Courts Act Cap 216 [R.E 2019] supported by the affidavit deposed by Mr. Costantine Ramadhani, learned advocate. The applicant prays this court to grant leave to lodge an appeal to the Court of Appeal



against the decision made by this Court dated 04.08.2023 before Hon. Dyansobera, J. During the hearing, the applicant who was also present was represented Mr. Costantine Ramadhani learned advocate and Mr. Masanja Ngofile learned counsel appeared for the 1st, 2nd 3rd 6th 7th and 8th respondents. Mr. Costatnine learned avocate prays for the matter to proceed ex-parte against the 4th and 5th respondents who were properly served but did not enter appearance. The prayer was not objected by Mr Masanja Ngofile, learned advocate for other respondents and the court granted the prayer.

Submitting first, Mr. Costantine Ramadhani for the applicant prays the court to adopt his affidavit and form part of his submissions. He went on that, the applicant is applying for leave to appeal to the Court of Appeal against the decision of this court in Land Appeal No. 65 of 2021 which was delivered on 04.08.2022 before Dynsobera, J. He went on that, the applicant had already lodged a notice of appeal but as a requirement of law, this court may grant leave if there is a triable issue or point of law. Referring to paragraph 8 (a)-(f) of his affidavit, he insisted that, there are arguable issues for consideration and determination by the Court of Appeal. Supporting his prayer he cited the case of **Jireys Nestory Mutalemwa vs Ngorongoro Conservation Authority**, Civil



Application No. 154 of 2016 whereby, among other things, the Court of Appeal insisted that leave is granted if there are arguable or triable issues. In that regard, he prays this court to allow the application.

Responding to the applicant's submissions, Mr. Masanja Ngofile prays this court to adopt the counter affidavit filed and form part of his submissions. He strongly objected to the prayer. He submitted that, the applicant did not meet the requirement of the law for the court to grant leave. He insisted that, leave is not automatic but granted after the applicant met the legal thresholds. Referring to paragraph 8 of the applicant's affidavit, he insisted that there are no arguable issues of general importance for determination by the Court of Appeal.

Insisting he cited the case of **Godwin Nyaki & Another vs Ardhi University**, Civil application No. 491/01/of 2021, where it was stated that where a party to a case does not agree with the decision of the court is not a ground of appeal. He therefore prays the application to be dismissed.

Rejoining, Mr. Costantine Ramadhan kept on insisting that, what is stated on paragraphs 8 (a)-(f) of the affidavit are arguable issues that need the attention of the Court of Appeal. Referring to paragraph 8(b) of the affidavit as an example he claims that, the trial court did not enter a



verdict against the 4th and 5th respondents whose matter proceeded exparte against them. He went on averring that the case cited by the respondent's learned counsel is distinguishable and insisted that there are triable and arguable issues by the Court of Appeal and prays the application to be granted.

After hearing the submissions of both parties, the main issue for consideration and determination is whether there is arguable issues that need attention and determination by the Court of Appeal for this Court to grant leave.

It is the settled position of the law that, for the court to consider an application for leave to appeal to the Court of Appeal, there must be arguable issues on fact or law to be determined. It is also settled that grant of leave to appeal to the Court of Appeal is a discretionary power of the court. The law on this point is very clear on what should the court consider before granting leave to appeal to the Court of Appeal. As it stands, the decision which is intended to be appealed against was made by this Court and my duty here is not to go to the merit of the decision and state my opinions but rather to state only if there are arguable issues.

The law is clear under section 5 (2)(c) of the Appellate Jurisdiction Act, Cap 141 [R.E.2022] which provides that:-



"...No appeal shall lie against any decision or order of the High Court in any proceedings unless the High Court certifies that a point of law is involved in the decision or order".

In the determination of this application, the Court is mandated to see if the intended appeal is arguable or not. This court lacks jurisdiction to go into merit or deficient of the judgment. In the case of **Jireyes Nestory Mutalemwa vs Ngorongoro Conservation Area Authority**, Application No. 154 of 2016, which was also cited by the applicant, the Court of Appeal observed 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 chance of success as a factor to be considered for grant of leave to appeal. It is logical that holding so at this stage amounts to prejudging the merits of the appeal."

Besides, in the case of **The Regional Manager-TANROADS Lindi vs DB Shapriya and Company Ltd**, Civil Application No. 29 of 2012, the Court of Appeal of Tanzania as quoted with approval in the case of **Jireys Nestory Mutalemwa** (supra) it was pointed out that;



"It is now a 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."

Guided by the above decisions, it is upon this Court to scrutinize the points of law advanced by the applicant and exercise judiciously the discretion to grant or refuse to grant leave to appeal to the Court of Appeal. I have perused the applicant's affidavit specifically in paragraph 8 (a) - (f) and observed that there are both matters of law and facts worth determination by the Court of Appeal as demonstrated by the applicant that some of the issues were not attended.

For the foregoing reasons and to the extent as stated above, an application for leave to appeal to the Court of Appeal against the decision of this Court in Land Appeal No. 65 of 2022 is hereby granted. Costs to follow the event.

It is so ordered.




M. MNYUKWA
JUDGE
26/05/2023

Court: Ruling delivered on the 26th day of May 2023 in the presence of the applicant and the 3rd respondent.



M. MNYUKWA

JUDGE

26/05/2023