

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

MISCELLANEOUS LAND APPLICATION NO. 8 OF 2023

(Arising from the judgment of High Court of Moshi at Moshi dated 13th February 2023 in Land Appeal Case No. 34 of 2022 Masabo, J. and originating from the decision of District Land and Housing Tribunal of Moshi at Moshi in Land Application No. 10/2018)

**THE REGISTERED TRUSTEES OF
THE WORD FOUNTAIN MINISTRY.....APPLICANT**

VERSUS

EMMANUEL LYAMUYA.....1ST RESPONDENT

STEPHEN ERASTO MSHOMI.....2ND RESPONDENT

RULING

25th October & 11th December, 2023

A.P.KILIMI, J.:

This is the ruling in respect to prayer by the applicant for leave to appeal to the court of appeal. The applicant has moved this Court by way of Chamber Summons pursuant to section 47(1) of the **Land Disputes Courts Act**, Cap 216 R.E.2019 and Rules 45 (a), 46 (1) and 29 (3) of the Tanzania **Court of Appeal Rules**, 2019 (the Rules). The application is supported by an affidavit of Mr. Elikunda George Kipoko, learned advocate. Challenging this application each respondent filed his own counter affidavit.

Subsequent, Mr. Kipoko filed a notice of preliminary objection to the effect that the counter affidavit by the first respondent is fatally defective. According to the nature of application and objection raised, conveniently, I ordered the application and the objection be argued together.

In his submission Mr. Kipoko started by addressing the alleged defects in the first respondent's counter affidavit, where he submitted that the counter affidavit by the 1st respondent contains untruths. Arguing on this point, he submitted that in his affidavit the 1st respondent averred that he is an adult female while he is a male person. He contended that the law is settled that an affidavit containing false information cannot be relied upon by the court to decide the matter. To support his argument Mr. Kipoko cited a court of appeal case of **Damas Assey and Another vs. Raymond Mgonda Paula and 8 Others**, Civil Application No. 32/2017 of 2018. He then prayed that the counter affidavit be struck out and the application to be granted.

Continuing on the preliminary objection Mr. Kipoko stated further that the counter affidavit by the 1st respondent contains arguments. He began by citing the case of **Uganda vs. Commissioner of Prisons, Ex-parte Matovu** [1967] EA 514 then he quoted paragraphs 3 and 4 (a) and (d) of

the 1st respondent's counter affidavit and submitted that the paragraphs contain pure arguments which is in violation of the law governing affidavits.

With respect to the grounds for granting leave to appeal, it was Mr. Kipoko's submissions that, first of all the Respondents do not oppose the application for leave. He contended so by referring to the 1st respondents counter affidavit on paragraph 4(c) and 9(d) where he said the 1st respondent also conceded that there was a point that needs the attention of the court of appeal to be resolved. It was his further submission that with respect to the 2nd respondent also it is apparent from his counter affidavit that he also supports the application for leave.

Furthering his submission Mr. Kipoko contended that there is a point of law with sufficient importance requiring the attention of the court of appeal. It was his submission that, there are serious illegalities on points of law and facts occasioning failure of justice in the challenged decision and the same is intended to be exposed to the court of appeal if leave is granted. Submitting further Mr. Kipoko enumerated and expounded the grounds stated in his affidavit which require serious judicial consideration by the court of appeal as follows:

Firstly, that the court of appeal would be invited to determine whether the appellate high court was legally right in nullifying the otherwise competent proceedings and flawless evidence on mere absence of the name of trustee in the verification clause.

Secondly, that the court of appeal would be invited to determine whether appellate high court was legally right to nullify the proceedings on ground that the current applicant who instituted the case subject of the appeal had no locus standi to prosecute the case despite the trustee testifying in support of the case and his testimony and capacity as trustee was not disputed through cross examination.

Thirdly, that the court of appeal would be invited to determine whether appellate high court was legally right to condemn the applicant to pay costs of the proceedings as still rule that the trial proceedings were not initiated by the applicant.

Fourthly, that the appellate high court erred by nullifying the judgment and the decree of the trial tribunal on ground that the applicant who was the original applicant, that he had no locus standi to claim on the suit premises while that was not among the issue at the trial tribunal and

despite evidence to the contrary since the same appellate court found it in judgment that the applicant was a legal entity dully registered and capable of owning property.

