

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

MISCELLANEOUS LAND APPLICATION NO. 63 OF 2022

(Arising from Judgment and Decree of High Court of Tanzania at Moshi dated 24/11/2022 in Land Appeal no. 27 of 2022 and originating from Decision of District Land and Housing Tribunal of Moshi at Moshi dated 3/06/2022 in Application No. 167 of 2015)

SALEHE FADHILI MTETI

(As legal representative of the deceased Hadija Salehe).....**APPLICANT**

VERSUS

MARTIN MRISHA.....**1ST RESPONDENT**

HONORATHA ADOLFU**2ND RESPONDENT**

RULING

16th May & 13th July, 2023

A.P.KILIMI, J.:

The applicant hereinabove has lodged this matter in this court by way of chamber summons supported by his affidavit under section 5 (1) (c) of the Appellate Jurisdiction Act, Cap 141 RE 2019 and Section 47(2) of the Land Disputes Courts Act Cap 216 R.E 2019. In this application the applicant is seeking for leave of this court to appeal to the court of appeal with costs.

In his affidavit the applicant has deponed that, he was the appellant in Land case appeal No. 27 of 2022 which originated from District Land and Housing tribunal of Moshi at Moshi in land Application No. 167 of 2015, thus conversant with the facts of that case. I have considered that in the chamber summons to this application it is written decision he want to appeal for land Appeal no. 40 of 2021. However, since affidavit is evidence, I invoked the principle of overriding objective to cure this anomaly for the sake of attaining substantive justice of this application.

The applicant further in his affidavit deponed that, the dispute was as follows, his late mother (Hadija Salehe) sometimes in 2015, instituted a claiming of 15 acres of land which was trespassed by the respondents mentioned hereinabove. At the tribunal, the 2nd respondent, did not file her written statement of Defense, but the tribunal allowed her to give evidence. Also, one of the issues which was framed at the trial tribunal was to determine and declare the owner of the suit land between the parties. But the same was not determined as the trial chairman ended in stating that, that issue had been clearly answered by documentary evidence (sale

agreement and customary right of occupancy) which had been tendered by the respondents, while was not tendered.

In regard to points, the applicant wants the court of appeal to settle, the applicant deponed that, both the first appellate court and the trial tribunal erred in law for not proceeding ex parte against the second respondent as she had not filed a written statement of Defence. Secondly; the learned high court Judge erred for holding that the trial tribunal determined the issue of ownership of the suit land while it did not. Third, the first appellate court erred in law and facts for conceding with trial chairman, when stated that, he failed to tender documents which show who allocated the suit land to Hadija Salehe. Then, he has concluded that these are legal triable Issue which need intervention of the court of appeal of Tanzania.

When this application came before me for hearing, Mr. Erasto Kamani learned counsel appeared for the applicant while Mr. Martini Kilasara learned counsel represented the respondents. This court acceded with their prayer for arguing this matter by way of written submission. I thank them for timely compliance of the schedule issued.

In supporting this application, is Mr. Kamani commenced by submitting that in order leave to appeal to be granted, the grounds of appeal proposed must raise issue of general importance or a novel point of law or they must show a prima facie or arguable appeal. To support this stance, he has invited me to refer the cases of see **British Broadcasting Corporation vs. Eric Sikujua Ng'maryo**, Civil Application No. 138 of 2004 and **Jirey Nestory Mutalemwa vs. Ngorongoro Conservation Area Authority**, Civil Application No.154 of 2016 (both unreported).

The counsel then proceeded on grounds, that, the first ground of an intended appeal is failure of the trial chairman to evaluate the evidence adduced by the parties. Evaluation of evidence is the issue of general importance as it forms basis upon which a just and fair judgment is composed. The issue to be considered by the court of appeal here is whether the tribunal assessed properly the credibility, reliability and probative value of the evidence adduced by the parties.

