

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(MOROGORO SUB-REGISTRY)
AT MOROGORO

LAND APPLICATION NO. 27 OF 2022

*(Originating From Land Appeal Case No. 251 of 2020; In the High Court of Tanzania,
at Morogoro Sub-Registry)*

LIFANAUTI MKUPETE 1ST APPLICANT

ZAHORO MKUPETE 2ND APPLICANT

VERSUS

PHILEMON OTIENO..... RESPONDENT

RULING

12th June, 2023

CHABA. J.

The applicants, Lifanauti Mkupete and Zahoro Otieno jointly and together instituted in this Court the instant application seeking for leave to appeal to the Court of Appeal of Tanzania (the CAT) against the decision of this Court (Ngwembe, J.) in Land Appeal No. 251 of 2020 delivered on 07th June, 2022. The application is made under section 47 (2) of the Land Disputes Courts Act, [CAP. 216 R. E, 2019], and it is supported by the joint affidavit of the first and second applicant.

As background, the crux of the matter is 2 ½ acres of parcel of land located at Songambebe hamlet, Mbingu village within Kilombero District in Morogoro Region. As garnered from the Court records, following a prolonged

and bitter quarrel between the parties, the respondent had no other option other than instituting a land matter before the District Land and Housing Tribunal for Kilombero/Malinyi District, at Ifakara (the DLHT) via Land Application No. 43 of 2018. At the end of the day, the DLHT concluded that; **one**, the application was lacking the merit, and **two**, the application was dismissed with costs. Aggrieved, the respondent / applicant appealed before this Court clothed with three grounds of appeal. This time around, the respondent's / appellant's appeal was found to have merits and therefore, the Court proceeded to allow the appeal based on the first two grounds of appeal, hence the decision of the DLHT was set aside and the respondent herein / appellant was declared to be the rightful owner of the disputed land, (2 ½ acres) meanwhile, the respondents / applicants herein were declared as the trespasser(s) to the disputed parcel of land.

When the matter was called on for hearing, the applicants had the legal services of Mr. Humphrey Mwakajinga, the learned counsel, and the respondent for reasons better known by himself did not enter appearance, hence the application proceeded ex-parte against him.

Submitting orally in support of this application, Mr. Mwakajinga first, urged this Court to adopt the applicants' affidavit to form part and parcel of the Court proceedings and continued to substantiate that, the applicants being unhappy with the decision of this Court (Ngwembe, J.), via Land Appeal No. 251 of 2020 they preferred the instant application intending to challenge the

impugned decision issued by this Court on 7th June, 2022. He therefore, on behalf of his clients prayed the Court to grant the applicants with the leave to appeal to the CAT against the impugned judgment due to the following reasons:

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1. That, the first Appellate Court erred in law and fact when it failed to properly consider the facts surrounding the case by introducing irrelevant matters ending in erroneous decision.
2. That, the first Appellate Court erred in law and facts for failure to evaluate the evidence available leading to erroneous decision which is unjustifiable in law.
3. That, the first Appellate Court erred in fact and in law by declaring the Appellant (Respondent) the lawful owner of the suit land while the case was not proved on the balance of probabilities according to the evidence available.

To reinforce and support the application, Mr. Mwakajinga referred this Court to the case of **Winford Mlagha Vs. Dinales Paulo Mwasile** (Administratrix of the late Paulo Mwasile) **and Two Others**, Civil Application No. 112/06 of 2022, extracted from tanzlii.go.tz, and prayed the application be granted as prayed.

I have considered the applicants' submission made by the learned counsel. Mr. Mwakajinga and the affidavit in support of this application. The main question for consideration and determination by this Court is, whether the grounds listed in the joint affidavit filed by the applicants raises issues of general importance, noble points of law or prima-facie arguable appeal.

This application has been brought in Court under section 47 (2) of the Land Disputes Courts Act [CAP. 216 R. E, 2019]. The law provides that: -

"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, appeal to the Court of Appeal.

Based on the above provision of the law, it follows therefore that, in granting leave to appeal to the CAT, it is vital to meet the above legal requirements and the principle of law expounded by the CAT in number of cases including the case of **British Broadcasting Corporation Vs. Erick Sikujua Ng'maryo**, Civil Application No. 138 of 200, where the Court 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 should 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 raise issues of general importance or a novel point of law or where the grounds show prima facie or arguable Appeal....However, where the grounds of Appeal are frivolous, vexatious, useless or hypothetical, no leave will be granted."




The above principle was enunciated and emphasized in the case of **Rudolf Temba and Another Vs. Zanzibar Insurance Corporation**, Civil Application No. 167 of 2008 (unreported), in which the CAT observed that: -

"Leave to appeal will be granted where the grounds of appeal raise issues of general importance, a novel point of law or where the grounds show prima facie or arguable appeal".

In the instant application, the applicants through the learned counsel have raised the points as mentioned herein above, through which they intend to challenge the impugned decision. Since I am not in the position to probe into the points raised by the applicants, the only task which is ahead of me, is first, to confine myself on determining whether or not the applicants have presented arguable issues which requires consideration by the CAT without going into the merits or demerits of the grounds presented by the applicants. In my considered opinion, determination of the merits at this stage are within the the domain of the CAT. This position was underscored by the CAT in the case of **Jireys Nestory Mutalemwa Vs. Ngorongoro Conservation Area Authority**, Civil Application No. 154 of 2016 (unreported), where the Court held: -

"Similarly, in applications of this nature, it is a well-established principle of law that, the Court is not expected to determine the merits or otherwise of the substantive issues before the appeal itself is heard."



The CAT went on to state further 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 chances of success a factor to be considered for the grant of leave to appeal. It is logical that holding so at this stage amounts to prejudging the merits of the appeal."

The same position was also stated in the case of **The Regional Manager-TANROADS Lindi Vs. DB Shapriya and Company Limited**, Civil Application No. 29 of 2012 (unreported), where the Court emphasized that: -

"It is now 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."

Reverting to the matter at hand, the gist of the applicants' application as stated earlier on, is to challenge the impugned decision for failure to properly consider the facts surrounding the case by introducing irrelevant matters ending in erroneous decision, failure to evaluate the evidence available leading to erroneous decision which is unjustifiable in law, and declaring the respondent herein (appellant) the lawful owner of the suit land while the case was not

proved on the balance of probabilities. At this juncture, I feel compelled to reiterate that, my task is not to consider whether my brother Hon. Ngwembe, J., rightly or wrongly determined the matters in question. Guided by the wisdom in **Mutalemwa's case** and **The Regional Manager - TANROADS Lindi's case (supra)**, the merits of the issues raised by the applicants cannot be resolved without going into the details of the decision which in my opinion, is not within the power of this Court. Going into details of the decision of this Court that is purely a business of the full Court, which is the Court of Appeal of Tanzania.

Heartened by the principles elucidated by the CAT and the intended grounds of appeal which discloses an arguable appeal worthy consideration by the CAT, I find that there is sufficient cause established by the applicants to warrant this Court granting leave to appeal to the CAT.

In the final event, I thus grant leave to the applicants to appeal to the CAT as prayed. Considering the circumstances of this application, each party shall bear its own costs. **Order accordingly.**

DATED at MOROGORO this 12th day of June, 2023.



M. J. CHABA

JUDGE

12/06/2023

Court:

This Ruling to be delivered by the Honourable Deputy Registrar.



M. J. CHABA

JUDGE

12/06/2023

