THE UNITED REPUBLIC OF TANZANIA

(JUDICIARY)

THE HIGH COURT – LAND DIVISION

(MUSOMA SUB REGISTRY AT MUSOMA)

Misc. LAND APPLICATION No. 40 OF 2023

(Arising from the High Court (Musoma Sub Registry) in Land Appeal No. 14 of 2022; and the District Land and Housing Tribunal for Mara at Tarime in Land Application No. 69 of 2020)

ZAINABU MALALE ..... **APPLICANT**

Versus

THE REGISTERED BOARD OF

TRUSTEES OF MUSILM SOCIETY ..... **RESPONDENT**

RULING

14.11.2023 & 15.11.2023

Mtulya, J.:

The present parties are in dispute since 2020 contesting ownership of a graveyard located at Tarime District in Mara Region. The burial ground had buried several deceased persons since 1982. Reasons of contesting the cemetery are not displayed in the record of instant application for leave. Even if the reasons were in the record of the application, this court is restricted by precedents to check and scrutinize substances of disputes.

There is a large bunch of precedents at the display of the Court of Appeal (the Court) on the subject restricting this court to move into the merits of contests (see: **Jireys Nestory Mutalemwa v. Ngorongoro Conservation Area Authority,** Civil Application No.

154 of 2016 and **The Regional Manager-TANROADS Lindi v. DB Shapriya & Company Ltd**, Civil Application No. 29 of 20120). This court is very well aware of the practice (see: **Joseph Kasawa Benson v. Mary Charles Thomas**, Misc. Criminal Application No. 60 of 2022 and **FINCA Tanzania Ltd v. Shaban Said Mganda**, Misc. Civil Application No. 4 of 2023).

The reason of restraining this court to examining substances of contests is intended at declining prejudging merits of the intended appeals. The duty of resolving the materials in substances is reserved to the Court (see: **Murtaza Mohamed Viran v. Mehboob Hassanali Versi**, Civil Application No. 168 of 2014 and **Victoria Real Estate Development Limited v. Tanzania Investment Bank & Three Others**, Civil Application No. 225 of 2014).

The merit of the current dispute has been resolved by the **District Land and Housing Tribunal for Mara at Tarime** (the tribunal) in **Land Application No. 69 of 2020** (the application) and this court in **Land Appeal No. 14 of 2022** (the appeal), and may be determined in the second appeal at the Court, if this application is granted. In the tribunal and this court, the learned minds of the Chairman and Judge have decided in favor of the respondent. At this court, the learned Judge reasoned at page 2 and 3 of the judgment that:

Ukiutafakari ushahidi wa mjibu rufaa hii anaonyesha kuwa ni mzito zaidi kuliko wa mrufani kwa sababu...mashahidi wa mrufaniwa wameweza kuthibitisha/ kuwa na ushahidi mzito zaidi ya mrufaniwa. Kama mrufaniwa amekuwa akilitumia eneo hilo kwa ajili ya mazishi ya wafu (waamini) na kuwepo kwa makaburi husika tokea mwaka 1982 na pia mrufani anakiri kuwepo kwa makaburi hayo, basi ni vyema kuheshimu mipango ya eneo hilo kama ilivyowekwa hapo awali...kwa kuwa kesi inaamriwa kwa ubora wa ushahidi, Mahakama hii inaona Baraza la Ardhi na Nyumba Wilaya lilifikia uamuzi sahihi kwa wingi wa ubora wa ushahidi wa mjibu rufaa (Tazama kesi ya ***Hemedi Said v. Mohamed Mbilu*** *(1984) TLR 113).*

At page 4 of the decision, this court had produced two important paragraphs with regard to the decisions. The first paragraph shows that: *mahakama hii inahitimisha kwa kusema eneo hilo linalotumiwa na Msikiti kwa shughuli za mazishi liheshimiwe na kutambuliwa kuwa ni mali ya Msikiti.* The second paragraph in the judgment at page 4 shows that: *mahakama inaelekeza wadaawa kukaa pamoja na kubainisha mipaka yao vizuri kwa kushirikiana na uongozi wa Kijiji ili kuepusha migogoro zaidi siku zijazo.*

Regarding the issue, which was raised at the tribunal and this court, the judgment displays at page 2 that: *hoja kuu katika Baraza la Ardhi na Nyumba ilikuwa nani mmiliki halali wa eneo la mgogoro?*

Kwa kutafakari hoja za rufaa hii kuhusiana na umiliki wa eneo hilo la mgogoro, hoja kuu itabaki kuwa moja tu, je nani mmiliki halali wa eneo lenye mgogoro? Finally, this court held that that disputed graveyard belongs to the defendant.