Mr. Kamani further submitted that, the second ground to be raised is failure of the trial tribunal to determine the owner of the suit land. Failure to determine the owner of the suit property is a serious issue of general

importance and it shows that there is an arguable issue. This court as well as the trial tribunal in their decisions concluded that the issue of ownership was answered by admissible documentary evidence (sale agreement and customary rights of occupancy) which was tendered by the respondents and that the evidence of the applicant was inadmissible because he did not tender the documentary evidence. Therefore, in view thereof, Mr. Kamani anticipates that the issue which the court of appeal will be called upon to consider here is whether it is true that by simply stating that the question of the owner of the land in dispute has been answered by admissible documentary evidence tendered by the respondents, another issue to be considered here is whether omission of the appellant to produce documentary evidence rendered all of his evidence inadmissible.

In third ground of an intended appeal is a mistake of the tribunal to allow the second respondent to adduce evidence in defending herself while she had not presented her written statement of defense. Wrist, Mr. Kamani argued that, the second respondent did not present a written statement of defense yet she was allowed by the trial chairman to proceed with the hearing and produce evidence in defending herself. And thus, is thinking,

the issue to be considered by the court of appeal, is whether according to provisions of Order VIII Rule 14 (i) of The Civil Procedure Code, (Cap 33 R.E 2019) it was proper for the second respondent who had failed to present a written statement of Defense to be allowed, to give evidence in defending herself instead of proving a case *exparte* against her.

In conclusion, Mr. Kamani argued that, the fourth arguable issue at the court of appeal, is a misdirection of this court which instead of deciding the grounds of appeal which was before it and which the appellant had submitted on, it made decision on something different in ground No.3, 4 and 5 of appeal No. 27 of 2022, this is because, the appellant was challenging the credibility, reliability and probative value of the respondents' documentary evidence. But this court in its judgment decided that the appellant is stopped and precluded from faulting the admissibility of documents which he did not object at trial.

Responding to the applicant's submission, Mr. Kilasara for the respondent contended the first ground of intended appeal that, the trial tribunal with the aid of parties framed three issues to wit, who is the lawful owner of the suit land; whether the Respondents have trespassed the suit

land and what reliefs are the parties entitled to. Also, the trial court analyzed the evidence of both parties as in relation to the issues framed, dully assed the credibility of the witnesses brought and finally reached a legally justified conclusion that the Applicant's claim was devoid of any merits. The first Appellate court also reaffirmed the trial court findings of facts and law. Thus, said Applicant's purported assertions are frivolous and grossly misconceived.

On the alleged issue of ownership of the suit land was not determined by the trial tribunal. Mr. Kilasara contended that the 1st Respondent duly testified how and when he acquired ownership of his respective lands. The title for customary right of occupancy as well as sale agreements to substantiate his ownership were tendered and freely admitted at the tribunal as Exhibits. Then, the tribunal upon hearing the parties and evaluating the whole evidence adduced before it held at page 8 of the impugned decision that there was credible and sufficient evidence that the Respondents never trespassed the suit land as alleged by the Applicant.

In respect, to the fact that the second Respondent did not present her written statement of defence, Mr. Kilasara contended that, these were never raised in the pleadings or at the trial or grounds of appeal raised by the

Applicant in his memorandum of appeal filed at the first Appellate court, therefore they have been raised now at this stage for the first time, and thus cannot be argued at the second Appellate stage; as the Applicant tries to insinuate. To buttress his stance has referred the cases of **Hotel Travertine Ltd. vs. National Bank of Commerce Ltd.** (2006) TLR 133 and **Augustus N. A D D.G. Halikas vs. M. K. Mithani and Mehboob Yusufuali Manti** (1984) TLR 74.

In conclusion, Mr. Kilasara argued that, the first Appellate court duly exercised its obligation to reevaluate the evidence on record and made a legally justified unanimous findings of both facts and law that the said appeal was devoid of merits. And this was after it have considered and reassessed the evidence on record. Therefore, no indication that the findings of the first Appellate Court are not based on law and facts availed on record.

