

IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

HIGH COURT OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

MISCELLANEOUS LAND CASE APPLICATION NO. 52 OF 2022

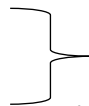
*(C/F land Appeal No. 40 of 2021 at the High Court of Tanzania Moshi Registry
originating from Application No.22 of 2017 at District Land and Housing
Tribunal for Moshi at Moshi)*

JOYCE BATHOLOMEO MASSAWE..... APPLICANT

VERSUS

JIMI LEMA

VICTOR KAVISHE



.....RESPONDENTS

RULING

Date of Last Order: 04.09.2023

Date of Ruling : 05.10.2023

MONGELLA, J.

The applicant herein filed this application under Section 5(1) (c) of the Appellate Jurisdiction Act, (Cap 141 RE 2019), Rule 45 (a) of the Tanzania Court of Appeal Rules, 2009 and Section 47 (2) of the Land Disputes Courts Act, [Cap 216 RE 2019] seeking for this Court to grant her leave to appeal to the Court of Appeal of Tanzania against the judgement of this court in Land Case Appeal No. 40 of 2021.

The brief facts of the matter as drawn from the applicant's affidavit are that: the applicant instituted Land Application No. 156 of 2014 before the District Land and Housing Tribunal of Moshi at Moshi (the Tribunal, hereinafter) claiming ten (10) acres of land she alleged to have been trespassed by the respondents. In their written statement of defense, the respondents objected the claim averring that the suit land had been purchased by the 2nd respondent from one Satimiya Mariki Massawe in 1982. The Tribunal ruled in favour of the 2nd respondent by declaring him the rightful owner of the suit land. Aggrieved by the decision, she appealed to this Court vide Land Case Appeal No. 40 of 2021, but the decision of the Tribunal was upheld. Still aggrieved, she wishes to knock the doors of the Court of Appeal, hence the application at hand to obtain leave to appeal as per the requirement of the law. The intended appeal to the Court of Appeal, as per the supporting affidavit is based on the following grounds:

- a) That, the 1st appellate court erred in law for holding that the trial tribunal was proper to refuse to receive the appellant's documentary evidence at the first hearing merely because it had not been annexed to pleadings and, or served to the respondents.*
- b) That, the learned High Court judge erred in law for holding that the trial tribunal was right to deny the appellant her right to be represented for the reason that the case had stayed in the tribunal for a long time.*

- c) *That, the learned high court judge erred for supporting the trial tribunal that the sale agreement (exhibit D1) prove that the suit land was purchased by the 2nd respondent's mother and then gave it to the 2nd respondent while it is not true.*
- d) *That, the 1st appellate court erred in law and fact for not finding that the trial chairman failed to evaluate evidence on record and as a result reached at a wrong and unjust decision.*

The respondents contested the application in their joint affidavit duly sworn and signed by the 1st respondent who was authorized by the 2nd respondent to swear on his behalf. In the affidavit he averred that the refusal to admit the redemption agreement was legally done and the applicant was required to comply with the law but failed to do so. That, the applicant failed to act promptly and diligently in pursuit of her frivolous claims against the respondents. That, the respondent's evidence was not contradictory and the evidence sufficed to prove their case on balance of probabilities. That, the trial Tribunal and the first appellate court properly evaluated and analyzed the evidence on record while the applicant did not discharge her duty to prove her case against them, thus there are no any procedural irregularities or mis-directions. They found the appeal in this court to have been devoid of any merits and a tactic to meet the ends of justice.

The application was argued by written submissions filed by the parties' counsels. The applicant's submission was filed Mr. Erasto Kamani and the respondents' submission by Mr. Martin Kilasara.

While adopting the applicant's affidavit, Mr. Kamani averred that the applicant intends to appeal on grounds set out in her affidavit. He elaborated on the grounds as follows:

On the 1st ground, Mr. Kamani averred that **Regulation 10 (1) of the Land Disputes Courts (the District Land and Housing Tribunal) Regulations, 2003 GN. No. 174 of 2003** allows the Tribunal to admit documents not annexed to the pleading without following procedures laid out under the **Civil Procedure Code** [Cap 33 RE 2019] and the **Evidence Act** [Cap 6 RE 2022]. He contended that according to this position and **Article 13 (6) of the Constitution of the United Republic of Tanzania, 1977** a person should be accorded the right to fair hearing, but the applicant was denied the right to tender the redemption agreement which her husband had signed to redeem the suit land from the 2nd respondent's father, merely because she had not served a copy to the respondents.

