

THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF BUKOBA)
AT BUKOBA

MISC. LAND APPLICATION NO. 02 OF 2023

(Arising from the High Court of United Republic of Tanzania (Bukoba Registry) in Land Appeal No. 42 of 2021 original Land Application No. 76 of 2017 from the District Land and Housing Tribunal for Muleba at Muleba)

HELENA PROTACE 1ST APPLICANT

ELIAS PROTACE 2ND APPLICANT

VERSUS

DEUSEDIT JOSEPH 1ST RESPONDENT

JASSON PROTASE 2ND RESPONDENT

RULING

20TH & 22ND November 2023
A.Y. Mwenda J,

Before the District Land and Housing Tribunal of Muleba at Muleba Mr. Deusdert Joseph filed an Application No. 76 of 2017 to be declared as the rightful owner and the respondents as trespassers to the Suitland. At the end of the trial the said application was dismissed with costs for want of merits. On the other hand the 1st respondent was declared as the lawful owner of the Suitland. Aggrieved with the said decision Mr. Deusdedit Joseph filed Land Case Appeal No. 42 of 2021 before this court and, at the end of the hearing he was declared as the rightful owner of the Suitland. This decision did not impress the applicants who decided to file a notice of appeal to the Court of Appeal. After that they applied for a copy of proceedings which was supplied to them when the time to lodge

application for leave to appeal to the Court of Appeal had already expired. They then filed the present application seeking extension of time to file application and leave of this court to Appeal to the Court of Appeal out of time. This application is brought under section 47(2) of the Land Dispute Courts Act [CAP 216 R.E 2019] and Rule 45 (a) of the Tanzania Court of Appeal Rules and section 11(a) of the Appellate Jurisdiction Act [CAP 141 R.E 2019]

At the hearing of this application the applicants were represented by Mr. ELIPHASI BENGESI, learned counsel while the respondents hired the legal services from Mr. DERICK ZEPHURINE, learned counsel.

When he was invited to submit in support of this application, Mr. Bengesi submitted that the Applicants are seeking extension of time to apply for leave to appeal to the Court of Appeal and for the leave itself. He submitted that the reason for the delay to file an application for leave to appeal to the Court of Appeal was due to technical delay as they were supplied with the copy of proceedings, judgment and decree when the time prescribed to lodge application for leave to appeal had already expired. To support this point, he cited the case of VALERIE MCGIVEN VS SALIM FARKRUDIN BALAL, CIVIL APPEAL NO. 386 of 2019.

Regarding his submissions in support of application for leave to appeal, the learned Counsel submitted that at paragraphs five of the Applicants' Affidavit there is arguable appeal worth to be determined by the Court of Appeal. The

same is regarding the validity of the contract. To support this point, he cited the case of SAVERA KATISHA VS YUSTINIAN MIAMO, MISC. LAND CASE APPEAL NO. 16 OF 2015. He then concluded his submission by praying this application to be allowed.

Responding to the submissions by the learned Counsel for the Applicants, Mr. Zephurine did not oppose the fact that the Applicants were prevented by technical delay to file application for leave to Appeal to the Court of Appeal. He pointed out that he is aware of the automatic exclusion of days spent by the party waiting for court's records. He however challenged the learned counsel for the Applicant's submission regarding capacity to contract. He said that point was not raised as one of the framed issues before the trial Tribunal. According to him the vendors had capacity to enter a contract because the said contract was witnessed by the parties themselves and their mother one Hellene Protace (the 1st Applicant). Further to that Mr. Zephurine submitted that the issue of vendor's age was determined at page 8 of the copy of judgment of this court. On that basis he prayed this application to be dismissed.

In rejoinder, Mr. Bengesi insisted that both vendors were minor as they did not have capacity to enter into contract. He stressed that this ground by itself suffice to be arguable appeal worthy to be determined by the Court of Appeal.

That marks the end of the summarized submissions for and against the present application which now allows this court to determine the fate of the present Application.

At the outset, let me point out that that leave to appeal to the Court of Appeal must be filed within fourteen (14) days from the date of the decision. This is accordance to section 45 (b) of the Tanzania Court of Appeal Rules. The said section read as follows;

“Where an appeal lies with the leave of the Court, application for leave shall be made in the manner prescribed in rules 49 and 50 and within fourteen days of the decision against which it is desired to appeal or, where the application for leave to appeal has been made to the High Court and refused, within fourteen days of that refusal; Provided that, in computing the time within which to lodge an application for leave in the Court under paragraph (b), there shall be excluded such time as may be certified by the Registrar of the High Court as having been required for preparation of a copy of the decision subject to the provisions of rule 49(3)...” [Emphasis added]

The takeaway from the above legal position is that application for leave to appeal to the Court of Appeal must be filed within 14 days from the date of

the decision. In the present application the applicant is seeking extension of time to file application for leave to appeal to the Court of Appeal out of time and to be granted the said leave. Regarding delay to file application seeking leave to appeal to the Court of Appeal, it is said that the copy of the proceedings, judgment and decree were not supplied in time. This was categorically stated at paragraph 3 and 4 of the applicants' affidavit where they narrated on how they made a follow up of the said records. Their points are exhibited by annexures HP -1 and HP -2 which are letters requesting to be supplied with the court records. I have considered this argument and came to an agreement with Mr. Bengesi and Mr. Zephurine that the applicants were prevented by technical delay to file application for leave to appeal to the Court of Appeal. This is so because it is trite law that in computing time limitations, the time spent awaiting for the court's records should be excluded in computation of time and as such it suffices to be a ground for extension of time. This position has been discussed by the Court of Appeal in the case of THE DIRECTOR GENERAL LAPF PENSIONS FUND VS PASCHAL NGALO CIVIL APPLICATION NO 76/08 OF 2018 that;

"A distinction had to be drawn between cases involving real and actual delays and those such as the present one which clearly only involved technical delays in the sense that the original appeal was lodged in time but had been found to be incompetent for one or another reason and

a fresh appeal had to be instituted. In the present case the applicant had acted immediately after the pronouncement of the ruling of the Court striking out the first appeal. In these circumstances an extension of time ought to be granted."