On part the second respondent, responded by starting with ground number three of intended appeal arguing that, it is in records that upon receipt of the Land Application o. 167 or 20 15 of the District Land and Housing Tribunal for Moshi, the 2nd Respondent did file her Written Statement of Defence on 08th March 2017. Thus, she had the right to defend

herself thereafter, therefore applicant's claims which was not even a subject of his appeal is unfounded. Moreover, the second respondent argued in regard to first ground that the Chairman in his judgment did properly evaluate evidence of both parties, it is nothing but the applicant failed to reach the extent of proof required by the law. Likewise, the High Court re-evaluated the both parties' evidence. Also argued that through the said evaluation the tribunal was right to determine the owner of the suit land. Finally, the second respondent contended that the appellate court dealt with grounds raised and after evaluated evidence concluded that the applicant had failed to prove his case to required standards.

I have considered the rival submissions of parties to this application and the record of the case the applicant intending to appeal therefrom, and before I proceed, I find appropriate to look on the applicable law in application of this kind. It is settled law that, 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 on the materials before the Court. As a matter of general principle, leave to appeal will be granted where the grounds of appeal raise issue of general importance or a novel point of law

or where the grounds show a prima facie or arguable appeal. (See the case of British **Broadcasting Corporation vs. Eric Sikujua Ng'amaryo** Civil Application No. 133 of 2004 and **Rutagatina C. L. vs. The Advocates Committee & Another**, Civil Application No. 98 of 2010 (both unreported)

From the above, in my view, this right is not automatic, the applicant must show that the intended appeal has some merit whether factual or legal or that there are grounds of appeal which merit serious judicial consideration. Where the decision from which it is sought to appeal was decided according to the requirements of the law and no any seriously misapprehensions which occasioned failure of justice any party, the same should not be granted leave. In this regard, I feel to refer the case of **Harban Haji Mosi & Another vs. Omar Hilal Seif and Another**, Civil Reference No. 19 of 1997 (unreported) when the Court of appeal had this to say;

"Leave is grantable where the proposed appeal stands reasonable chances of success or were, but not necessarily the proceedings as a whole reveal such disturbing features as to require the guidance of the Court of Appeal. The purpose of the provision is therefore to spare the Court the specter of

unmeriting matters and to enable it to give adequate attention to cases of true public importance."

Guided on the above law, the issue for determination is whether the applicant has raised grounds passing the test set out in the above decisions of this land. In dealing with the grounds to be raised, I am mindful that I should restrain from considering substantive issues that are to be dealt with by the appellate Court, since by doing so will be pre-empting the merits or demerits of the intended appeal. (See the cases of **Grand Regency Hotel Limited vs. Pazi Ally and 5 Others**, Civil Application No. 100/01 of 2017 and **Regional Manager-Tanroads Lindi vs. DB Shaprya and Company Lid**, Civil Application No. 29 of 2012. (Both unreported).

I have considered the grounds of appeal, the applicant is intending to appeal with, I wish to start with the ground he argued as number three in his written submissions. The applicant counsel alleges that the second respondent was allowed to defend by adducing evidence during trial while she did not file her written statement of defence. In responding this, the second respondent contended as above that she filed her WSD on 8th March 2017. This has induced me to peruse the entire record of Land application

No. 167 of 2017. Apparently, the said WSD was filed as stated. This is the court record therefore need to be believed. The principle of law that court records are deemed authentic and cannot be easily impeached was stated in the case of **Halfani Sudi vs. Abieza Chichili** [1998] TLR 527 when the court held that:

"(i) A court record is a serious document. It should not be lightly impeached.

(ii) There is always a presumption that a court record accurately represents what happened."

