

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

AT MOSHI

MISC. LAND APPLICATION NO. 41 OF 2022

(Arising From Land Appeal No. 45 Of 2021)

EDWARD PETER CHUWA APPLICANT

VERSUS

EVARIST MUSHIRESPONDENT

RULING

Last Order: 5/12//2022

Ruling: 11/01/2023

MASABO, J.:

In this an uncontested application, Edward Peter Chuwa, the applicant, has moved this court under section 47(2) of the Land Disputes Courts Act [Cap 216 R.E. 2019]. He is seeking a leave to appeal to the Court of Appeal of Tanzania against the judgment of this court in Land Appeal No. 45 of 2021. For appreciation of the application, I will, albeit, briefly narrate the factual background of the application as discerned from the affidavit filed in support of the application and its supporting documents.

From these documents it is deciphered that, the kernel of the dispute is ownership of a parcel of land located at Longu A *Mgharibi* in Moshi which I

shall refer as 'the suit land'. The Applicant sued the respondent over ownership of the suit land before the District Land and Housing Tribunal (DHLT) for Moshi at Moshi in Land Application No. 14 of 2021. Hearing of the said application proceeded *ex parte* the respondent after the DHLT being satisfied that the respondent was duly served but declined service. In the end, an *ex parte* judgment and decree were entered in favour of the applicant who was declared the lawful owner of the suit land.

The time within which to apply for setting aside the *ex parte* judgment lapsed before the applicant took any action. After a while, he resurfaced and filed an application for extension of time within which to apply to have the *ex parte* judgment and decree set aside. In the affidavit supporting the application which was admitted as Misc. Civil application No. 140 of 2021, he deponed, among other things, that the *ex parte* judgment was marred by illegalities as there was neither proof that he was in deed served with the summons to appear and file his defence nor that he declined service. He deponed further that contrary to the law, he was not notified of the date of the *ex parte* judgment. Unfortunate to him, the application ended barren.

Disgruntled further, he approached this court by way of an appeal admitted as Land Appeal No. 45 of 2021 and assigned to Hon. Simfukwe, J. He also subsequently filed an application for revision which was admitted as Land Revision No. 6 of 2021 and assigned to Hon. Mwenempazi, J. After the applicant was served, he raised a notice of preliminary objection against both, the application and the appeal contending among other things that the applicant was riding two horses at the same time. The application for revision was struck out at infancy after the applicant conceded to the preliminary objection.

The preliminary objection against the appeal was called upon for hearing after the disposition of the application for revision. For expeditious dispensation of justice and with the consent of the parties, the court found it fit and just to have the hearing of the preliminary objection and the appeal proceed parallel in anticipation that should the preliminary objection be overruled, it will proceed to determine the merit of the appeal without having to spend more time waiting for the parties to make fresh. The parties duly complied. Having received the submissions the court determined the preliminary objection which it overruled after taking a judicial notice of the

order striking out the application for revision. It then determined the appeal and allowed. Moreover, it proceeded to revise the proceedings for Land Application No. 14 of 2021, *suo motto*, quashed it and ordered a trial *de novo* after it found out that the proceedings were marred by illegalities. It is this decision which has aggrieved the applicant hence the instant application. In paragraph 9 of his affidavit, he has deponed that if the leave is granted, he intends to invite the Court of Appeal to determine the following six issues:

1. Whether the appellate court was right to invoke revisional powers *suo motto* against the proceedings and ruling of the DHLT in Land Application No. 14 of 2021 which was not before it;
2. Whether the appellate court was right to entertain the revision on Land Application No 14 *suo motto* without affording the applicant the right to be heard on the revision;
3. Whether the court was right to entertain the Land Appeal No. 45 of 2021 which was filed simultaneously with Land Revision No. 6 of 2021 on the same day;
4. Whether the appellate court was right to deliver the judgment in the absence and without notice to the parties;

5. Whether the appellate judge was right to consider the alleged illegality in Land Application No. 14 of 2021 which was never before it;
6. Whether the appellate judge was right to substitute her discretionary powers for an extension of time for revisionary powers on the proceedings not before her.

When the application was called on for hearing, the Respondent who was represented by Mr. Emanuel Anthony, learned counsel, notified the court of the respondent's intention not to contest the application. Knowing that the application was uncontested, the applicant who appeared in person, unrepresented, adopted the content of his affidavit and prayed that his application be granted as it is not contested.