Lastly, that the court of appeal would be invited to determine whether appellate high court was legally right in law to nullify the judgment based on defective verification of the application despite lawful written statements of defence by the then respondents who had their respective claims over the suit land and on which the evidence and judgment was based upon. Based on his submission he prayed for the application to be allowed with cost.

Responding to the submission the learned counsel for the 1st respondent submitted by citing the case of **Innocent Bisusa vs. Rajabu Rashi Mgonzi** [2023] TZCA 17320 TANZLII and another case of **Mexon Sanga vs. Total Tanzania Limited** [2023] TZCA 143 TANZLII. It was his submission that in the cited cases above the Court of Appeal of Tanzania has given some guidelines to be taken into account when granting or refusing to grant leave to appeal. In line with the cited cases above the learned counsel submitted that they do not oppose the application save for

costs which he argued that the same would be determined in the intended appeal.

With respect to the objection against the counter affidavit, he submitted that the preliminary objection amid the concession by the 1st respondent over the application are wastage of time as it will just be a useless academic exercise because, it is settled that an offensive paragraph can be expunged or disregarded and the court can continue to determine the application based on the remaining paragraphs, if the expunged paragraph is inconsequential. He supported his submission with the case of **Jamal S. Nkumba & Another vs. Attorney General** (Civil Application 240 of 2019) [2021] TZCA 756.

Furthering in his submission the learned counsel for the respondent stated that if the objections are found meritorious the 1st respondent can still be heard on points of law. He submitted further that if paragraph 4 is expunged or the whole counter affidavit is struck out, they still maintain their submission that they agree with the application based on the legal guidance of the court of appeal in the case of **Innocent Bisusa and that of Mexcon Sanga** (supra). He contended that they lean on the cited

cases above because the authority from those cases is legal as opposed to factual.

Responding to the issue of the 1st Respondent being represented as a female, the learned counsel submitted that it was a slip of pen which is excusable. He contended further that an overriding objective principle cures such non-fatal mistakes. He supported his submission with the case of **Kobil Tanzania Limited vs. Fabrice Ezaovi** [2021] TZCA 477. TANZLII

With respect to the issue of paragraphs which are seen to be argumentative, he submitted that he sees no word or phrase suggesting arguments rather facts. He emphasized that what is contained in paragraph 4 is an up thrust to what is contained in paragraph 9 of the applicant's affidavit. He contended that paragraph 9 contains grounds upon which the application is pegged and that the said grounds are a mixture of law and facts therefore he argued that a reply to them ought to be of an equal force. He finally submitted that there are no arguments in any of the paragraphs as the counter affidavit and so prayed for the objections to be overruled.

The 2nd respondent on his part also submitted by conceding that there are serious issues of general importance which are considered to be novel points of law in our jurisprudence which need the attention of the court of appeal. He contended further that these grounds show prima facie or arguable appeal.

It was his further submission that it is worth for the court of appeal to be invited to determine whether or not the appellate high court was legally right to nullify the proceedings on the ground that the applicant in this application had no locus standi to prosecute the case. He argued further that by the mere fact that the applicant's names were not indicated in the application yet they appeared in person before the court and gave their testimony with the capacity of trustees and that their capacity was not disputed through cross examination.

Submitting further the second respondent, argued that the court of appeal is required to determine whether or not the appellate high court's nullification of the tribunal's judgment and decree on the ground that the applicant who was the original applicant had no locus standi to claim on the suit premises while that was not among the issues and despite evidence to the contrary since the same appellate court found in its

judgment that the applicant was a legal entity dully registered and capable of owning property.

He also submitted that it is important for the court of appeal to be invited to determine whether the appellate high court was legally right in law to nullify the judgment based on defective verification of the application despite lawful written statement of defense by the then respondents who had their respective claims over the suit land and on which the evidence the judgment was based upon. Finally, it was his prayer that the application be allowed.

Now, before proceeding to determine the application on merit, I will begin by determining the preliminary objection. First the issue of the 1st respondent introducing himself as a female in his affidavit while in fact he is a male, as clearly seen and as averred by respondent in his submission that this was simply a slip of pen, I also subscribe with that observation, however in my view the same did not prejudice the applicant who actually knew is a male, I thus with of considered opinion this is excusable under the principle of overriding objective.