Be it as it may, this matter never raised by the applicant at the trial court or at the first appellate court. In that regard I find myself subscribe with Mr. Kilasara argument that the above being new matters cannot be raised at this stage. (See the cases of **Hotel Travertine Ltd. vs. National Bank of Commerce Ltd** and **Augustus N. A D D.G. Halikas vs. M. K. Mithani and Mehboob Yusufuali Manti** (1984) TLR 74. (supra). Nevertheless, can not be the ground of appeal at the Court of Appeal, where the applicant is seeking to knock its door.

The issue whether the Court of Appeal could hear and determine a matter not raised and decided by the first appellate court, was decided by the Court of Appeal in the case of **Hassan Bundala @ Swaga vs. Republic**, Criminal Appeal No. 386 of 2015 (unreported) and I wish to reiterate the wordings of the said court hereunder;

"It is now settled law that as a matter of general principle this Court will only look into matters which came up in the lower court and were decided; not on matters which were not raised nor decided by neither the trial court nor the High Court on appeal."

In the above premise, it is my considered view, the same cannot be arguable issue at the court of Appeal.

In respect to the remaining grounds of appeal which the applicant is seeking leave to be forwarded to the court of appeal, I have entirely considered them in relation to the circumstances of the impugned decision, these grounds are on points of facts based on Evidence. Nonetheless, upon my perusal to the decision of the first appellate court, the said court did its duty as a first appellate court by re-evaluate the entire evidence and arrive at the said findings of adduced facts. In the case of **Future Century Ltd**

vs. TANESCO, Civil Appeal No. 5 of 2009, the Court of Appeal observed that;

"It is part of our jurisprudence that a first appellate court is entitled to re-evaluate the entire evidence adduced at the trial and subject it to critical scrutiny and arrive at its independent decision.

Moreover, according to this matter at hand, it is undisputed that, after the first appellate court did its duty of considering the above grounds reached a concurrent finding of the first trial tribunal. In my view according to the circumstances stated above, it is rarely for the second appellate court to fault the concurrent finding of two lower courts. I am saying so, because the second appellate court can not step into the shoes of the first appellate court which did its duty precisely. This is because, it is a trite law that where there are concurrent findings of facts by two courts, the second appellate court should not disturb the findings, unless, it is clearly shown that there has been misapprehension of evidencing a miscarriage of justice or violation of some principle of law or procedure as it held in the case of **Amratlal Damodar Maltaser and Another t/a Zanzibar Silk Stores V A.H**

Jariwallatla Zanzibar Hotel [1980] TLR 31 and **Bushanga Ng'oga V. Manyanda Maige** [2002] TLR 335.

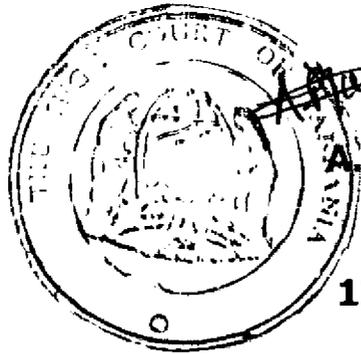
In this matter at hand, in my view to the submissions by the applicant counsel, there is no violation of some principle of law or procedure shown. However, the counsel has argued on misapprehension of evidencing which he believed has jeopardize justice in his part. As proved above by case laws, I think it is not every claim should be taken as ground of appeal, the appellant has to show the said ground claim a serious issue of general importance. I have thought his grounds, in my opinion, it is like a repetition of appeal heard in the first appellate court, but now the applicant wants to be dealt at the court of appeal. Since the same were dealt at the first appellate court, at this stage in my view cannot be serious issues of general importance, therefore can not be re- again be arguable issue at the court of appeal.

In the circumstances, the issue raised hereinabove is answered negatively that, this application does not meet any of the conditions for granting leave to appeal to the Court of Appeal as prayed. In view thereof,

it is my finding that this application has no merit, and consequently I continue to dismissed it with costs.

It is so ordered.

DATED at **MOSHI** this 13th day of July, 2023.



A. P. KILIMI
JUDGE
13/7/2023