

IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

HIGH COURT OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

MISCELLANEOUS LAND CASE APPLICATION NO. 34 OF 2022

*(C/F land Appeal No.32 of 2021 at the High Court of Tanzania Moshi Registry
originating from Application No.22 of 2017 at District Land and Housing
Tribunal for Same at Same)*

ELIESIKIA EMMANUEL MGONJA..... APPLICANT

VERSUS

FIRIMANI STEPHANO MBUGU.....RESPONDENT

RULING

Date of Last Order: 31.08.2023
Date of Ruling : 04.10.2023

MONGELLA, J.

The applicant herein has preferred this application under Section 47 (1) of the Land Disputes Courts Act Cap 216 RE 2019, seeking for this court to grant him leave to appeal to the Court of Appeal of Tanzania against the judgement of this court in Land Appeal No. 32 of 2021.

Aggrieved by the decision of the District Land and Housing Tribunal for Same at Same in Application No. 22 of 2017 he filed Land Appeal No. 32 of 2021 before this court. The appeal was determined in the respondent's favour on 07.12 2021. Aggrieved,

he obtained necessary copies and filed his notice of appeal on 04.01.2022. He then instituted Misc. Land Appeal No. 08 of 2022, which was struck out with leave to refile, hence this application. The applicant averred that he intends to challenge the decision before the Court of Appeal on the grounds that this court:

- i) Erred in law and in fact for failure to scrutinize the contradictory testimony of the respondent's witnesses.
- ii) Erred in law and in fact to rely on a valuation report which does not belong to the respondent.
- iii) Erred in law and in fact for failure to consider the evidence tendered before it.
- iv) Erred in law and in fact for the respondent failed to prove his case in accordance with the required standards.
- v) Erred in law and in fact for not considering that the original application was filed at the Tribunal out of the prescribed time.

The application was contested by the respondent who in his sworn counter affidavit faulted the grounds averring that; there was no contradiction in his evidence before the trial Tribunal; the trial Tribunal disregarded the valuation report in its judgement and questioning the same was misconception of the judgment and the

law and; that this court scrutinized the available evidence on record and reached a just conclusion. He further averred that the application was frivolous, scandalous and has no merit. He thus prayed for the same to be dismissed with costs.

The application was argued by written submissions. The appellant was unrepresented while the respondent was represented by Mr. Sylvester Kahunduka, learned advocate.

The applicant averred that the dispute is over a farm located at Mvango village within Vuje Ward in same District. That, he was sued before Vuje Ward Tribunal and on appeal to the District Land and Housing Tribunal, the proceedings of the Ward Tribunal were nullified. The matter was then filed afresh in the District Land and Housing Tribunal thereby leaving questions as to whether the Tribunal had jurisdiction to determine the application.

In his submission, he contended that in the intended appeal he would seek for the Court of Appeal to determine several issues including; the jurisdiction of the trial Tribunal to hear the application; the question of time limitation in which he shall address whether the original application was time barred as he had enjoyed the suit land from 1974 to 2014 when the respondent interrupted his use.

On the question of jurisdiction, he averred that he shall address the Court on the value of the suit land whereby the trial Tribunal relied on the valuation report which showed that the suit land was valued

at T.shs. 6,514,000/-, but the said report was prepared by another person and not the respondent thus misleading the trial Tribunal into thinking it had jurisdiction.

He further argued that the suit land was also subject to another Application before the same Tribunal (Application No. 12 of 2018) and the same valuation report had been tendered before the trial Tribunal by the person who conducted the valuation and the trial Tribunal granted a judgment and decree to another person in respect of the suit land. He said that he is in the process of launching an appeal against the decision in Application No. 12 of 2018 and intends to raise the question of *res judicata*.

The applicant also contended that the trial Tribunal relied on hearsay evidence whereby the respondent testified on an issue that took place when he was a year old; but the trial Tribunal and this court did not detect the said issue. He further submitted that there were many issues raised during trial and in the appeal, but were not determined. That, the issues included the variation between pleadings and the evidence tendered before the trial Tribunal.

He further averred that there are genuine issues which require the attention of the Court of Appeal and the grounds of the intended appeal are not frivolous, vexations or baseless. He had the stance that his grounds of appeal have passed the test settled in **British Broadcasting Corporation vs. Eric Sikuja Ng'maryo** (Misc. Civil

Appl. No.138 of 2004) [2005] TZCA 93 TANZLII and prayed for this court to grant him leave to appeal before the Court of Appeal.

In reply, Mr. Kahunduka opposed the application while adopting the contents of the respondent's counter affidavit. He challenged the issue of pecuniary jurisdiction on the ground that it is not featured in the applicant's affidavit, thus being a mere afterthought. He urged the court not to consider it.

