

IN THE HIGH COURT OF TANZANIA
MUSOMA DISTRICT REGISTRY
AT MUSOMA
MISC. LAND APPLICATION NO. 63 OF 2022

(Arising from Land Appeal No. 32 of 2022 in the High Court of Tanzania at Musoma)

FLORA AUMA NYARONGA

(Pronate Administratrix of the Estate of the **1st APPLICANT**
Late GERSHON OLIVER NYARONGA)

MONICA APIYO NYARONGA

(Pronate Administratrix of the Estate of the **2nd APPLICANT**
Late GERSHON OLIVER NYARONGA)

JANE AKINYI NYARONGA

(Pronate Administratrix of the Estate of the **3rd APPLICANT**
Late GERSHON OLIVER NYARONGA)

VERSUS

SAMWEL OCHIENG ONDOTO 1st RESPONDENT

KWARA AIRO 2nd RESPONDENT

RULING

3rd & 17 August, 2023

M. L. KOMBA, J.:

Applicants above mentioned seeks to move this court to grant leave to appeal to the Court of Appeal of Tanzania (the Court) against the decision of this court (Mahimbali, J) in Land Appeal No. 32 of 2022 where the

respondents successfully appealed against the decision of the District Land and Housing Tribunal of Tarime (Application No. 91 of 2018).

The application brought by way of chamber summons made under section 47(2) of the Land Disputes Courts, Cap 216 R. E. 2019 (Cap 216) and accompanied by the counsel for applicants' affidavit. The section does not compel service of the Notice to the other party neither provide for notice. Respondents too filed counter affidavit with Preliminary Objection raising points that first; the name of the court was mistakenly and second; they were not legally served with Notice of Appeal and pray for dismissal of the application.

Brief factual background giving raise to the current application can be summarized as follows; Applicants who are administratrixes of the estate of the late Mzee **GERSHON OLIVER NYARONGA** claim the disputed land to be owned by their late father since 1965 and that in 1974 their father extended boundaries as he bought the land from one Airo Mlek. From there, respondents father used the land peacefully. They complained it was the respondents who invaded their land.

On other side, the 1st respondent admits to know the family of applicants who moved to the village in 1968 and that were allocated only three (3) acres of land. The rest of the land was used in agreement. The 2nd respondent claim that the area was in their fathers' possession till 1983 when he died then their mother was administratrix till 2013 when also died; he disputed the fact that he sold it to applicants' father as there is no proof of the sale. He claimed that it was in 2017 when applicants extended boundaries hence this dispute.

Trial tribunal decided in favour of the applicants, decision which was overturned by the first appellate court and declared the disputed land belongs to respondents herein as applicants failed to establish their case at the trial tribunal. Dissatisfied, applicants registered their intention to go to the highest court searching for their rights.

When the matter was fixed for hearing, appellants had a legal service of Mr. Cosmas Tuthuru and Mr. Ostack Mligo, both advocates, while respondents appeared themselves, without any representation. As custom, preliminary objection when raised has to be delt first. See **Khaji Abubakar Athumani vs. Daudi Lyakugile TA D.C Aluminium & Another**, Civil Appeal N086 of 2018, CAT at Mwanza.

Being lay persons in law both respondents prayed this court to adopt their affidavit and PO and waiting for response from the applicants.

Mr. Tuthuru for the applicants submitted that on the issue of the name of this court, that was slip of the pen which is curable. On the second point of objection, he submitted that on whether respondents were served with notice on time or not shall be determined by the Court of Appeal and not at this stage as was decided in the case of **Jireys Nestory Mutalewa vs. Ngongoro CCA**, Civil Application No. 154 of 2016. The CAT held lower court duty is to forward the appeal not to confine on procedures. He prayed this court not to consider the objection and the case be heard on merit.

During rejoinder both respondents maintained their prayer that PO to be found with merit and the application be dismissed.

I read the objection filed by respondent and heard submission by counsel for the applicants. About the name which is written in the High Court of Republic of Tanzania, and District Sub registry. I find this is slip of the pen as our contrary and this court is addressed as the High Court of Tanzania. So far as the application is filed in this court then I take Judicial Notice that

applicant intended to write United Republic of Tanzania just as submitted by Mr. Tuthuru that was slip of the pen and can be cured under S. 3 A of the Civil Procedure Code. Notice of Appeal was filed to this court and attached in application which seeks leave to appeal to the court of appeal. This court is moved by section 47 (2) of Cap 216. The section does not compel service of the Notice to the other party neither provide for notice. Reading further the law I came across with sub section (4) of section 47 thus;

'(4) The procedure for appeal to the Court of Appeal under this section shall be governed by the Court of Appeal Rules.'

Reading the rules, I find Notices are regulated by rule 83 and further the Court under rule 4 (2) is mandated to regulate procedures to be adopted. Mr. Tuthuru submitted that this court should not confine itself to procedures and cited the case of **Jireys Nestory Mutalewa vs. Ngongoro CCA** (supra). In that case, the court cited their wise words in **The Regional Manager TANROADS Lindi vs. DB Shapriya and Company Ltd**, Civil Application No. 29 of 2012 (unreported) thus;

'it is now settled that the 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 decision on substantive issues before the appeal itself is heard.....'

