IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

HIGH COURT OF TANZANIA

MOSHI SUB-REGISTRY

AT MOSHI

MISCELLANEOUS LAND CASE APPLICATION NO. 24 OF 2023

(C/F Land Appeal No. 37 of 2022 in the High Court of Tanzania-Moshi Sub-Registry. Originating from Application No. 146 of 2015 in the District Land and Housing Tribunal for Moshi at Moshi)

CATHERINE JOHN KIPENDAROHO LUHENDE…… APPLICANT

VERSUS

RAPHAEL KIMBA…….. ……..RESPONDENT

RULING

Date of Last Order: 05.10.2023
Date of Ruling : 16.11.2023

MONGELLA, J.

The application at hand is preferred under **Section 5 (10 (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 Dispute Courts Act,** [CAP 216 RE 2019]. The applicant is seeking for this court to grant her leave to appeal to the Court of Appeal against the decision of this court in Land Case Appeal No. 37 of 2022 and costs for the application. It is supported by the applicant's sworn affidavit and opposed by the counter affidavit duly sworn by Mr. Elikunda George Kipoko, advocate for the respondent.

The brief background of the application as drawn from the applicant's affidavit is as follows: The respondent, in the District Land and Housing Tribunal for Moshi at Moshi (the Tribunal, hereinafter), sued the applicant for trespass vide Land Application No. 146 of 2015. The hearing of the application took a long time to be completed. The respondent's case took two years to be heard whereby it appears it ran from November 2029 to December 2021. The matter was then fixed to be heard on 21.03.2022. However, due to sickness the matter was adjourned to 02.06.2022.

Aware that the presiding Chairman had been transferred, the applicant attended the Tribunal unprepared. She prayed for the matter to be adjourned and it was fixed to proceed on 06.07.2022. However, when she appeared before the Tribunal on the material day, she suddenly fell ill and could not testify. Nevertheless, the trial Chairman refused to adjourn the matter alleging the same was a backlog and the applicant was employing delaying techniques. The trial Chairman hence closed her defence and fixed the matter for judgement without requiring assessors to give their opinion. Judgement was thereby delivered without assessors' opinions being read before the trial Tribunal.

Aggrieved, the applicant lodged an appeal before this court vide Land Case Appeal No. 37 of 2022. The appeal was partially successful in that this court quashed the Judgement and decree of the trial Tribunal and ordered the matter to be remitted to the trial Tribunal for the assessors to record their opinion, the same be read

out to the parties and a judgement delivered thereafter. It is this decision that the applicant intends to challenge before the Court of Appeal. The grounds for challenging the decision have been articulated under paragraph 16 of the applicant's affidavit as follows:

a) *That, both the trial Tribunal and the first appellate court erred in law for denying the appellant the fundamental right to be heard.*

b) *That, the learned High Court judge erred in law and fact for ordering the assessors to be required to give opinion basing on the proceedings which had been vitiated by fatal irregularity occasioned by the trial Chairman who had failed to request, receive and read out the assessors' opinion to the parties before composing judgement.*

c) *That, the learned High Court judge misdirected herself for concluding that the appeal succeeded partially while she had decided that the third ground of appeal which was capable of disposing the whole appeal had merit.*

d) *That, the learned High Court judge erred in law and facts for holding that the appellant was supposed to present*

scientific proof to prove her sickness while she fell sick while she was at the Tribunal.

The application was argued *viva voce* whereby both parties were represented. The applicant was represented by Mr. Erasto Kamani while the respondent was represented by Mr. Elikunda George Kipoko, both learned advocates.

Prior to his submissions, Mr. Kamani adopted the applicant's affidavit. He submitted on the intended grounds of appeal. On the 1st ground, he averred that the applicant was denied her fundamental right to be heard as enshrined under **Article 13 (6), (1) of the Constitution of the United Republic of Tanzania, 1977**.