With regard to the value of the land, he stated that the value of the suit land as recorded in the application was T.shs. 3,000,000/- which was beyond the pecuniary jurisdiction of the Ward Tribunal as before the amendments introduced by **the Written Laws (Miscellaneous Amendments) (No. 3) Act, 2021 GN No. 5 of 2021**. He challenged the applicant for not showing the value of the suit land, hence finding the complaint a speculation not to be determined by the Court of Appeal. He further disputed averred that the valuation report was not relied on by the trial Chairman in his judgment.

On the issue that the application was time barred, he averred that the evidence was to the effect that the respondent was given the land in 1970's when he was still young, but the same was officially handed to him in 1985 whereby he continued to enjoy the same until 2017 when the applicant trespassed therein. That, such evidence was believed by both the trial Tribunal and this court as proving on balance of probability that the cause of action accrued

in 2017 and not in 1974. He was of the view that the applicant is geared at introducing new evidence at the Court of Appeal.

Mr. Kahunduka further challenged the applicant's claim that the Tribunal relied on hearsay evidence. In that respect, he had the stance that the intervention of the Court of Appeal was not needed. He finalized his submissions by praying that the Application be dismissed with costs for being devoid of merit.

I have considered averments in the applicant's supporting affidavit and the respondent's counter affidavit as well as the submissions of both parties. It is settled law that leave to appeal to the Court of Appeal is granted on the discretion of the court where the grounds raise issues of general importance or novel point of law or show a *prima facie* or arguable appeal. See; **British Broadcasting Corporation vs. Erick Sikujua Ng'maryo** (supra); **Rutagatina C.L vs. The Advocates Committee & Another** (Civil Application No. 98 of 2010) [2011] TZCA 143 TANZLII; **Yusufu Juma Risasi vs. Anderson Julius Bicha** (Civil Appeal 233 of 2018) [2022] TZCA 174 TANZLII; **Lightness Damian & Others vs. Said Kasim Chageka** (Civil Application 450 of 2020) [2022] TZCA 713 TANZLII; **Safari Mwazembe vs. Juma Fudisha** (Civil Application No. 503 of 2021) [2022] TZCA 67 TANZLII; **Airtel Tanzania Limited vs. KMJ Telecommunications Limited** (Civil Application No. 393 of 2021) [2023] TZCA 26 TANZLII; **Henry Julius Nyela vs. Sauda Mtunguja Rajabu** (Civil Application No. 514 of 2020) [2023] TZCA 115 TANZLII; and; **Benedicta Sabasi vs. Glory Mushi** (Civil Application No.421/02 of 2020) [2023] TZCA 17555 TANZLII.

The Court of Appeal in **Lighthness Damiani and 5 Others vs. Said Kasim Chageka** (supra) gave instructions on how to resolve an application for grant of leave to appeal, it stated:

“...it seems clear to us that all that applicants are required to do in applications of this kind is simply to raise arguments whether legal or factual which are worth consideration by the Court. Once they pass that test, the court is obligated to grant leave to appeal. It is not the duty of the judge to determine whether or not they have any merit.”

The applicant therefore, must show that the grounds of appeal raised merit serious judicial consideration. This was again well expounded in **Henry Julius Nyela vs. Sauda Mtunguja Rajabu** (supra) in which the Court stated:

“... a person aggrieved by a decision of the High Court, and we may add, or the Court of the Resident Magistrate exercising extended jurisdiction, has a right to assail that decision to the Court. However, that right is not automatic. It is conditional upon that person showing that the intended appeal has some merit whether factual or legal or that there are grounds of appeal which merit serious judicial consideration.”

Given the conditions required as settled in the above referred to authorities, the question is therefore whether the issues raised herein

qualify as such. In his affidavit, the applicant raised the issue of contradiction in the testimony of the respondent's witnesses, reliance on valuation report which did not belong to the respondent, failure of the trial Tribunal to consider the evidence before it, the case not being proved by the respondent to the required standard and the original application being time barred. In submitting, the applicant further raised a question of jurisdiction of the trial Tribunal to entertain the application, the reliance of the valuation report, a question of *res judicata* and several questions of evidence.

While the issue of jurisdiction and the case being *res judicata* were not raised in his affidavit, the same are points of law, hence viable for determination even at the appellate stage. These are issues that, if determined in the affirmative, they have the capacity of vitiating the proceedings and decisions of the lower courts. The rest of the applicant's complaints are linked to the evaluation and application of the evidence placed before the trial Tribunal and this court. Whether the said evidence was properly evaluated and applied is not a question within my domain to adjudicate, but within the domain of the Court of Appeal.

In the foregoing, I am of the considered view that the applicant has advanced arguable legal and factual issues worth of consideration by the Court of Appeal. The applicant is therefore granted leave to appeal to the Court of Appeal against the judgment and decree

of this Court in Land Appeal No. 32 of 2021. Given the nature of the application, each party shall bear his/her own costs.

Dated and delivered at Moshi on this 04th day of October 2023.



X

L. M. MONGELLA

JUDGE

Signed by: L. M. MONGELLA