

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LAND DIVISION

AT MOSHI

MISC. LAND APPLICATION NO. 23 OF 2023

(c/f Misc. Land Case Appeal No. 63 of 2022 of the High Court Moshi District Registry,
originating from Application No. 74 of 2017 of Moshi District Land and Housing Tribunal)

THE REGISTERED TRUSTEES OF KANISA LA

PENTEKOSTE KILIMANJARO..... APPLICANT

VERSUS

RAYMOND MUSHI 1ST RESPONDENT

GIDO RAPHAEL KAYANI.....2ND RESPONDENT

DAFA KIMELA MKILINDI3RD RESPONDENT

RULING

30/8/2023 & 04/10/2023

SIMFUKWE, J.

The applicant herein after being aggrieved by the decision of this court delivered on 17th day of May 2023 before Hon. Kilimi, J intends to appeal to the Court of Appeal of Tanzania against the said decision.

The application has been filed under **section 47(2) of the Land Disputes Courts Acts**, Cap 216 R.E 2019, **Order XLIII rule 2 of the Civil Procedure Code**, Cap 33 R.E 2019 and **section 5(1)(c) of the Appellate Jurisdiction Act**, Cap 141 R.E 2019. The applicant prayed for the following orders that:

a) The Honourable Court may be pleased to grant to the applicant leave to appeal to the Court of Appeal against the whole decision of the High Court of Moshi at Moshi delivered by Hon. A. P. Kilimi, Judge dated 17th May, 2023 in Land Appeal No. 63 of 2022.

b) Costs be ordered to be in the cause.

The application was supported by an affidavit of the applicant sworn by Sethiel Israel Kombe principal officer of the applicant, which was contested by the counter affidavits of the 1st respondent sworn by Andrew Johnson Kimario, the 2nd and 3rd respondents.

During the hearing of this application, the applicant was represented by Ms. Lilian Mushemba, learned advocate, the 2nd respondent was represented by Ms. Jane James, learned advocate while the 1st and 3rd respondents were unrepresented.

Supporting the application, Ms. Lilian on the outset adopted the affidavit to form part of her submission. She continued to notify this court that the counter affidavits of the 1st and 3rd respondents are defective in their jurat of attestation contrary to **section 8 of the Notaries Public and Commissioners for Oaths**, Cap 12 R.E 2019. She supported her objection with the case of **Hadija Adam vs Godbless Tumbo**, Civil Application No. 3 of 2010. (CAT)

Also, the learned counsel raised another objection against the same counter affidavit to the effect that the same discussed the merit of the appeal. She was of the view that this court is *functus officio* to determine the merit of the appeal. Ms. Lilian supported her contention with the case

of **Lightness Damian and 6 Others vs Said Kasim Chageka**, Civil Application No. 450/17 of 2020. (CAT)

Furthermore, the applicant's advocate informed this court that the said counter affidavit contains extraneous matters in form of arguments and conclusion. She supported the point by referring to the case of **Uganda vs Commissioner of Prisons Ex parte Matovu** (1966) EA 514 as affirmed by the Court of Appeal in the case of **Jamal S. Mkumba & Another vs Attorney General**, Civil Application No. 240/01 of 2019.

Arguing the instant application, Ms. Lilian submitted that land appeals to the Court of appeal are regulated by the **Appellate Jurisdiction Act**, Cap 141 R.E 2019 and **Part III of Land Disputes Courts Act** under **section 5(1) (c)** and **section 47(2)** respectively. That, the applicant must demonstrate that there is a point of law involved which will prompt the Court of Appeal to entertain the appeal. In the present matter, the learned advocate was of the opinion that there are points of law worthy determination by the Court of Appeal as stated in the case of **Simon Kabaka Daniel vs Mwita Marwa Nyang'anyi and Others [1989] TLR 64.**

Explaining the point of law in the intended appeal, Ms. Lilian referred to paragraph 5 of the applicant's affidavit and argued that the applicant has demonstrated the point of law to the effect that neither the Tribunal nor the High Court discussed the two aspects of trespass and ownership in relation to the dispute before them. That, it is for that reason the applicant seeks to appeal to the Court of Appeal.

