

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF ARUSHA AT ARUSHA**

**MISC.LAND APPLICATION NO.133 OF 2022**

*( C/f Land Appeal No.5 of 2022 at the High Court of Tanzania at Arusha)*

**GODFREY LIKINDISHILU.....1<sup>ST</sup> APPLICANT**

**DAUDI MUKAINE.....2<sup>ND</sup> APPLICANT**

**Vs**

**ELIYAHU ISRAEL.....RESPONDENT**

**RULING**

*Date of last order:31-5-2023*

*Date of Ruling :20-6-2023*

**B.K.PHILLIP,J**

This application is made under section 5(1) (c) of the Appellate Jurisdiction Act, Cap 141 , R.E 2019 and section 47 of the Land Disputes Courts Act Cap 216 R.E 2019. The applicants pray for the following Orders;

- i) That the Honourable Court be pleased to grant leave to the applicants to appeal to the Court of Appeal of Tanzania against the whole of the decision of this Honourable Court in Land Appeal No.5 of 2020.
- ii) Costs to be provided for.

The application is supported by an affidavit sworn by the learned Advocate John Kivuyo Lairumbe, the applicants' advocate. The respondent filed a counter affidavit in opposition to the application. The applicant appeared in person, unrepresented. The application was heard by way of written

submissions. The respondent's submission was prepared in gratis by the learned advocate Joseph Moses Oleshangay of the Legal and Human Rights Center, Arusha.

Submitting for the application, Mr. Lairumbe pointed out that the applicants are aggrieved by the judgment of this court in Land Appeal No. 5 of 2020. They have lodged the Notice of Appeal to the Court of Appeal and wrote a letter to the court for request to be supplied with the copies of the proceedings, judgment and decree, and now they have filed this application for leave to appeal to the Court of Appeal on the grounds stated in the affidavit in support of this application in paragraph 8 ( a-j), to wit;

- i) Whether the High Court was proper in law in held (*sic*) that the suit land belongs to the respondent
- ii) Whether the High Court was proper in law in held ( *sic*) that the suit land belongs to the respondent
- iii) Whether the High Court was right to consider the documents which are photocopies and the same hold that it was manufactured while it was never objected before the trial tribunal.
- iv) Whether the High Court was right to consider exhibits R1 at the appellate stage without afforded (*sic*) the appellant right to be heard.
- v) Whether the High court was correct to determine the issues or grounds of appeal which were not raised during (*sic*) the appeal by the respondent.

- vi) Whether the High Court was correct to consider the documents which were not admitted as exhibits in the court.
- vii) Whether the High Court was correct to hold that the respondent put his land to the 1<sup>st</sup> applicant as the security without any proof to that effect.
- viii) Whether the High Court in nutshell consider (*sic*) the testimonies adduced during the trial tribunal .
- ix) Whether the High Court failed to consider that the applicants herein managed to call the material witness who witnessed the deed of sale between the first applicant and respondent.
- x) Whether the High court failed to consider that the applicants testified and managed to produce the exhibits R-2 witnessed the deed of sale (R-1) as it was signed by the respondent herein.

He went on submitting that the above grounds are worthy the attention of the Court Appeal. He pointed out that at this stage is not an opportune time to discuss the applicants' grounds of intended appeal. He contended that it is trite laws that leave to appeal to the Court of Appeal is not automatic. It lies in the court's discretion. However, that discretion must be exercised judiciously. To cement his argument he cited the case of **British Broadcasting Corporation Vs Erick Sikujua Ng'maryo , Civil Application No.138 of 2004** ( unreported) , in which it was held 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 be 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 raises issues of general importance or a*

*novel point of law or where the grounds show a prima facie or arguable appeal .... However where the grounds of appeal are frivolous , vexatious or useless or hypothetical no leave will be granted..”*

Another case cited by Mr. Lairumbe with similar holding to the one above is the case of **Kadili Zahoro** ( *Administrator of the Estate of the late Bahati Ramadhani Mponda*) **and Sauda Bahati Mponda** ( *Administrator of the Estate of the late Bahati Ramadhani Mponda*) **Vs Mwanahawa Selemani, Civil Application No.137/01 of 2019** ( unreported).In conclusion of his submission, Mr. Lairumbe implored this court to grant this application.

In rebuttal, Mr. Joseph submitted as follows; that in an application for leave to appeal to the Court of Appeal like the one at hand , the applicant is required to present to the court materials that can facilitate the court to assess on whether or not there is an arguable appeal. The applicant is obliged to demonstrate that the intended appeal raises contentious issue of great public importance or related to misdirection or non -direction likely to result in failure of justice. He went on submitting that in this application the applicants’ advocate has just listed the intended grounds of appeal and in his submission he did not make any elaboration on how those intended grounds of appeal are related to the impugned judgment. He contended that from the evidence in record there is nothing signifying that the applicant has arguable appeal raising a novel issue which deserve the attention of the Court of Appeal. To cement his arguments he cited the case of **Atupakisye Mwakikuti Vs Sekela Mwakikuti and Mbonile Kapalata**, Misc. Land Application No.48 of 2018 ( unreported).In

conclusion of his submission Mr. Joseph urged this court to dismiss this application.

In rejoinder, referring this court to the eight grounds enumerated in his affidavit intended to be tabled before the Court of Appeal, Mr. Lairumbe insisted that he has demonstrated that there is a prima-facie arguable appeal worth the attention of the Court of Appeal. He contended that this court has no powers to determine the merit or demerit of the intended grounds of appeal raised by the applicant in this application. To cement his argument, he cited the case of **Husna Joseph Buyaga Vs Charles Matoke Mahindi, Misc.Application No. 89 of 2021** (unreported), in which this court held that;

*"In consideration of the above , coming back at this application for consideration, I am of the view that whether these grounds for leave to appeal to the Court of Appeal have merits or not is the domain of the Court of Appeal. It is not the duty or responsibility of this court. However, at this stage I am satisfied that the grounds put by the applicant and argued by her learned counsel , have pointed out arguable points for the Court of Appeal's determination..."*

It is a common ground that leave to appeal to the Court of Appeal is not automatic. It lies in the discretion of this court and is granted upon the applicant demonstrating that the intended appeal raises issue of general importance or where the grounds of appeal show that there is a prima-facie or arguable appeal. [See the case of **British Broadcasting Corporation** (supra)]. In addition, the position of the law is that this court has no power to determine whether or not the intended grounds of



appeal are meritorious. The duty of this court is determine whether there is prima facie or arguable appeal in the light of the impugned decision.

Guided by the above legal principles, upon perusing the impugned judgment I am convinced that the applicants have raised grounds of appeal which demonstrates the existence of a prima-facie /arguable appeal. In the impugned judgment, the subject of this application, this court discussed extensively the validity of the sale agreement ( exhibit R1) and quoted in extenso a complaint letter that was wrote to the chairman of the District Land and Housing Tribunal by the respondent herein. Thus, the applicant's intended grounds of appeal concerning this court's findings on the respondent's letter aforesaid and the exhibit R1 definitely demonstrates existence of an arguable appeal, just to mention a few.

In the upshot, this application is allowed. The applicant is hereby granted the leave to appeal to the court of appeal. Costs will be course.

Dated this 20<sup>th</sup> day of June 2023



**B.K.PHILLIP**

**JUDGE**