The applicant was aggrieved by the decision and reasoning of this court hence has approached this court in **Misc. Land Application No. 40 of 2022** (the application for leave) seeking leave to take the dispute to the Court. Concerning questions to be registered for determination at the Court, the applicant had registered at the seventh paragraph of the supplementary affidavit, duly sworn by her learned counsel, **Mr. Innocent Kisigiro**, namely, in brief: whether this court erred in law to confirm the decision of the tribunal while proceedings at the *locus in quo* was in fault; and second, whether this court erred in law to decide in favor of the respondent without proof on how and when it acquired the disputed land (ownership).

When Mr. Kisigiro was summoned in this court to explain the issues, he abandoned the first issue as he rightly submitted that he intended to complain on testimony of Nyankomogo Hamlet Chaiperson, but he was not marshalled as witness in the tribunal and the record of the application for leave is silent in citing him.

Regarding the second issue, Mr. Kisigiro briefly submitted that this court had decided the contest in favor of the respondent without materials on how and when it had acquired the land in dispute. According to him, the intended appeal raises issues of general importance and the proceedings of the tribunal reveal disturbing features that need attention and intervention of the Court.

In course of his submission, Mr. Kisigiro also raised an issue of size and demarcations surrounding the disputed land. In his opinion, the parties went to the tribunal praying for declaration of ownership of the disputed land, but there are no materials which show size and demarcations as indicated by the judgment of this court. In support of the move, Mr. Kisigiro cited page 4 of the judgment when this court stated that: *mahakama inaelekeza wadaawa kukaa pamoja na kubainisha mipaka yao vizuri kwa kushirikiana na uongozi wa Kijiji ili kuepusha migogoro zaidi siku zijazo.*

The submission in support of the application for leave was protested by the respondent's learned counsel **Mr. Onyango Otieno**, who contended that Mr. Kisigiro has not produced good reasons as per requirements of precedents of this court, which show that: first, the intended appeal must raise issues of general importance or novel point of law; second, the ground must show a

prima facie case or arguable appeal; third, the grounds should not be frivolous or vexatious; fourth, the appeal stands reasonable chances of success; and finally, the proceedings reveal disturbing features which require the guidance of the Court.

In his opinion, Mr. Otieno thinks that the issue before the tribunal and this court was on ownership of the disputed land and this court had decided that the graveyard belongs to the respondent. According to Mr. Otieno, Mr. Kisigiro has produced new issues which were not resolved by the two courts and in any case, he wants to take the dispute of evidences to the Court after decision on the same by two courts.

In substantiating his five (5) factors for consideration in deciding applications for leave, Mr. Otieno submitted that: first, there is no any issues of general importance in the contest as the graveyard were decided in favor of the respondent; second, there is no arguable appeal as the issue was ownership and all materials are in favor of the respondent; third, the application is frivolous as rights of the parties have already been resolved; fourth, the appeal has no chances of success as the main issue which took the parties to the tribunal has been resolved; and that there is no any disturbing features in the proceedings to require guidance of the Court.

According to Mr. Otieno, the complained paragraph at page 4 of the judgment of this court is a mere guidance of the court and not admission of the fault on record. In a brief rejoinder, Mr. Kisigiro submitted that the parties are disputing ownership of graveyard, but the judgment of this court did not resolve the issue of ownership as it directed other authorities to resolve the dispute in terms of size and demarcations. In his opinion, the intervention of the Court is necessary in order to scrutinize the materials brought by the parties at the tribunal.