As to the 2nd ground, he had the stance that this court erred in law and fact by ordering assessors to give their opinion basing on proceedings it had vitiated due to the fatal irregularity occasioned by the trial Chairman by failing to request, receive and read out assessors' opinion to parties before composing judgment. He believed that the act serves as a *prima facie* ground of an arguable issue warranting determination by the Court of Appeal.

Addressing the 3rd ground, he contended that this court erred in law and fact by holding that the appellant was supposed to present scientific proof to prove her sickness while she had fallen sick while at the Tribunal. He averred that the matter ought to be presented to the Court of Appeal for the same to provide guidelines as to

whether it was proper for a person caught by serious illness while before the court to be required to furnish documents to prove his illness.

With regard to the 4th ground, Mr. Kamani argued that the appellate Judge in this court misdirected herself in declaring that the appeal had succeeded partially while she had reasoned that the judgement and Tribunal proceedings were violated, which was a matter capable of disposing the whole appeal. He had the view that the propriety of the said order warrants determination by the Court of Appeal.

Considering the grounds he submitted as above; he had the firm view that arguable issues for consideration by the Court of Appeal have been advanced. That the grounds present novel points of law and they have passed the tests settled in **British Broadcasting Corporation vs. Eric Sikujua Ng'maryo,** Civil Application No. 138 of 2004 (unreported) and **Jireys Nestory Mutalemwa vs. Ngorongoro Conservation Area Authority** (Civil Application 154 of 2016) [2021] TZCA 9 TANZLII, which are that: the grounds of appeal must raise issues of general importance, raise a novel point of law and must show a prima facie or arguable appeal. He finally prayed for this court to grant the application.

In reply, Mr. Kipoko, while adopting his counter affidavit, raised an issue that the applicant had not attached the judgement which he intended to appeal against. In that respect, he had the stance that

this court is denied necessary material on which to base its decision as the judgement which she intends to appeal against is missing. He cemented his argument by the case of **Paul Alphonce Munisi vs. Elisante Wilbard Kirita** Misc. Civil Application No. 253 of 2022. He insisted that the record cannot assist the application as the applicant ought to have complied with requirement of **Rule 49 (3) of the Court of Appeal Rules**, which requires necessary documents to accompany the proceedings. He contended that this court cannot determine this application in the absence of the copy of judgement.

Rejoining, Mr. Kamani averred that Mr. Kipoko misconceived the authority he supplied to the court. He contended that in the first place the decision he referred to was made by the High Court and the decision itself contravenes decisions of the Court of Appeal. That, it was made per incuriam. He was of the considered view that the said decision interpreted **Rule 49 (3) of the Court of Appeal Rules**, which is inapplicable in an application for leave to appeal at first instance. Instead, he said, the requirement is set for applications instituted as a second bite before the Court of Appeal and the requirement is meant to ensure that the Court of Appeal is supplied with necessary documentations from which it can draw inference as at such times the record is usually at the High Court.

Mr. Kamani further averred that the requirement to attach the decision against which the appeal is to be sought is only relevant to the Court of Appeal. He thus asked the court to confine itself to

the application at hand as to whether the proposed grounds raise arguable issues before the court for leave to be granted. He prayed for the application to be granted convinced that the grounds advanced are suitable for consideration by the Court of Appeal.

I have dispassionately considered the submission of both parties. The applicant herein has sought this application seeking leave to appeal before the Court of Appeal against the decision issued in Land Case Appeal No. 37 of 2022. Mr. Kipoko, counsel for respondent, challenged the competence of this application on the ground that the applicant did not attach the impugned judgement of this court on which he intends to appeal. Upon observing Mr. Kipoko's counter affidavit, it appears that the same point has been raised under paragraph 20 of the same whereby he deponed that the applicant did not depone as to the necessary steps required to warrant an appeal. I am of the view that at its core, this is a matter of jurisdiction of this court and should thus be addressed.

