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

MISC. LAND APPLICATION NO. 50 OF 2022

(C/f Misc. land appeal no. 09 of 2021, Misc. Land Application No. 27 of 2021 before the District Land and Housing Tribunal for Moshi)

ELIMKIRA NDESAMBURO SAMBO ..... APPLICANT
VERSUS
AMINIEL NDESAMBURO SAMBO ..... RESPONDENT

RULING

Last Order: 14th February 2023
Judgment: 17th February 2023

MASABO, J.:-

The applicant intends to appeal to the Court of Appeal against a judgment of this court in Misc. Land Appeal No. 9 of 2001. He has moved this court by way of a chamber summons filled under section 47(2) of the Land Disputes Court Act [Cap 216 RE 2019] and section 5(1)(C) of the Appellate Jurisdiction Act [Cap 141 RE 2019] praying for leave to appeal to the Court of Appeal. Accompanying the application is his affidavit in which it is deponed that, the kernel of the application is a parcel of land identified as Plot No. 78 Farm 125 located at Kiborolini ward within Moshi Municipality which I shall refer, for convenience, as the suit land.

Both parties assert ownership of the suit land. The applicant was partially successful in the original suit, Land Application No. 27 of 2021 before the Land and Housing Tribunal (DLHT) for Moshi. He was declared the lawful

owner of the suit land but ordered to pay the respondent a compensation at tune of 30% of the total value of the suit land. Also, his prayer for costs was rejected. Disgruntled he filed an appeal, Land Case Appeal No. 9 of 2022, before this court challenging the compensation and the denial for costs. Equally disgruntled, the respondent filed a cross appeal, Land Case Appeal No. 11 of 2022. The two appeals were consolidated and upon hearing, this court delivered a judgment reversing the judgment and decree of the DLHT and declared the respondent the lawful owner. Disgruntled further, the applicant has come back to this court seeking for leave to appeal to the Court of Appeal.

Through paragraph 9 of the affidavit, it was deponed that, if the leave is granted, the applicant shall invite the Court of Appeal to hold as follows: **one,** the first appellate court erred in its reassessment and re-evaluation of the evidence on record hence arrived at an erroneous finding that the applicant failed to prove ownership of the suit land. **Two,** the court overlooked the fact that the application was time barred. **Three,** the issues framed were not sufficiently determined contrary to Order XX rule 4 of the Civil Procedure Code [Cap 33 RE 2019]. **Four**, the court relied on uncorroborated evidence and ignored the fact that he is the one who invited the respondent into the suit land and **last**, the requirement of section 110 of the Evidence Act [Cap 6 RE 2022] was overlooked as the allegations on forgery were not proved. These grounds he deponed, have overwhelming chances of success thus it is fair that the leave be granted.

The respondent was ardently opposed. Upon being served with the application, he filed a counter affidavit disputing all the assertions and prayed that leave should not be granted as the intended appeal has no chance of success.

Hearing of the application proceeded in writing. Both parties were represented. Mr. Gaston Shundo Garubindi appeared for the applicant whereas the respondent was represented by Mr. Julius Semali, all learned counsels.

Submitting in support of the application, Mr. Garubindi argued that, as per the law currently in force in our jurisdiction, there is no automatic appeal to the Court of Appeal in matters originating from the DLHTs. Such matters can only go to the Court of Appeal upon leave been granted by this court. He proceeded that, the grant of leave is within the discretionary powers of this court which must be exercised judiciously based on the material presented to the court and upon the court being satisfied that the decision against which the appeal is intended, raises legal points worth consideration by the Court of Appeal. In fortification, he cited the case the Court of Appeal ruling in **British Broadcasting Corporation vs Eric Sikujua Ng'maryo,** Civil Application No. 138 of 2004 (unreported) as cited in **Rutagatina C. L. vs The Advocates Committee and Another,** Civil Application No. 98 of 2010 (unreported), and re-affirmed in **Lightness Damian & 5 Othrs v Said Kasim Changeka,** Civil Application No. 450/17 of 2020 where it was held that what the applicant in similar application is required to do is to

demonstrate that there are factual or legal issues worth consideration by the Court of Appeal.

Applying these authorities to his application, he reasoned that the application passes the tests. Through the intended grounds of appeal above stated, it has clearly demonstrated that there are legal and factual issues worth consideration by the court of appeal. He added that, time limitation and failure to determine the issues raised are pertinent legal issues and suffices as good grounds for granting leave so that they can be interrogated and determined by the apex court. By their nature, if they are found valid, they have a potential of nullifying the proceedings, judgment and decree. In fortification, he once gains drew my attention to **Lightness Damian & 5 Others v Said Kasim Changeka** (supra). As regards the undetermined issues, he argued that the issues left undetermined by the court include: whether the trial tribunal was right in awarding compensation whereas the same was neither pleaded nor proved and whether the trial court acted properly by denying him costs. He concluded by arguing that the, I should not entertain the argument that the application has no chances of success as in doing so the court will risk usurping the powers it is not clothed with by considering the merit of the appeal which should be reserved for the appellate court.