From paragraph 5 of the Applicant's affidavit, the learned advocate raised the following contentious points of law which she thought are worthy to be determined by the Court of Appeal:

- 1. Whether the evidence on record was properly analysed by both the trial and the first appellate court; in light of law on ownership and trespass to land.*
- 2. Whether the evidence on record was properly analysed by both the trial and first appellate court; in light of the contradiction in the measurement of the land in dispute*
- 3. Whether the evidence on record was properly analysed by both the trial and the first appellate court; in light of demarcations fit for surveyed land and;*
- 4. Whether the evidence of the Applicant's witness was rightly considered by the trial tribunal in light of the law on ownership and trespass to land.*

Mr. Lilian reiterated that trespass and ownership are points of law worthy to be determined by the Court of Appeal. To buttress the issue of ownership and trespass as points of law, she cited the book titled **Manual on Land Law and Conveyancing in Tanzania of 2008** by Mr. Sista J. Mramba & Dr. W. R. Tenga and the book by Scholars Megarry R and Wade titled, **The Law of Real Property, 6th Edition of 2000**.

The learned advocate kept on insisting that the issue of ownership and trespass of land and failure to analyse evidence are very serious matters of law that cannot be summarily dismissed without the intervention of the Court of Appeal just because the respondents are satisfied with the decision. She cited the case of **Said Ramadhani Mnyanga vs**

Abdallah Salehe [1996] TLR at page 74 in which the application for leave was allowed because it contained contentious issues of law fit for consideration by the Court of Appeal.

In her conclusion, the learned advocate asserted that this court is *functus officio* to determine the merits of the intended appeal. That, the contents of the respondents' counter affidavit ought to have pointed out if there is no point of law involved or arguable issues warranting intervention of the Court of Appeal.

Ms. Lilian prayed that this application be granted with costs.

In reply, the 1st respondent submitted that he was not well served with the Applicant's Written Submission as it was only photocopy of the said submission which was served to him. That, even the cited authorities in the applicant's submission were not attached to the copy served to him. On that basis, he commented that he was deprived his right to make a defence on the alleged authorities.

Responding to the argument on the defectiveness of the jurat, the 1st respondent submitted that since the respondent is supposed to sign the document in the presence of the Commissioner for Oaths, then he was not at all responsible to the error that may have been caused by an inadvertent on the table of the Commissioner for Oaths. He referred to the case of **Melisho Sindiko vs Julius Kaaya [1977] LRT 18** and the case of **Phanton Modern Transport (1985) Ltd vs D. T. Dobie (Tanzania) Ltd**, Civil Reference No. 15 of 2001 and 3/2002 in which it was stated that amendment in the pleadings stage is admissible.

Concerning the issues raised by the learned advocate for the applicant, the 1st respondent stated that the raised issues run to the opposite

direction of the judgment of the trial tribunal and the 1st appellate court since the said allegations were completely dealt with and judgments speak for themselves. That, the applicant is creating issues and non-existing situation trying to clean the tinted and contradictory evidence.

The first respondent implored this court to dismiss the application with costs and uphold the decisions of the trial tribunal and the 1st appellate court.

Ms. Jane for the second respondent blamed the applicant's advocate for ignoring the order of filing submission in support of the Application and submitted on preliminary objection without leave of this court and without filing Notice of preliminary objection. She supported his argument with the case of **Karori Chogoro vs Waitihache Merengo**, Civil Appeal No. 164 of 2018 which underscored the importance of compliance to court orders. She contended that, submitting contrary to the court order is illegal and improper since all court orders must be complied. That, it is not fair for the respondents to be ambushed with the submissions on preliminary objections without being notified with the Notice of Preliminary objections.