With respect to the objection regarding 1st respondent's affidavit containing arguments, I have considered the said paragraphs, on paragraph 3 the issue as to whether the respondent was served with the letter or not is argumentative. Again, on paragraph 4(a) what the respondent is stating is his opinion which is also not allowed. Also, on paragraph 4 (d) whether the written statement of defence by the respondents can cure the defects stated or not is argumentative and ought not to have been contained in the affidavit. The law on affidavit is to the effect that an Affidavit for use in court is a substitute for oral evidence and ought to be limited to statements of facts only. This was so stated in the case of **Uganda vs. Commissioners of Prisons Ex parte Matovu** (supra) which was followed by the court in **Phantom Modern Transport (1985) Limited vs. D.T. Dobie (Tanzania) Limited** [2002] TZCA 6 (TANZLII). In the latter case the court had this to say;

"Where defects in an affidavit are inconsequential, those offensive paragraphs can be expunged or overlooked, leaving the substantive parts of it intact so that the court can proceed to act on it."

(See also **Jamal S. Nkumba & Another vs. Attorney General**. [2021] TZCA 756 (15 December 2021 (TANZLII)).

In the light of the authority above, I am settled and therefore, the complained paragraphs in the 1st respondent's counter affidavit are hereby expunged for being defective.

Having determined the preliminary objection, I will now proceed to determine the application of leave to appeal to the court. Before I proceed, I find pertinent to highlight the law to such effect; It is trite 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 was noted earlier by the defunct East African Court of Justice in **Sango Bay Estates Ltd and Others vs. Dresdner Bank** [1971] EA 71 particularly remarked that:

"Leave to appeal from an order in Civil Proceedings will normally be granted where prima facie, it appears that there are grounds of appeal which merit serious judicial consideration."

Almost the same was reiterated and expounded in the case of **British Broadcasting Corporation vs. Eric Sikujua Ng'maryo**, Civil Application No. 133 of 2004 (unreported) when referred **Buckle v Holmes** (1926) ALL ER. Rep. 90 at page 91; that guided by the judicious exercise of the discretion, leave to appeal is within the discretion of the Court and therefore not automatic. (See also **Nurbhai N.Rattansi vs. Ministry of Water, Construction, Energy and Environment and Hussein Rajabali Hirji** [2005] T.L.R. 220; **Harban Haji Mosi and Another vs. Omary Hilal Seif and Another** [2001] T.L.R. 409; **Gaudencia Mzungu v. Institute of Development Management Mzumbe**, Civil Application No. 94 of 1999; **Rutagatina C.L. vs. The Advocates Committee and Another**, Civil Application No. 98 of 2010 and **Jireys Nestory Mutalemwa vs. Ngorongoro Conservation Area Authority**, Civil Application No. 154 of 2016 (unreported) to mention few.

In lieu of the above law, the issue is whether this application has met the above test; I am mindful, in applications of this nature courts should avoid taking on board substantive issues to pre-empt the merits or demerits of the intended appeals. (See **Regional Manager-Tanroads**

Lindi vs. DB Shaprya and Company Lid, Civil Application No. 29 of 2012. (Unreported).

I have considered the grounds raised by the applicant's counsel in paragraph 9 of his affidavit, in my view there are some points of law worthy to be considered by the Court of Appeal. I am saying so because, the applicant is faulting the High Court decision for nullifying the tribunal proceedings on grounds that the applicant lacked locus standi. I am of settled view the issue of locus standi under the circumstances it was dealt by the first appellate raises a point of law for judicial consideration by the court and second the initiation of the case at the trial tribunal and the ground/point raised at the first appellate court which caused determination of the appeal at the High Court raises a point to be considered by the court in respect to costs of case ordered to be paid by the applicant.

In the upshot, on account of what we have endeavored to discuss hereinabove, I find merit in this application and allow it. As the applicant did not press for costs, I make no order in that regard.

It is so ordered.

DATED at **MOSHI** this 11th day of December, 2023.



X

JUDGE

Signed by: A. P. KILIMI

Court: - Ruling delivered today on 11th day of December, 2023 in the presence of Ms. Lilian Mushi holding brief of Mr. Elikunda Kipoko for the applicant, applicant and both respondents also present.

Sgd: A. P. KILIMI
JUDGE
11/12/2023