As stated in prelude, the preset application has emanated from a land matter and has been preferred under section 47(2) of the Land Disputes Court Act, which states thus

(2) A person who is aggrieved by the decision of the High Court in the exercise of its revisional or appellate

jurisdiction may, with leave of the High Court or Court of Appeal

Much as this provision and similar provisions are silent on the criteria that this court should employ when exercising its discretion to grant leave, the law as elucidated by the Court of Appeal in **Harban Haji Mosi (ii) shauri Haji Mosi vs (i) Omar Hilal Seif (ii) Seif Omar**, Civil Reference No. 19 of 1997, CAT and affirmed in a plethora of subsequent authorities such as in **British Broadcasting Corporation vs Eric Sikujua Ng'maryo**, Civil Application No. 138 of 2004 (unreported), **Rutagatina C. L. vs The Advocates Committee and Another**, Civil Application No. 98 of 2010, and **Jireys Nestory Mutalemwa vs Ngorongoro Conservation Area Authority**, Civil Application No. 154 of 2016, CAT at Arusha (unreported), is that, if this court is to positively exercise its discretion to grant leave, it must be satisfied that the envisioned grounds of appeal raise issues of general importance or a novel point of law. Leave may also be granted if the grounds of appeal show a *prima facie* or arguable appeal. Expounding this position in **British Broadcasting Corporation vs Eric Sikujua Ng'maryo** (supra), as cited in the case of **Rutagatina C. L. vs The**

Advocates Committee and Another (supra), the Court of Appeal stated that;

"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: **Buckle v Holmes** (1926) ALL ER. 90 at page 91). However, where the grounds of appeal are frivolous, vexatious or useless or hypothetical, no leave will be granted."

It follows that, in the exercise of this function whose main role is to filter out vexatious and frivolous so as to spare the apex from dealing and wasting its precious time on such unmerited matters, the court must judiciously exercise its discretion based on the criteria above, irrespective of whether the application is opposed or unopposed as the present one. Accordingly, the sole question pending determination of this court is whether the 6 grounds

listed above raise issues of general importance, novel points of law, a *prima facie* or an arguable appeal?

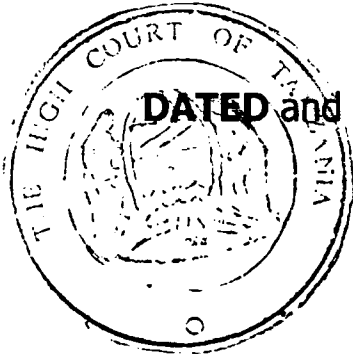
In my reading of the applicant's affidavit and the materials placed before me, I was able to decipher four contested points the first being on the decision on the court's findings with respect to the preliminary objection in which the applicant intends to question the competency of the appeal which was filed simultaneous with the revision. And, as per record, the application for revision was struck out before the hearing of the preliminary objection and the appeal. The second and the third point question the court's finding on the merit of the appeals and especially, the exercise of revisionary powers *suo motto* by the court. In the second point, the applicant intends to question whether it was correct for the court while exercising its appellate jurisdiction over Land Appeal No. 45 of 2021 to revise, *suo motto*, the proceedings of Land Application No. 14 of 2021, quash and set aside the proceedings and the ruling notwithstanding that the same was not before it. In the third point, his main question is whether it was open for the court, while invoking its revisional powers *suo motto* over Land Application No. 14 of 2021, to proceed without affording the parties the right to be heard. The last

anticipated point concerns the mode of delivery of the judgment and the specific question is whether it was right for the court to deliver its judgment in the absence of both parties and without notifying them of the date of the ruling.


In my considered view, the 2nd and 3rd points which concern the exercise of revisional powers by the appellate court raise novel points worth determination by the Court of Appeal as they touch upon the jurisdiction of the court and the right to be heard which are both at the epicenter of a fair trial and constitute vital principles in the dispensation of justice. As for the 1st and the 4th point, much as they do not appear to rise a novel point compared to the two points above, considering, with respect to the first point, that it is undisputed that the application for revision had been stuck out prior to the hearing of the preliminary objection and the appeal, they raise arguable points.

In the foregoing, I find and hold that the four points above stated, merit the consideration and the determination by the Court of Appeal. Accordingly, the sole issue for determination is, to the extent above, answered affirmatively.

The application is allowed and leave is, subsequently, granted to the applicant to lodge his appeal in the Court of Appeal. As the application was uncontested, there are no costs.



DATED and DELIVERED at MOSHI this 11th day of January 2023.

 Recoverable Signature

X

Signed by: J.L.MASABO

J.L. MASABO

JUDGE