Based on the above authority I am convinced that the Applicants were prevented by technical delay and as such I hereby grant extension of time to file application for leave to appeal to the Court of Appeal and since, the said application is part of this matter, I am going to determine it as I do hereunder.

Regarding leave to appeal to the Court of Appeal, it is appropriate to point out that leave to appeal is not automatic as it within the discretion of the Court to grant or refuse. While propounding this principle, the Court of Appeal in *BRITISH BROADCASTING CORPORATION VERSUS ERIC SIKUJUA NG'IMARYO*, CIVIL APPEAL NO. 138 OF 2004 set some conditions for scrutiny in exercising the said discretion. The Court said that the discretion must however judiciously be exercised and on material before the court. Of importance in the said case are the following words which read as follows:

"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 or

useless or hypothetical, no leave will be granted.”

[Emphasis added]

Similar positions were also covered in the case of SAFARI MWAZEMBE V. JUMA FUNDISHA, CIVIL APPLICATION NO. 503/06 OF 2021, CAT (Unreported) where the Court held inter alia that:

“Arguably, much as the grant of leave is discretion of the court, the same is not automatic in sense that, the Court has to be satisfied that the grounds of the intended appeal raise arguable issue(s) for consideration by the Court. The Court has to be satisfied that the grounds raised should merit a serious judicial consideration by the Court in order not to waste the precious time of the Court.” [emphasis added].

Also see SIX TELECOMS LIMITED VERSUS CAPITAL PROPERTIES LIMITED, MISC. LAND CASE APPL. NO. 269 OF 2017; LAKE CEMENT VERSUS WAMILUMA ENTERPRISES LIMITED, MISC. CIVIL APPLICATION NO. 120 OF 2022; JIREYS NESTORY MUTALEMWA VERSUS NGORONGORO CONSERVATION AUTHORITY, CIVIL APPLICATION NO. 154 OF 2016, CAT(Unreported) and HASHIMU JUMA NAPEPA VERSUS BAKARI AHMAD NG’ITU (Administrator of the Estate of late Galus Polipili) and 1 Another, CIVIL APPLICATION NO. 07/7 OF 2022, CAT (Unreported), just to mention a few.

Based on the above legal position, the issue for determination is whether the Applicant has raised grounds passing the test in the authorities stated herein above.

In the present matter, the proposed grounds of appeal appear at paragraph 5, 6 and 7 of the applicant's affidavit. The same are coached in the following manner:

"5) That, the 1st appellant court upheld a non-existing sale contract of the suit premises. The two vendors were minor of 12 years and 15 years old.

6) That, the 1st appellate court wrongly supported an appeal. The 2nd respondent vacated his pleadings.

7) That, the 1st appellate court illegally visited the locus in situ. It never complied to the guidelines and judicial policies after visiting the same."

Regarding the ground at paragraph 5, having put it under scrutiny, this court formed opinion that the issue regarding vendors capacity to contract (Jason Protace and Elias Protace) is point worthy to be discussed before the Court of Appeal. This is so because at trial level and before the Appellate Court, the vendors capacity to Contract dominated the proceedings and the evidence from the parties concerned was tendered in Court. During his submission Mr. Zephurine said that the same cannot be considered as a point worthy to be

discussed before the Court of Appeal only because it was not raised as one of the issues for determination. Much as I agree that the same was not raised as one of the issues for determination, since the same was dominant in the records, then the law permit the same to be dealt with as one of the key issues. See DR.A. NKINI AND ASSOCIATE LTD V. NATIONAL HOUSING CORPORATION, CIVIL APPEAL NO.72 OF 2015, CAT, (Unreported) Where the Court departed from the general rule under Order XX Rule 5 of the Civil Procedure Code [Cap 33 RE 2019]

Regarding the point raised at Paragraphs 6 that the 1st appellate court wrongly supported an appeal while the 2nd respondent vacated his pleadings, this should not detain me much. This is so because parties are bound by pleadings and if the 2nd respondent vacated to his pleadings, then the Court was justified to look for other pieces of evidence available.

Regarding the point at paragraph 7 that the 1st Appellate Court illegally visited the locus in situ, I have revisited the proceedings of the Appellate Court and failed to locate any record in that regard.

In the light of the above reasoning this Court is of the view that at paragraph 5 of Affidavit there is prima facie or arguable point of appeal worth tabling before the Court of appeal for determination. In that regard this application is hereby granted. Each party shall bear its own costs.

It is so ordered.


A.Y. MWENDA

JUDGE

22.09.2023

Ruling delivered in chamber under the seal of this court in the presence of Mr. Eliphasi Bengesi learned counsel for the applicants and in the presence of the respondents.




A.Y. MWENDA

JUDGE

22.09.2023