

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF MWANZA
AT MWANZA**

MISC. LAND CASE APPLICATION NO. 42 OF 2023

DAMAS MATIKU NYANG'ANYI.....APPELLANT
VERSUS
AKIBA COMMERCIAL BANK.....1ST RESPONDENT
MASHOKA AUCTION MART.....2ND RESPONDENT
GERALD KISUNGA MASINDE.....3RD RESPONDENT

RULING

20th June & 21st June, 2023

Kilekamajenga, J.

The third respondent sued the applicant, first and second respondent in the District Land and Housing Tribunal claiming ownership of a piece of land. The third respondent purchased the land in dispute in a public auction which was conducted by the second respondent on behalf of the first respondent. Later, the applicant also resurfaced claiming to have bought the land from FINKA. Before the District Land and Housing Tribunal, in Land Application No. 80 of 2018, the third respondent was heard *ex parte* after publishing the summons in the newspapers. Finally, the third respondent secured an *ex parte* judgment against the applicant, first and second respondent. As a result, the applicant was ordered to vacate from the suit premises. The third respondent filed Misc. Application No. 80B of 2019 which sought execution of the decision of the District Land and Housing Tribunal in Land Application No. 80 of 2018. This is the time when the



applicant became aware of the decree against him. On 15th August 2019, the applicant filed an omnibus application under certificate of urgency vide Misc. Application No. 80C of 2019 seeking extension of time to file an application to set aside the exparte judgment and stay the execution. However, the record does not provide any clue whether the applicant was granted extension of time nor stay of execution. The applicant later filed Misc. Land Application No. 80 D of 2020 seeking an order to set aside the exparte judgment. However, he did not succeed to set aside the exparte judgment on the reason that the substituted service to the applicant by way of publication was sufficient. Dissatisfied with the decision of the District Land and Housing Tribunal, the applicant approached this court vide Land Appeal No. 57 of 2021 which was opposed with a point of objection of the reason that the appeal was incompetent because the application to set aside the exparte judgment was filed out of time and without leave of the tribunal. This court invited the parties to argue the point of objection and sustained it by declaring that the appeal was incompetent as it originated from an incompetent proceedings and ruling which were heard and determined out of time.

Now the applicant wishes to approach the Honourable Court of Appeal to challenge the decision of this court that declared the appeal incompetent. Therefore the instant application seeks leave of this court for the applicant to

approach the Court of Appeal. The application was made under section 47(2) of the Land Disputes Courts Act, Cap. 216 RE 2019 and section 95 of the Civil Procedure Code, Cap. 33 RE 2019 and any other enabling provisions of the law. The counsel for the applicant, Mr. Stephen Kaswahili deposed an affidavit to accompany the application. Despite service of summons to the respondents, only the third respondent appeared in person who also informed the court on his inability to file the counter affidavit due to financial constraints. The court ordered the hearing of the application in the absence of the first and second respondent. Mr. Kaswahili who appeared for the applicant argued that, leave to appeal is granted where there are disturbing features to warrant the attention of the Court of Appeal. In this case there are missing records hence the decision of this court was wrongly hinged on the missing record. The counsel insisted that, the applicant applied for extension of time though the ruling to that regard cannot be traced. In his view, this court was supposed to order the retrial of the case instead of declaring the appeal incompetent. He reinforced his argument with the case of **Said Salum@ Kiwindu v. Republic**, Criminal Appeal No. 190 of 2017. The counsel further averred that, the applicant was denied the right to be heard as the ruling of this court was delivered in his absence. He pointed some legal issues to justify his appeal to the Court of Appeal of Tanzania thus; the legality of the substituted service to the applicant, the issue of time limitation, incompetence of the appeal before this court and the right to be

heard. To justify his move, he referred the court to the case of **Godwin Lyaki and Another v. Ardhi University**, Civil Application No. 491 of 2021, CAT at Dar es salaam which sets the conditions for granting leave to appeal. On the other hand, the third respondent, who was a layperson and unrepresented simply invited the court to apply the law and grant justice in this matter.

After a careful consideration of the submission by both parties, I am now in a position to consider whether this application holds merit or not. In an application for leave to appeal to the Court of Appeal, the matter must qualify certain conditions. In the case of **Broadcasting Corporation v. Eric Sikujua Ng'maryo**, Civil Application No. 138 of 2004, the Court of Appeal 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 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 case or arguable appeal.**"*

Therefore, before the court grants leave to appeal to the Court of Appeal, the applicant must show that there is serious matter or point of law worth to be considered by the Court of Appeal. See the cases of **Harban Haji Mosi and Another vs Omary Hilali Seif and Another** [2001] T.L.R 409, **Rutagatina**

C.L v. The Advocates Committee and Another, Civil Application No. 98 of 2010.

Furthermore, the court's duty at this point is not to look into the merit or demerit of the case or point raised by the applicant. The role of this court is to see whether the raised points are worth consideration by the Court of Appeal. In the case of **Bulyanhulu Gold Mine Limited & 2 Others v. Petrolube (T) Limited & Another**, Civil Application No. 364/16 of 2017, the Court of Appeal stated that:

*"Just as a matter of guidance, we wish to emphasize that the duty of the court in application of this nature is not to determine the merits or demerits of the grounds of appeal raised when seeking leave to appeal. Instead, court has only to consider whether the proposed issue are embraced in conditions set in the case of **British Broadcasting Corporation vs Eric Sikujua Ng'maryo** (supra)."*

From the above principles of the law, the essence of application for leave is to spare the Court of Appeal from unmerited cases. In the case at hand, the applicant main argument lies on the decision of this court which dismissed his appeal on the ground that it was incompetent. His main contention was that, the District Land and Housing Tribunal extended time for the application to set aside the exparte judgement. However, the ruling which is believed to have granted extension cannot be traced anywhere in the court's record. In absence of such a

ruling, the applicant's contention that he was granted extension of time before filing the application to set aside the exparte judgment is unfounded. Hence the decision of this court is correct. At this point I find no serious issue to bother the Honourable Court of Appeal. I hereby dismiss the application with costs. Order accordingly.

DATED at **Mwanza** this 21st day of June, 2023



Ntemi N. Kilekamajenga.
JUDGE
21/06/2023



Court:

Ruling delivered this 21st June 2023 in the presence of the counsel for the applicant, Ms. Milembe Lameck and the 3rd respondent. The applicant, 1st and 2nd respondent were absent. Right of appeal explained.



Ntemi N. Kilekamajenga.
JUDGE
21/06/2023