This being an application for leave which is governed by Cap 216, and so far as the section applicable does not provide anything about the Notice of Appeal, bearing in mind that Court of Appeal Rules is for the Court and that, the Court may regulate its procedures, I am anxious to deal with requirements of appeal at this stage. The issue of Notice will be handled well at the appellate stage. I find the Preliminary Objection has no merit as hereby overruled without costs.

Being done with PO now I turn to the main application as parties submitted on both. Mr. Tuthuru was the first to address this court in their application for leave. He started by praying the affidavit be adopted and submitted that their arguments based in paragraph 5 of the affidavit which states as follows;

5. that there is important matters of law and facts which were not adequately dealt with by this HONORABLE Court which need the redress of the Court of Appeal of Tanzania namely;

(a) Whether or not there is misapprehension of evidence on record by the first appellant Court, leading to a wrong decision of the court and hence causing injustice to the applicants.

(b) Whether or not the first Appellate Court properly invoke the priority principle to decide ownership of disputed land in favour of the respondents.

(c) Whether or not the 1st Appellate Court invoke the doctrine of adverse possession to decide the alleged invaded piece of land by respondents in favor of the appellants.

It was his submission that at paragraph 5(b) they wish to know if the priority principle was properly invoked by the trial Judge when he find the respondents were the once who first occupied the land but the evidence in record is different. Another issue intended to move the court is whether the High Court analysed properly the evidence as adduced by parties while citing the case of **Kilombero Sugar Company vs. Comm of TRA**, Civil Appeal No. 261 of 2018. To him, there was apprehension of evidence by the 1st appellate court as there is oral account on how the applicants own the land.

Mr. Mligo for applicants submitted on paragraph 5(c) of the affidavit on the principle of adverse possession. He submitted that the applicant herein complains that the disputed land was invaded in year 2017 and 2018. The 1st respondent claimed that the area was in his control since 1994

according to the High Court judgment. Mr. Mligo pointed that they wish to move the Court and determine if the principle of adverse possession was considered as there was no evidence on what was going on over the disputed land since 1994 to the time when the land was invaded 2017 and prayed the leave to be granted.

1st respondent submitted that there was contradiction on when exactly applicants started to use the disputed land and the size which is claimed to be encroached. He submitted that the trial tribunal erred in its decision and supports what has been done by the appellate court. In summary he resists the application.

Second respondent resist the application as he supports the first appellate court findings. He said available evidence was properly analysed and the decision was fair.

Having keenly considered the application and submission by parties, I am moved to determine whether or not this application for leave to the Court of Appeal of Tanzania has merit. I am alive that in our jurisdiction there are unlegislated principles which guides grant of leave to the Court of Appeal. However, the Court of Appeal and also this court have strived to make the

guiding principles which this court or the Court of Appeal vides a second bite may exercise its discretion of either to grant or refuse to grant leave to appeal to the Court of Appeal of Tanzania.

The above principles that may be gleaned from a plethora of case law include the following; one, leave may be granted where there is a point of law, or there is a point of public importance to be determined by the Court of Appeal. See, **Rugatina CL vs. The Advocates Committed and Mtindo Ngalapa**, Civil Application 98 of 2010) [2011] TZCA 143.

Also, the same principle was articulated in the case of **British Broadcasting Corporation vs. Erick Sikujua Ng'amaryo**, Civil Application No. 138 of 2004 thus:-

'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 on the material before the Court. As a matter of general importance, 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.'

Again, this court (Commercial Division), in the case of **Citibank Tanzania Limited vs. Tanzania Telecommunications Company Ltd and 5**

others, Misc. Commercial Cause No. 6 of 2003, at Dar es Salaam (unreported) Hon Massati, J. (As he then was) observed that;

'I think it is now settled that, for an application for leave to appeal to succeed, the applicant must demonstrate that the proposed appeal raises contentious issues worth taking to the Court of Appeal or are of such public importance, or contain serious issues of misdirection or non-direction likely to result in a failure of justice and worth consideration by the Court of Appeal....In an application of this nature, all that the Court needs to be addressed on, is whether or not the issues raised are contentious....the Court cannot look at nor decide either way on the merits or otherwise of the proposed grounds of appeal.'

I have carefully analysed the reasons advanced by the applicant in pursuing their application and in conjunction with the grounds advanced by the applicants' counsel as seen in his affidavit under paragraph 5 (a), (b) and (c) of the sworn affidavit. Based on such reasons and the position of the law stated above, I am fortified that the reasons/grounds pinpointed have-shown arguable appeal and or raise matters on point of law which needs intervention of the Court.

I will not go into the details of the reasons but I consider it prudent to pinpoint an issue or two that have captured my attention and, in my

humble opinion, need intervention by the highest court of our land. For example, paragraph 5(b) needs the Court of Appeal to determine whether the principle of priority was properly applied and considered by the first appellate court. I find this and many others are points need attention of the higher authority.

In the upshot, I hereby grant the application with no order as to costs.

DATED at **MUSOMA** this 17th day of August, 2023.



Nkk
M. L. KOMBA
Judge