

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB- REGISTRY OF MWANZA

AT MWANZA

MISC. LAND APPLICATION NO. 66 OF 2022

(Arising from High Court Mwanza Misc. Civil Application No. 96 of 2021, Originating from District Land and Housing Tribunal for Mwanza at Mwanza in Misc. Land Application No. 65 of 2006)

MAHAMUDI ALLY.....APPLICANT

VERSUS

OLIVER DANIEL (Administrator of the Estate of

The Late Daniel Manywili).....1st RESPONDENT

MWANZA CITY COUNCIL.....2nd RESPONDENT

TARACIUS MISANA3rd RESPONDENT

RULING

16th February and 6th June 2023

ITEMBA, J.

The applicant is moving this court to grant leave to appeal to the Court of Appeal. The application is made under Section 5(1) (c) of the Appellate Jurisdiction Act and Rule 45 of the Court of Appeal rules and it is supported by the affidavit of Ally Zaid counsel for the applicant. Opposing the applications, Messrs Joseph Vungwa State Attorney and Taracisius Misana for the 2nd and 3rd respondent respectively, filed their counter affidavits.

At the hearing, the applicant was represented by Mr. Ally Zaid, learned advocate. The respondent was represented by Mr. Joseph Vungwa, State Attorney and Mr. Kassim Gilla. The application was heard

in the absence of the 1st respondent as it was reported that he denied to accept the court summons.

The main grounds for the application are found in paragraph 6 of the applicant's affidavit which are:

- a) Whether the court properly examined the evidence put forward by the Applicant pertaining to the issue of illegality to reach to the said decision*
- b) Whether it was proper for the court not to consider the proceedings dated 26/11/2020 which had the issues to be considered and decided to rely only on the proceedings dated 07/08/2020 to reach the decision/Ruling*
- c) Whether the High Court properly evaluated the records of the District Land and Housing Tribunal as claimed by the Applicant as a whole to reach to the decision.*

In expounding these grounds. Mr. Zaid submitted that the court had a duty to extend time as stated in **Principal Secretary Ministry of Defence Vs Valambya [1992]** TLR 185

He explained that the court did not consider the proceedings dated 26.11.2020. therefore, the issue is whether court records can be read in isolation in determination of the matter.

In the 3rd and last ground, the learned Counsel cited the case of **British Broadcasting Corporation Versus E. Sikujua Ngimaryo** Court of Appeal, Civil application No. 138 of 2004 (unreported), stating that, the Court of Appeal had stressed that leave is grantable where there is a chance of success and where there are disturbing features. He also referred to the case of **Winford Mlagha Versus Dinales Paulo Mwasile & others** in Civil Appeal No. 112/6 of 2022 Court of Appeal at Mbeya, where the court stated that what is important for leave to be granted is a *prima facie case* to be made, therefore based on the disturbing features in the impugned ruling, he prayed for the court to grant the application.

In rebuttal both counsels for the 2nd and 3d respondents strongly objected the application. Mr. Vungwa, State Attorney, referred to paragraph 4 of his counter affidavit. He stated that the issue is whether the grounds raised in paragraph 6 of the applicant's affidavit are arguable issues to be determined by the Court of Appeal of Tanzania?

It was his submission that, all grounds raised are grounds of fact not of law hence not arguable. He added that even in the **British Broadcasting** case at paragraph 7 it was said that for leave to be granted there must be issues of law. That, the Court of Appeal considered factors

like 'public importance' and 'chances of success' but the applicant's grounds do not have any of these features. That, there is no violation of law which has been cited, therefore chances of success cannot be established.

He finalized his submission by arguing that leave is granted upon court's discretion and the court in exercising its discretion is guided by the fact that there is a *prima facie* case established as pronounced in the case of **Winford Mlagha** and as the applicant failed to establish a *prima facie* case at the High Court, his application lacks merit and it should be dismissed with costs.

On his part, Mr. Kassim Gilla, told the court that, the basis of this application is the High Court decision by Hon. Mnyukwa, J. That the Judge refused the applicant's application, because the applicant did not disclose any issue of illegality and because the applicant failed to account for delay.

He referred the cited case of **British Broadcasting Corporation Versus E. Sikujua Ngimaryo** stating that leave is granted when there is a novel point of law on issues of general importance. He supported his submission with the case of **Nurbhai Ratansi vs Ministry of Water Construction, Energy and Environment and another** [2005] TLR

220. He challenged para 6 of the affidavit that it contains matters of fact and not Law and there is no issue of general importance.

In rejoinder, the applicant maintained his position explaining that for an application for leave it is not necessary for establishing a point of law.

The learned counsel added that the issue of illegality is a point of law and even non consideration of court records is an issue of law because the court cannot decide the matter in isolation of part of the records.

He also steered that evaluation of evidence is a point of law and it is cardinal principal of law that the court has to evaluate evidence on records and based on this, there are features which need guidance and consideration of the Court of Appeal.

Having heard both parties, the issue is whether the application has merit.

Section 5(1) (c) of the Appellate Jurisdiction Act makes it mandatory for every appeal to the Court of Appeal be preceded by an application for leave. While, section 45 (a) of the Court of Appeal rules states that;

In civil matters: -

(a) *'notwithstanding the provisions of rule 46(1), where an appeal lies with the leave of the High Court, application for leave may*

be made informally, when the decision against which it is desired to appeal is given, or by chamber summons according to the practice of the High Court, within thirty days of the decision;'

Having gone through the records and arguments from both parties. At page 10 and 11 of the impugned ruling the Judge has mentioned on the issue of whether or not the applicant's written submissions were considered by the Trial Tribunal. The applicant insisted that the proceedings dated 26/11/2020 were not considered but the ruling was to the effect that the applicant's assertion is not supported by records. I do not think that at this juncture I am the appropriate forum to decide whether or not the court did not consider part of the records. My careful reading of the rival submissions does not however suggest that the proposed issues are frivolous and vexatious. They are, in my view, *bonafide* arguable issues which may deserve attention of the Court of Appeal.

At this stage, I find that this application with merit. Leave to appeal to the Court of appeal is therefore granted.

Costs to follow the event.

DATED at **MWANZA** this 6th Day of June, 2023.



**L.J. ITEMBA
JUDGE**

Ruling delivered under my hand and seal of the court in the presence of Mr. Ally Zaid counsel for the applicant and Mr. Joseph Vungwa and Kassim Gilla and Ms. Gladness Mnjari, RMA.

**L.J. ITEMBA
JUDGE
6.6.2023**