The law regulating applications like the instant one displays that reasons for leave to access the Court must raise issues of general importance or novel point of law or *prima facie* case or arguable appeal or where proceedings as a whole reveal disturbing features as to require the guidance of the Court.

There are multiple decisions of the Court in support of the position (see: **Jireys Nestory Mutalemwa v. Ngorongoro Conservation Area Authority**, Civil Application No. 154 of 2016; **The Regional Manager-TANROADS Lindi v. DB Shapriya & Company Ltd**, Civil Application No. 29 of 2012; **Murtaza Mohamed Viran v. Mehboob Hassanali Versi**, Civil Application No. 168 of 2014; and **Hamisi Mdida & Said Mbogo v. The Registered Trustees of Islamic Foundation**, Civil Appeal No. 232 of 2018).

This court has been cherishing the move without any reservations (see: **FINCA Tanzania Ltd v. Shaban Said Mganda,** Misc. Civil Application No. 4 of 2023; **Shaban Said Mganda v. FINCA Tanzania Ltd,** Misc. Civil Application No. 21 of 2022; and **Joseph Kasawa Benson v. Mary Charles Thomas**, Misc. Criminal Application No. 60 of 2022).

I have scanned the present application for leave and found that applicant is seeking leave to have his complaint on how and when the land was acquired by the respondent be heard and determined at the Court. In order to move this court to decide in favor of the applicant, Mr. Kisigiro submitted that the record is silent on how and when the disputed land was acquired. In midst of his submission, he produced another complaint on size and demarcation of the disputed land. In reply, Mr. Otieno stated that Mr. Kisigiro has produced new complaints in the application for leave, and are based on evidences, which he wants to move the Court to scrutinize the same.

I have had an opportunity to peruse the impugned judgment of this court between the parties delivered on 30th September 2022 and found that the main issue was whether who is a rightful owner of the disputed land. This court after hearing of the parties had resolved for the respondent. The reason of deciding so is well displayed in the

judgment and for purposes of appreciation of the same, it was quoted in this Ruling. The issue of how and when is replied in relation of all relevant materials, at page 2 & 3 of the judgment that: *eneo la msikiti ni lile waliopatiwa na Mzee Rajabu na Mama Kereba. Mrufaniwa amekuwa akilitumia eneo hilo kwa ajili ya mazishi ya wafu na kuwepo kwa makaburi husika tokea mwaka 1982.*

The record is vivid from the first glance that the question of how and when is replied in the judgment. It is not correct to say the record of the application is silent on the complained subject. On the other hand, the question of extents and demarcations was not at dispute in both the tribunal and court and it is not displayed anywhere in the judgment of this court. It is not easy to take the same to the Court. The available practice in the Court is that: *the Court will only look into matters which were brought in the lower courts and were decided, and not matters which were not raised or decided by either the trial court or this court on appeal* (see: **Elisa Mosses Msaki v. Yesaya Ngateu Matee** 1990 TLR 90).

In the precedent of **Elisa Mosses Msaki v. Yesaya Ngateu Matee** (supra), the dispute started at **Moshi Resident Magistrates' Court** (the RMs court) in **Civil Case No. 54 of 82** (the case) where the dispute was over two houses built in one plot of land and the RMs court was questioned on whether the two houses belonged to the

applicant's father alone or whether they were jointly owned by the parties, that is Elisa Mosses Msaki and Yesaya Ngateu Matee. After a full trial, the RMs court was satisfied, and came to the conclusion that the two disputed houses were jointly owned by the parties.

Dissatisfied by the decision of the trial court, the applicant in the case had preferred an appeal to this court in **Civil Appeal No. 19 of 1985**. The appeal in this court was dismissed and the decision of the RMs court was affirmed. At the Court, the applicant's counsel argued in support of the application that both the Rms court and this court erred in not deciding as to who between the parties was the owner of the plot of land on which the houses were built. This failure, it was argued has caused a lot of difficulties as ownership over the plots remains unresolved. It was submitted that the point regarding ownership of the plot was basic and that this court should have granted the application although the issue was not raised. The Court, finally held that the question of ownership of the plot on which the two houses are built was neither at issue at the RMs court nor in this court.