Foremost, Mr. Kipoko argued that the application lacks necessary documents as it did not contain a copy of the judgement which the applicant intends to appeal against. He considered the omission a violation of **Rule 49(3) of the Court of Appeal Rules**. Mr. Kamani, on the other hand, argued that the said Rule is not applicable on leave to appeal filed in the High Court. I thus find it pertinent to reproduce the provision hereunder, for ease of reference. The Rule reads:

> "***(3)*** *Every application for leave to appeal shall be accompanied by a copy of the decision against which it is desired to appeal and where application has been made to the High Court for leave to appeal by a copy of the order of the High Court.*"

From the wording of the above cited provision, it is clear that the requirement to attach the judgement intended to be appealed against is meant for all applications for leave to appeal regardless of the whether the application is filed in the Court of Appeal as a second bite or the High Court at first instance. When filing in the Court of Appeal as a second bite, the applicant shall be required to also attach the refusal order issued by the High Court. This was well explained in the case of **Grace Fredrick Mwakapiki vs. Jackline Fredrick Mwakapiki & Another** (Civil Application 51 of 2021) [2022] TZCA 64 TANZLII whereby the Court reasoned:

> "An application for leave, in terms of Rule 45(b) of the Rules, is one of the matters upon which the High Court and this Court have concurrent jurisdiction. **Rule 49(3) of the Rules**, quoted above, is directive of which documents should be attached to the affidavit when an application for leave is to be filed in the High Court, and which documents should accompany it, when it is to be made before the Court. **If the application is to be filed in the High Court, it must be attached with one document, that is a decision from which an appeal is to be preferred, should leave be granted.** Upon refusal of leave by the High Court, in which case, the same has to be made to the Court, the application, should be

> accompanied with one more document in addition to the decision to be challenged on appeal. That second document, is a copy of the order refusing grant of the leave by the High Court."

The application brought before this court has no attachments thereto, hence clearly lacking copy of the judgement of this court in Land Case Appeal No. 37 of 2022. This is a clear violation of a mandatory requirement of the law. I am of the considered view that this omission cannot be corrected by mere presence of court records within the court registry. It is not the duty of the court to dive into the records to fetch necessary documentation that the parties are obliged to attach and have omitted to do so.

In addition, considering that Mr. Kipoko generally deponed in his counter affidavit, which he prayed to adopt to form part of his submission, that the applicant failed to depone on taking necessary steps to appeal. It came to my attention that the applicant's bare application also lacked details showing whether there was any notice of appeal to the Court of Appeal. This is itself an issue questioning the jurisdiction of this court which is conferred by filing of the notice of appeal. According to **Rule 46(1) of the Court of Appeal Rules,** where leave of appeal is required, the applicant should first lodge notice of appeal. For ease of reference, the provision states:

> "(1) Where an application for a certificate or for leave is necessary, it shall be made after the notice of appeal is lodged."

Therefore, undoubtedly, the first step in filing an appeal before the Court of Appeal is first for a party to lodge notice to the Court of Appeal and thereafter lodge an application for leave if so required. The Court in **Modestus Daudi Kangalawe vs. Dominicus Utenga** (Civil Application 139 of 2020) [2021] TZCA 560 TANZLII, held:

> "Without first having lodged the notice of appeal the applicant's efforts in procuring leave to appeal were useless. **It's the requirement of the law that the notice of appeal should be lodged first before the application for leave.**"

The basic requirements of the application are for the applicant to attach the impugned judgement on which he or she intends to appeal. The applicant also has to attach the notice of appeal to inform the High Court that the appeal process has been initiated as per the law. It is by taking these steps that the High Court is assured of its jurisdiction to determine an application for leave to appeal.

The applicant herein plainly failed to comply with the mandatory requirements of the law. In the circumstances, the application is found to be incompetent and hereby struck out, with costs.

Dated and delivered at Moshi on this 16th day of November 2023.

X

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