Concerning the submissions in respect of the application for leave to appeal, Ms. Jane stated that the raised issues are not points of law to be determined by the Court of Appeal as the applicant's counsel submitted on the evidence adduced before the trial Tribunal and the first appellate court. That, paragraph 5 of the applicant's affidavit and submission do not contain any issue of general importance or novel point of law. Even the raised grounds do not show a prima facie or arguable appeal. The raised four points are pure evidence which do not require to be

considered by the Court of Appeal. She supported her assertion with the case of **Safari Mwazembe vs Juma Fundisha**, Civil Application No. 503/06 of 2021 (CAT).

In her conclusion, Ms. Jane prayed the application to be dismissed with costs.

The submission by the third respondent was the same as the submission of the 1st respondent.

In her rejoinder to the argument by Ms. Jane for the 2nd respondent that the applicant argued the preliminary objection without leave of the court, Ms. Lilian elaborated that her disclosure was meant to stand as preliminary objection as she was fulfilling her duty to the court in line with **section 66 and 94 of the Advocates Act**, Cap 341 R.E 2019

Apart from that, she alleged that the 1st and 3rd respondents have not filed their submissions in reply despite praying for the application to be heard by Written Submissions.

In so far as the gist of the application is concerned the learned counsel reiterated her submission in chief.

With the foregoing submissions from all the parties in arguing the application for leave to appeal, the issue before me is ***whether the application for leave to appeal to the Court of Appeal has merit.***

Starting with the objections raised by the learned counsel for the applicant, with due respect to Ms. Lilian the party is not allowed to raise objections in submissions. As rightly submitted by Ms. Jane for the 2nd respondent, the act of Ms. Lilian to submit contrary to the order which

required her to submit in support of the application for leave, is illegal and improper.

Also, the 1st and 3rd respondents claimed that they have been served with a photocopy of the Written Submission in chief of the applicant. However, they did not tell the court how the said copy prejudiced them in preparing their reply. On the argument that the copies of the authorities were not attached to the submissions, I am of considered opinion that the copies of the authorities are nowadays available through the Tanzlii. Thus, the same did not prejudice the respondents. It would be worse if they were not availed with the copy of the applicant's Written Submission in chief.

Back to the merit of this application, it is trite law that leave to appeal to the Court of Appeal is granted where the grounds of the appeal raise issues of general importance or novel point of law and if the grounds are arguable. This was held in the case of **British Broadcasting Corporation v Eric Sikujua Ng'maryo, Civil Application No. 133 of 2004** (Unreported) 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 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 or arguable appeal. However, where the grounds of appeal are frivolous, vexatious or useless or hypothetical, no leave will be granted."

In the instant matter, under paragraph 5 of the applicant's affidavit among the intended arguments advanced which the Court of Appeal's intervention is called for, is stated as follows:

"5. That, there are points of law worthy of determination by the Court of Appeal in view of the misdirection of the appellate Judge with regard to, among others; ownership of and trespass to land that led to the Tribunal decision being upheld and the appeal dismissed."

From the above quoted paragraph, I am convinced that the same raises arguable point of law worth determination by the Court of Appeal. This point has been explained in detail by Ms. Lilian for the applicant in her submission. I agree with her that the issue of ownership of the disputed property and trespass, suffice to move this court to exercise its discretion of granting leave to appeal to the Court of Appeal.

The learned advocate for the 2nd respondent as well as the 1st and 3rd respondents were of different views that this application should not be granted. However, they did not explain to this court why the same should not be granted. With due respect to Ms. Jane for the 2nd respondent, her contention that there is no point of law is misplaced since the law requires the applicant in his application to establish either novel point of law or issues of general importance or arguable appeal worth determination by the Court of Appeal.

In the upshot, I hereby grant leave to the applicant to appeal to the Court of Appeal as prayed. Considering the circumstances of the case, no order as to costs.

It is so ordered.

Dated and delivered at Moshi this 4th day of October, 2023.



X

S. H. SIMFUKWE
JUDGE
Signed by: S. H. SIMFUKWE

04/10/2022