In the present application, there is no materials in the judgment of this court showing the parties were contesting sizes and demarcations surrounding the disputed land. Similarly, the supplementary affidavit is also silent on the subject of sizes and demarcations. The issue cannot be raised at the hearing of this

application, and even if it is allowed to access the Court, it will not be entertained.

It should be noted that the Court had decided so while well aware of the established Latin Land Principle of *Quic Quid Plantatur Solo Solo Cedit*, meaning that whatever permanently attached to land becomes part and parcel of the land. The effect of the principle is that whosoever owns a piece of land will also own the things attached to it. The principle is well known and practiced in common law legal tradition and found support in this jurisdiction (see: **Farah Mohamed v. Fatuma Abdallah** [1992] TLR 205 and **Haruna Said Mbeo v. Zamda Ramadhani & Two Others**, Land Case No. 367 of 2017). However, the Court had declined it for the reason indicated in this ruling.

Similarly, the current thinking of the Court of Appeal is to resolve real issues brought to it such as who are rightful owners of the disputed lands in this jurisdiction or who have better evidences to substantiate their claims in disputes, and no other related issues which do not determine the matter on merit, such as complaint on individual or family land and *locus stand* (see: **Yakobo Magoiga Gichele v. Peninah Yusuph**, Civil Appeal No. 55).

Subsequent to the enactments of article 107A (2) (e) of the **Constitutional of the United Republic of Tanzania [Cap. 2 R.E. 2002]** (the Constitution), section 45 of the **Land Disputes Courts Act**

[Cap. 216 R.E. 2019] (the Land Disputes Act), and section 3A (1) of the **Civil Procedure Code [Cap. 33 R.E. 2022]** (the Code), the Court has been reluctant to receive and entertain disputes which do not move into substance of the matters (see: **Yakobo Magoiga Gichele v. Peninah Yusuph** (supra) and **Gasper Peter v. Mtwara Urban Water Supply Authority (MTUWASA)**, Civil Appeal No. 35 of 2017

In the present application, the judgment of this court shows that *mrufaniwa amekuwa akilitumia eneo hilo kwa ajili ya mazishi ya wafu na kuwepo kwa makaburi husika tokea mwaka 1982*. This is, at any rate, shows that a long stay and use of the disputed land. The practice available in the Court shows that: *the court has been reluctant to disturb persons who have occupied land and used it over a long period of time (see:* **Shabani Nassoro v. Rajabu Simba** (1967) HCD 233 and **Mussa Hassani v. Barnabas Yohanna Shedafa**, Civil Appeal No. 101 of 2018). The move is cherished by this court in the precedent of **Chenge Magwega Chenge v. Specioza Machubi**, Land Appeal No. 13 of 2023.

I am quietly aware that leave to access the Court is within the discretionary mandate of this court, either to grant or refuse (see: **Rutagatina C.L. v. The Advocates Committee & Another**, Civil Application No. 98 of 2010 and **Buckle v. Holmes** (1926) All E. R. 90). Practice shows that the discretion must be exercised judiciously

depending on the relevant materials registered in each particular case (see: **British Broadcasting Corporation v. Eric Sikujua Ng'maryo**, Civil Application No. 138 of 2004).

However, in the instant application, there are no relevant materials to persuade this court to grant the application. There are no issues of general importance or novel point of law or *prima facie* case or arguable appeal or any disturbing features as to require the guidance of the Court. I think, in my considered opinion, I cannot allow an application, like the present one, to disturb the tightly registry of the Court and busy time schedules of justices of appeal. I am well aware that the intended appeal does not display chances of success.

Having said so, I decline to move my discretionary powers in favor of the applicant to access the Court for the indicated reasons. In the end, I refuse to grant leave to the applicant and hereby dismissed the application without costs. I do so owing to the nature and circumstances of the instant application.

Ordered accordingly.

Right to the second bite at the Court explained to the parties

F. H. Mtulya

Judge

15.11.2023

This Ruling was delivered in Chambers under the Seal of this court in the presence of the applicant, **Zainabu Malale** and her learned counsel, **Mr. Innocent Kisigiro** and in the absence of the respondent.

F. H. Mtulya

Judge

15.11.2023