He added that the trial Chairman instead wrongly relied on Regulation 10 (3) of GN No. 174 of 2003 to refuse to admit the same whereas the regulation requires the Tribunal not to admit any document tendered under **Regulation 10 (2)** before the document is served to the other party. He contended that the provision is not related to Regulation 10 (1) which refers to documents annexed to

pleadings. In the premises, he submitted that the applicant intends to challenge the propriety of such act by the trial Chairman.

With regard to the 2nd ground, he averred that **Regulation 13 (1) of GN No. 174 of 2003** allows a party to be represented by an advocate or any representative during hearing. However, he said, the trial Tribunal denied the applicant's request for adjournment so that her advocate could be present at hearing of DW6's testimony. That, instead, the Chairman warned her that if she would not proceed on her own then her case would be dismissed. In the premises, he argued that the trial Tribunal had no mandate to decide so as her advocate had not been consecutively absent for two days as provided under **Regulation 13 (2) GN, NO. 174 of 2003**.

Concerning the 3rd ground, Mr. Kamani intends to challenge the trial Chairman for introducing extraneous matters into his judgement. He explained that the Hon. Chairman introduced new facts alleging to have obtained the same from Exhibit D1 Explaining the alleged facts, he said that the trial Chairman noted that "exhibit D1," which was a sale agreement tendered by the 2nd respondent, showed that the 2nd respondent's mother bought the land from one Satimiya Massao in 1982 and handed it to him. He challenged the trial Chairman arguing that "exhibit D1" does not contain such facts.

On the 4th ground, Mr. Kamani contended that both the trial tribunal and this court failed to evaluate the evidence adduced by

the parties and did not assess the reliability, credibility and probative value of the evidence adduced by parties. He said that after summarizing the evidence, the trial Tribunal rushed to conclude that the applicant is not the owner of the suit land for failure to tender the redemption agreement and that the suit land is the property of the 2nd respondent because he produced “exhibit D1” which showed that the suit land was purchased by his mother and later handed to him. He faulted the Tribunal and this court arguing that evaluation of evidence is of paramount importance as it forms the basis upon which a just and fair decision is given.

Citing the case of **British Broadcasting Corporation vs. Eric Sikujua Ng’maryo**, Civil Application No. 138 of 2004 and **Jireys Nestory Mutalemwa vs. Ngorongoro Conservation Area Authority** (Civil Application 154 of 2016) [2021] TZCA 9 TANZLII, he finalized his submissions by stating that the grounds advanced by the applicant raise issues of general importance, novel points of law and they show a *prima facie* or arguable appeal as settled in the said decisions.

In reply, Mr. Kilasara also started by adopting the counter affidavit of the 1st respondent. He challenged the application averring that the issues raised by the applicant had been determined by this court. Starting with the compliant in the 1st ground, he averred that **Regulation 10 (2) of GN. No. 174 of 2003** requires the document to be tendered to first be served on the other party and to be authentic. He considered the word “shall” in **Regulation of 10 (3)**

GN. No. 174 of 2003 implying that the requirement is mandatory as per **Section 53 (2) of the Interpretation of Laws Act** [Cap 1 RE 2019].

He contended that the applicant ought to have complied with the law thereby citing the case of **Puma Energy Tanzania Ltd vs. Spec Check Enterprises Ltd**, Consolidated Miscellaneous Commercial Causes No. 233 and 252 of 2014, High Court of Tanzania at Dar es Salaam (unreported), **Japan International Cooperation Agency (JICA) vs. Khaki Complex Limited** [2006] TLR 343 and **Sabry Hafidh Khalfan vs. Zanzibar Telecommunication Limited (Zantel) Zanzibar**, Civil Appeal No. 47 of 2009. He further challenged the applicant for failure to act with promptness to comply with Regulation 10 (2) and instead sitting on her rights. He supported his stance with **Zilaje vs. Feubora** [1972] HCD.

On the 2nd ground, he averred that the Mr. Kamani who was representing the applicant was disqualified as he had not renewed his practicing certificate for the year 2021. That, the applicant was instead accorded the opportunity to proceed without her advocate and she proceeded without seeking another advocate.

