

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA AT ARUSHA

MISC. LAND APPLICATION NO. 25 OF 2023

(C/f Misc. Land Appeal No.45 of 2022 at the High Court of Tanzania, Arusha, Original Land Application No. 32 of 2020 in the District Land and Housing Tribunal for Karatu at Karatu)

MARTIN QAMUNGA.....APPLICANT

Vs

JOSEPH PAULO TLEHHEMA.....1ST RESPONDENT

MATLE KWAANGW.....2ND RESPONDENT

RULING

Date of last Order:30-6-2023

Date of Ruling: 13-7-2023

B.K.PHILLIP,J

The applicant herein lodged this application under the provisions of section 47 (2) of the Land Disputes Courts Act, Cap 216 ,R.E. 2019, (Henceforth "Cap 216").His prayers are reproduced verbatim hereunder;

- i) That this Honourable Court be pleased to grant leave for the applicant to file his appeal to the Court of Appeal of Tanzania against the proceedings, Judgment and decree made in Land Appeal No.45 of 2022 before the High Court of Tanzania , Arusha District Registry at Arusha.
- ii) That costs of this application be considered in the intended appeal.
- iii) Any other relief this Honourable court deems fit and equitable to grant.

This application is supported by an affidavit sworn by the applicant. The learned Advocate Qamara Aloyce Peter swore a counter affidavit in opposition to this application.

A brief background to this application is as follows; That the applicant herein was the applicant in Land Application No.32 of 2020 at the District Land and Housing Tribunal for Karatu at Karatu, (Henceforth "the DLHT") which was dismissed on a point of preliminary objection that it was wrongly filed before the DLHT without leave to refile it since the same matter was previously filed at DLHT vide Land Application No. 49 of 2015 and was marked as withdrawn at the instance of the applicant. No order for leave to re-file it was granted by the DLHT. Aggrieved by the dismissal of his application, the appellant appealed to this court vide Land Appeal No.45 of 2022 which was dismissed with costs for lack of merit. This court (Hon Gwae, J) upheld the decision of the DLHT. Undaunted, the applicant has lodged this application seeking for leave to appeal to the Court of Appeal.

In this application the applicant appeared in person, unrepresented whereas the respondents were represented by the learned Advocate Qamara Aloyce Peter. The application was disposed of by way of written submissions.

Submitting for the application , the applicant argued that Land Application No.32 of 2020 was not *res judicata*. It was different from the first Application that is, Land Application No.49 of 2015 which was withdrawn by the applicant because in the previous Application (Land Application No. 49 of 2015) ,the respondents were sued in their official capacity whereas in

Land Application No. 32 of 2020 the respondents were sued in their personal capacities. Moreover, the applicant pointed out that in Land Application No.49 of 2015 , Gyekrum Lambo village council was among the respondents whereas in Land Application No. 32 of 2020 Gyekrum Lambo Village was not a party in the application.

In addition to the above, the applicant pointed out that the 2nd respondent never appeared in court. He contended that the advocate who appeared for the 2nd respondent might have appeared in court without any instructions from the 2nd respondent. He implored this court to grant this application.

In rebuttal, Mr. Qamara, submitted that the findings of this court that Land application No.32 of 2020 was similar to Land Application No.49 of 2015 which was previously filed by the applicant and withdrawn at the instance of the applicant are proper. He contended that as observed by this court in its judgment, the substance of the applicant's claims in Land Application No.32 of 2020 and Land Application No.49 of 2015 are similar. Therefore, Land application No.32 of 2020 was *res-judicata*. Not only, Mr. Qamara contended that the applicant re-filed the matter at the DLHT without any order for re-filing it after been withdrawn at the instance of the applicant.

In conclusion of his submission, Mr. Qamara contended that the applicant has not adduced any issue of law or fact worthy the attention of the Court of Appeal.

With regard to the applicant's concern that the 2nd respondent did not entered appearance in court, Mr. Qamara submitted that the 2nd respondent has been represented by his advocate as reflected in the court's records. He prayed this application to be dismissed with costs. In rejoinder, the applicant reiterated his submission in chief.

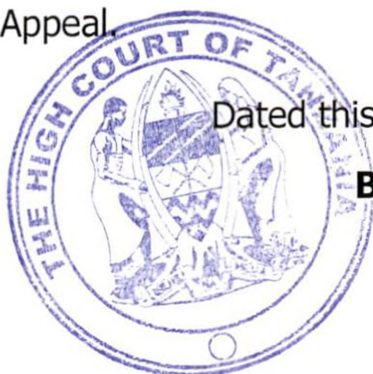
Having analyzed the competing arguments made by the parties, let me proceed with the determination of the merit of this application which basically requires me to make an assessment on whether or not the applicant has raised any issue(s) worthy the attention of the Court of Appeal or any arguable appeal. It is noteworthy that grant or refusal to grant an order for leave to appeal to the Court of Appeal lies in the court's discretionary powers. However, that discretion must be exercised judiciously. The conditions to be considered by the court in determination of an application for leave to appeal like the one in hand were stipulated in 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.."

Guided by the holding of the court in the case of **British Broadcasting Corporation** (supra) quoted herein above, I am of a settled view that this application has merit, as I shall elaborate soon hereunder.

In its judgment this court made a finding that despite the fact that in Land Application No.32 of 2020 Gyekrum Village council was not party but it was a party in the previous Land Application No.49 of 2015 which was marked withdrawn, in essence the applicant's claims were the same. In addition, the court made finding that Land Application No.32 of 2020 was filed without the leave to refile it after it was withdrawn by the applicant. In my considered view, I am inclined to agree with the applicant that the issue on whether or not Land Application No.32 of 2020 was *res judicata* deserves the attention of the Court of Appeal since it is not in dispute that the two applications had different parties as pointed out herein above. Not only that the issues on whether or not in essence the claims in Land Application No.32 of 2020 were the same to the claims in Land Application No.49 of 2015 and that the applicant required leave to re-file his claims despite the fact that the parties in the two applications were different are worthy the attention of the Court of Appeal.

From the foregoing, it is the finding of this court that this application has merits. The applicant is hereby granted the leave to lodge his appeal to the Court of Appeal.



Dated this 13th day of July 2023

B.K.PHILLIP

JUDGE