

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY
AT MOSHI

MISCELLANEOUS LAND APPLICATION NO. 5 OF 2023

(Arising from the decision of High Court of Tanzania at Moshi in Land Appeal case No. 20 of 2022 dated 23/01/2023 and originating from decision of District Land Housing Tribunal of Moshi at Moshi in Application No. 35 of 2019)

JOACHIM ALOYCE MREMA.....1ST APPLICANT
EDNA PANCRAAS MREMA.....2ND APPLICANT
(As administratrix of the estate of Pancras August Mrema)

Versus

AUGUST HERMAN MLATIE1ST RESPONDENT
DEOGRATIUS HERMAN MLATIE.....2ND RESPONDENT
ANTHONY HERMAN MLATIE.....3RD RESPONDENT

RULING

18th September & 26th October, 2023

A.P.KILIMI, J.:

Initially the applicants hereinabove successfully sued the respondents mentioned above at the District Land and Housing Tribunal of Moshi in Application no. 35 of 2019, then therein, the trial tribunal ordered valuation and sale of the suit land and division of its proceeds to the parties. Dissatisfied with the decision of the trial tribunal, the appellant raised to this court by way of appeal. In the course of hearing the appeal, this court

realized that the respondents at the tribunal were sued in their personal names and not as legal representatives of the late Herman Mlatie, thus invited the parties to address on the same. In considering of their submissions and law this court concluded that the trial tribunal erred when proceeded with it against the appellants in their personal capacity, hence nullified the entire proceedings of the said tribunal and set aside the judgment and decree thereto with costs.

It appears the respondents have dissatisfied with the above decision and order. Therefore, they have returned to this court for necessary legal requirement on the way to the Court of Appeal. They have moved this court under section 47(2) of the Land Disputes Courts Act Cap 216 RE 2019 read together with Rule 45(a) of the Tanzania Court of Appeal Rules, 2009 praying for leave to appeal to the Court of Appeal of Tanzania against the Judgement and Decree in Land Appeal Case No.20 of 2022 said above.

At the hearing of this application, Mr. Chiduo Zayumba learned counsel appeared for applicants while all respondents enjoyed the service of Mr. Patrick Paul learned advocate. It was agreed the same be by way of written submission, since both parties filed affidavits, I will refer to these submissions whenever necessary to do so.

At paragraph no. 4 of their affidavit, the applicants have raised the following grounds wishing the court of appeal to consider; **First;** Whether it is proper to condemn the Applicants to pay costs for a matter raised *sua motto* by the first appellate court. **Second;** Whether children/heirs of a deceased person who had forcefully taken possession of a suit land and had refused / had no intention to appoint an administrator of the deceased's estate, must be sued as personal legal representatives of the deceased. **Third;** Whether in law there is a capacity to sue Defendants/ Respondents who deny Plaintiffs/ Applicants possession/access of disputed land. **Fourth;** Whether failure to indicate in pleadings that the Respondents/Defendants are sued as legal representatives of the deceased was fatal to the proceedings while they are not administrators of the estate of the deceased. And **fifth;** Whether the Respondents cannot be part of an agreement in which they were physically present and signed the agreement between their deceased father and the Applicants.

In their respondents' counter affidavit contended that the above grounds are frivolous and vexatious basing on the point of law and legal arguments thus cannot be entertained by the second appellate court.

Before I dwell into above grounds, let me establish the base to be considered. It is a settled position of the law that for this court to consider application for leave to appeal to the Court of Appeal, there must be clear points of law to be determined or issues of general importance or grounds show prima facie of arguable appeal. This has been emphasized in a number of cases including the cases of **British Broadcasting Corporation v. Eric Sikujua Ngamaryo**, Civil Application No. 138 of 2004; **Rutagatina C.L. v. The Advocates Committee and Another**, Civil Application No. 98 of 2010 and **Jireys Nestory Mutalemwa v. Ngorongoro Conservation Area Authority**, Civil Application No. 154 of 2016 (Both unreported). In **British Broadcasting Corporation v. Eric Sikujua Ng'amaryo**, (supra) the court of appeal while determining the application before it stated at page 6 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 issue of general importance or a novel point of law or where the grounds show a prima facie or arguable appeal"

(Emphasis added).

