

IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

HIGH COURT OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

MISCELLANEOUS LAND APPLICATION NO. 14 OF 2023

(From Land Appeal No. 39 of 2022 in the Hight Court of Tanzania (Land Division) at Moshi. Originating from Land Application No. 140 of 2019 in the District Land and Housing Tribunal for Moshi at Moshi)

REV. ALPHEUS ZABLON SHAYO.....APPLICANT

VERSUS

AYOUB KISANGA.....RESPONDENT

RULING

Date of Last Order: 04.10.2023

Date of Ruling : 07.11.2023

MONGELLA, J.

The application at hand is brought under section 47 (1) of the Land Disputes Courts Act, Cap 216 R.E. 2019; and Rules 45 (a), 46 (1), and 49 (3) of the Tanzania Court of Appeal Rules, 2019. In the application, the applicant is seeking to be granted leave to appeal to the Court of Appeal to challenge a decision of this Court (Simfukwe, J.), rendered in Land Appeal No. 39 of 2022. The application was argued orally by the parties' advocate to wit, Mr. Elikunda Kipoko, for the applicant and Mr. Gideon Mushi.

The brief background of the matter is as follows: the appellant filed a land case against the respondent in the District Land and Housing Tribunal for Moshi at Moshi (the Tribunal, hereinafter) over a piece of land measuring 47 by 20 meters located

at Mnazi Mmoja Kiboriloni Ward, Moshi Municipality (the disputed land, hereinafter). He claimed to have bought the land in dispute in 1995 and was in active use of the same until when the respondent trespassed in 2019. On the other hand, the respondent claimed that the land belonged to his late sister, Josephine Herbert Kisanga and he was the administrator of the estate. The Tribunal ruled that the disputed land belonged to the estate of the late Josephine Herbert Kisanga which was administered by the respondent. Aggrieved, the appellant appealed to this court, but lost the appeal as the Tribunal decision was confirmed. In further pursuit of his claim, he wishes to appeal to the Court of Appeal, hence the application at hand.

In the applicant's supporting affidavit as well as in the oral submission by Mr. Kipoko, the applicant pointed a number of illegalities committed by this court to which the Court of Appeal shall entertain in the intended appeal. Mr. Kipoko referred to paragraph 8 (a to k) which he said contains the legal and factual issues to be determine by the Court of Appeal, to wit;

- (a) Whether it was right for the trial Tribunal and the High Court to find that a person who has long and undisturbed occupation of the land cannot benefit on the operation of the doctrine of adverse possession;
- (b) Whether the trial Tribunal and the High Court were right by basing their decisions on un-pleaded matters by the respondent;
- (c) Whether it was right for the trial Tribunal and the High Court to grant the respondent a relief which was not sought;
- (d) Whether wit was right for the trial Tribunal and the High Court to find that the suit land belonged to the deceased who was not a party to the proceedings.

(e) Whether the defence (WSD) by the respondent who was filed within time.

(f) Whether the respondent had the necessary locus to support his defence in the capacity of the administrator of the estate of the deceased. That, he was sued in person, but during his defence testimony, he testified as an administrator;

(g) Whether it was proper for the respondent to rely on letters of administration, which were obtained after the alleged trespass was committed and after the suit was filed;

(h) Whether the trial Tribunal and the High Court were legally right to find that the respondent had locus standi to defend as administrator despite not being sued as such;

Lastly, under (i), (j), and (k), whether the trial Tribunal and the High Court were right in finding that the respondent lawfully purchased the suit land. He argued that this is because there was no any iota of evidence of purchase of the disputed land by the respondent. That, to the contrary there was undisputed evidence of long occupation by the applicant.

Concluding, he urged the court to find that the applicant has presented factual and legal grounds warranting it to exercise its jurisdiction to grant the applicant an opportunity to present his grievances in the Court of Appeal. He referred the decision in **Ilemela Municipal Council vs. Ndeonasia Jonas Marengo**, Misc. Civil Application No. 86 of 2022 (HC at Mwanza), in which it was stated that where factual or legal grounds have been established then leave is grantable. On those bases he prayed for the application to be granted with costs to follow events.

Mr. Gideon made a brief reply whereby he found the application lacking merit as all the issues were determined in the lower courts. He prayed for the contents of the counter affidavit he deponed on behalf of his client to be adopted as his submission and for the court to consider the same and dismiss the application with costs.

After considering the applicant's supporting affidavit, the respondent's counsel's counter affidavit and the submissions by the parties, my task is to scrutinise as to whether the applicant's application is worth of being granted. It is settled law that leave to appeal to the Court of Appeal is granted where the grounds advanced raise issues of general importance or novel point of law or show a prima facie or arguable appeal. See: **Yusufu Juma Risasi vs Anderson Julius Bicha** (Civil Appeal No. 233 of 2018) [2022] TZCA 174; **Lightness Damian & Others vs. Said Kasim Chageka** (Civil Application No. 450 of 2020) [2022] TZCA 713; and **Safari Mwazembe vs. Juma Fudisha** (Civil Application No. 503 of 2021) [2022] TZCA 67.

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

"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."

In the matter at hand, the applicant advanced a number of issues which he wishes to seek the attention of the Court of Appeal. Among these issues, he questions the findings of both lower courts to the effect that a long and undisturbed usage of land did not entitle the appellant to benefit from the doctrine of adverse possession; that, the lower courts decisions based on unpleaded matters and granted reliefs not sought; the suit property granted to the deceased not a party to the suit and the respondent lacking locus standi for being sued in personal capacity, but testifying in the capacity of the administrator of the deceased's estate; and the question of limitation in filing a written statement of defence.

The applicant's counsel, on the other hand, argued that the matters raised by the applicant were dealt with in the lower courts. In his counter affidavit, which he prayed for this court to consider the contents of, he mainly challenged the applicant's points for determination by the Court of Appeal by stating how the issues were dealt with by the lower courts. With due respect, I find the learned counsel endeavoured in arguing the appeal. In my view, the fact that he advanced arguments countering the gist of the intended appeal in the manner he did, *prima facie* shows that the applicant has an arguable case before the Court of Appeal. As discerned from the authorities cited above, it is not upon this court, in an application as the one at hand, to dwell on the merits of the intended appeal or to scrutinise on whether the lower courts were right in reaching the decisions they arrived at or not. As I said, what this court is inclined to do is to see whether the points raised raise issues of general importance or novel point of law or show a *prima facie* or arguable appeal. The three conditions need not apply collectively. The presence of one of them suffices to warrant grant of the application.

In consideration of the fact that the applicant raised matters of time limitation, adverse possession, locus standi, entertainment of un-pleaded matters and grant of reliefs not sought, shows that there is an arguable case. Whether the lower courts were correct or not in reaching their decision is a question to be determined in an appeal before the Court of Appeal. In the premises, I find the application for leave to appeal to the Court of Appeal having merit and grant the same accordingly. Each party shall bear his own costs of the application.

Dated and delivered at Moshi on this 07th day of November 2023.



X

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