On the 3rd ground, Mr. Kilasara was of view that the applicant had a burden to prove that she was the owner of the suit land as required under **Section 110, 111 and 119 of the Evidence Act**, but failed to do so. To support his argument, he cited the case of **Buco Investment Holdings Limited vs. CRDB Bank PLC & Others**

(Commercial Case 15 of 2016) [2019] TZHCComD 178 TANZLII. He averred that exhibit D1 was rightfully used by the trial Tribunal.

As to the 4th ground, he was of view that the evidence of both parties was well evaluated by the trial Tribunal and this court. He finalized his arguments by arguing that there is no viable indication that the findings of this court were not based on law and facts availed on record. He also disputed the assertion that there is a misdirection of the evidence. He considered the application devoid of merit and prayed for its dismissal.

Rejoining, Mr. Kamani maintained that this court, in granting leave to appeal, ought to consider whether the issues raised by the applicant are of general importance or of novel point of law or that they show a prima facie or arguable appeal. He cited the case of **British Broadcasting Corporation** (supra), **The Regional Manager TANROADs Lindi vs. Shapriya and Company Limited**, Civil Application No. 29 of 2012 (CAT, unreported) and **Jireys Nestory Mutalemwa vs Ngorongoro Conservation Area Authority** (supra), arguing that he was able to show that the issues present an arguable appeal thus deserving the applicant grant of the leave to appeal.

I have considered the submissions of both parties' counsels. As argued by Mr. Kamani, in an application for leave to appeal, this court has to only observe whether the issues raised by the applicant pose matters of general importance, or a novel point of law or

establish a prima facie case or arguable appeal. In the cited case of **British Broadcasting Corporation vs. Eric Sikujua Ng'maryo** (supra) the Court stated:

"...leave to appeal is not automatic. It is within the discretion of the court to grant or to refuse leave. The discretion must, however be judiciously exercised and on the materials before the court ... 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."

See also: **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 and; **Henry Julius Nyela vs. Sauda Mtunguja Rajabu** (Civil Application No. 514 of 2020) [2023] TZCA 115 TANZLII.

Further, the issues raised, can be either legal and/or factual issues of merit that warrant judicial consideration. In **Henry Julius Nyela vs. Sauda Mtunguja Rajabu** (supra), it was explained:

“As good luck would have it, the law on this area is fairly settled in this jurisdiction. In applications for leave to appeal to the Court, what the court confronted with that application is supposed to do is to see if the intended appeal, *prima facie*, has some merits, whether factual or legal. In applications of this nature, the courts have all along been wary to withhold leave to appeal to a superior court if there are grounds meriting the attention of that superior court. Put differently, leave to appeal from an order in civil proceedings will be granted where, *prima facie*, it appears to the court seized with that application that there are grounds of appeal which merit serious judicial consideration.”

As such, the applicant ought to raise arguments worthy of consideration by the Court of Appeal and the granting court will be obligated to grant leave. The granting court must not dive into discussing the grounds on merit. In **Lightness Damian & Others vs. Said Kasim Chageka** (supra) the Court held:

“In the light of the above stance of the law, and with respect to the learned judge, 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 of 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."**

Both parties in this application have found themselves arguing the merits of the appeal instead of simply showing this court whether the issues raised by the applicant suffice as arguable grounds of appeal before the Court of Appeal. However, I was still able to gather from Mr. Kamani's submissions that the applicant intends to challenge the following issues before the Court of Appeal: **one**, whether there were procedural irregularities in the application before the trial Tribunal with regard to admission of exhibits; **two**, whether the applicant was denied the right to fair hearing by being denied the right to legal representation; **three**, whether the trial Tribunal relied on extraneous matters in determining the application and; **Four**, whether the trial Tribunal and this court properly evaluated the evidence before it.

I find the grounds advanced posing arguable issues worth of consideration by the Court of Appeal as they majorly relate to evaluation of the evidence placed before the lower courts in reaching a just decision. Whether the applicant's claims bear merit or not for the intended appeal to succeed or not is not within the mandate of this court to determine.

In the light of the foregoing, the applicant is herein granted leave to appeal to the Court of Appeal against the judgment and decree of this Court rendered in Land Case Appeal No. 40 of 2021. Given the nature of the application, each party shall bear his/her own costs.

Dated and delivered at Moshi on this 05th day of October 2023.



X

L. M. MONGELLA
JUDGE
Signed by: L. M. MONGELLA