(See also the cases of **Godwin Lyaki and another vs. Ardhi University and Kadiri Zahoro (Administrator of Estate of late Bahati Ramadhan Mponda) vs. Mwanahawa Selemani** (supra).

In the above premises, the vital point therefore to be considered is whether the applicant's application has met the test stated above.

In respect to the grounds averred in applicant's affidavit, the counsel for applicant argued that there is a need for the court to decide whether it was proper to condemn the Applicants to pay costs for a matter raised *suo motto* by the court and second the counsel submitted that there is no administrator of deceased's estate appointed in this matter, and those who claim the property belong to their deceased father, thus the respondents acted as intermeddles of the deceased estate. To buttress his assertion cited the case of **Rajabu Rashid Mgozi vs Innocent Bisusa** Land Appeal No.04 of 2021(unreported) HC at Kigoma, and **Sabitina Daudi Mbura vs Mary Elitumaini & Another** Miscellaneous Land Case Application no.39 of 2013 HC at Tanga, (unreported). Therefore, the counsel argued that the

above is prima facie and raises arguable issues for serious judicial consideration of the Court of Appeal.

Responding to the above, Mr. Paul learned advocate contended that this Court in appeal rightly held that the Applicants herein had sued the Respondents herein in their personal capacities; instead of suing them as administrators of the estate of Emmokuloto Herman Mlotie. Therefore, the Applicants have not shown how novel that ground is so as to be capable of obtaining leave to lodge appeal to the Court of Appeal of Tanzania. The counsel further said those grounds of appeal are frivolous, vexatious or useless or hypothetical, this is because the Applicants have failed to show how the said ground is of general importance or is a novel point of law.

In brief rejoinder, the counsel for the applicant submitted regarding the allegation that there is an administrator of the Respondents' deceased father named Emmakulata Herman Mlatie, the same is an afterthought, such a name was neither mentioned at the trial tribunal nor at the appeal in this Court, the Respondent did not bring her, even as a witness nor did she apply to be joined as a party. Further the counsel concluded that, it was proper for the current Applicants to sue the Respondents above named in their personal capacity since they could not have sued a non-existing Person, considering

the Respondents had forcefully taken possession of the suit premises after the demise of their father and they promised Applicants that they will appoint an administrator of estate but later on refused to do so.

I have considered the grounds above raised by the applicants and the submission above, before I decide I am aware in applications of this nature courts should avoid taking on board substantive issues to pre-empt the merits or demerits of the intended appeals. We took that stance in an unreported case of **Regional Manager-Tanroads Lindi v. DB Shaprya and Company Lid, Civil Application No. 29 of 2012.**

Therefore, it is enough for this court to look on the grounds raised objectively and check whether the grounds demonstrate 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 this application before me, the applicant seeks to assail the decision of the High Court in respect to the costs granted while the cause of their failure was the issue raised *suo motto* by the court and secondly, they claim that they sued non existing party because nobody was appointed as

administrator of the deceased estate, therefore since the respondents took the possession of the Suitland they sued them as intermeddle, as said above, I cannot dwell into the merits of the intended appeal. It is enough if the application before me shows that the intended appeal, prima facie, has some merit by raising arguable grounds or a point of law that needs the attention of the Court.

Having considered the above grounds, to my view, I am satisfied that the applicant has sufficiently demonstrated that there are serious questions that merits the attention of the Court. In such regard, I accordingly therefore grant this application. Costs should be in the cause.

It is so ordered.

DATED at **MOSHI** this 26th day of October, 2023.



X

JUDGE
Signed by: A. P. KILIMI

Court:- Ruling delivered today on 26th October, 2023 in the presence of Mr. Chiduo Zayumba, Advocate for Applicant and Patrick Paul, Advocate for Respondent. Also, first and second Respondent present whereas 1st Applicant present and second Applicant absent.

Sgd; **A. P. KILIMI**
JUDGE
26/10/2023

Court:- Right of Appeal explained.

Sgd; **A. P. KILIMI**
JUDGE
26/10/2023