In his reply submission, Mr. Semali submitted that the application should be dismissed as it has not passed the test laid down in **British Broadcasting Corporation vs Eric Sikujua Ng'maryo** (supra) in which it was held that

for leave to be granted, the applicant must demonstrate that the intended leave will raise issues of general importance or novel point of law or a prima facie/arguable case. He proceeded that; all the points listed as grounds of appeal were adequately resolved by the first appellant court hence no need for further appeal. The first appellate court adequately re-evaluated and analysed the evidence on record and made its own findings on the issues raised. In summation, he prayed that I should dismiss the application as the appellant has miserably failed to demonstrate novel point of law, a *prima facie* or arguable appeal.

Re-joining, Mr. Garubindi reiterated his submission in chief and argued that the issue whether the grounds above were sufficiently resolved by the trial court cannot be answered at this stage as they go into the merit of the appeal. They can only be determined by the apex court once the leave is granted. Determining them at this point would be synonymous to determining the appeal prematurely.

I have considered the parties' respective affidavits and their submissions. As correctly submitted by Mr. Garubindi, appeal to the Court of Appeal on matters emanating from the DLHTs is not automatic. As per section 47(2) of the Land Dispute Court Act, a person intending to appeal to the Court of Appeal cannot competently do so without first obtaining a leave of this court. Thus, the only issue for determination is whether the application has merit. In determining this issue, due regard must have to the fact that leave is granted at the discretion of the court. And, much as there is no statutory

guidance on how this discretion should be exercised, there is a plethora of authorities describing the factors that need be considered by court whin exercising such discretion (see **British Broadcasting Corporation vs Eric Sikujua Ng'maryo** (supra); **Rutagatina C. L. vs The Advocates Committee and Another** (supra), **Jireys Nestory Mutalemwa V Ngorongoro Conservation Area Authority**, Civil Application No. 154 of 2016, CAT at Arusha (unreported) and **Lightness Damian & Others vs Said Kasim Chageka** (supra). In **Rutagatina C. L. vs The Advocates Committee and Another** (supra), the Court had this to say:

> "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 and on the materials before the court. As a matter of general principle, leave to appeal will be granted where the grounds of appeal raise issues of general importance or a novel point of law or where the grounds show a prima facie or arguable appeal (see: **Buckle v Holmes** (1926) ALL ER. 90 at page 91). However, where the grounds of appeal are frivolous, vexatious or useless or hypothetical, no leave will be granted."

Cementing this position in **Jireys Nestory Mutalemwa V Ngorongoro Conservation Area Authority** (supra), the Court of Appeal held that:

> much as the grant of leave is discretionary, yet it is not automatic. The court adjudicating on such application is not left free to do so. It can grant leave to appeal only where the grounds of the intended appeal raise arguable issues for the attention of the Court. In other words, the grounds raised should merit a serious judicial consideration by the Court. This is intended to spare the Court from dealing and wasting its precious time on unmerited matters (See the Court's decisions

in the case of **(i) Harban Haji Mosi (ii) shauri Haji Mosi vs (i) Omar Hilal Seif (ii) Seif Omar,** Civil Reference No. 19 of 1997 cited in the case of **British Broadcasting Corporation vs Eric Sikujua Ng'maryo** (supra).

And, in **Lightness Damian & Others vs Said Kasim Chageka** (supra), it stated thus:

> "…..all that applicants are required to do in applications of this kind is simply to raise arguments whether legal or factual which are worth 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. By doing that it is to overstep into the mandate of the Court to which the appeal lies. It is to prejudge or predetermine the appeal. We therefore, as a reminder, hereby restate the well-established principle of law that in applications of this nature courts should avoid making decisions on the substantive issues before the appeal itself is heard which is a stance pronounced by the Court in the case of **The Regional Manager-TANROADS Lindi vs DB Shapriya and Company Ltd,** Civil Application No. 29 of 2012 CA (unreported) that:-
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> > "It is now settled that a Court hearing an application should restrain from considering substantive issues that are to be dealt with by the appellate Court. This is so in order to avoid making decisions on substantive issues before the appeal itself is heard.""

In the premise of these authorities, I now move to determine whether a novel point, *prima facies* or arguable appeal warranting the grant of leave has been demonstrated. As stated earlier on, through paragraph 9 of his

affidavit, the applicant has listed a total of seven points which in my considered view, revolve around the five issues I have summarized in prelude as the issues which he intends to invite the Court of Appeal to determine should this application sail and leave be granted.

Two of these issues are purely legal premised on time limitation and the consequence thereto which, as a rule, can be raised and determined at any stage. Similarly legal is the court's legal duty to determine the issues raised. The remaining three are purely factual. The seek to invite the apex court to interrogate and determine whether there was sufficient evidence on record in support of the reversal of the trial tribunal's findings as to ownership of the suit land. While reading the impugned judgment as appended to the applicant's affidavit, I have come to a conclusion that these five points considered conjointly, raise pertinent questions worth consideration and determination by the Court of Appeal so as to put to the rest the lingering question as to whether the trial court was competent and if so, who between the applicant and the respondent who are biological brothers, is the lawful owner of the suit land.

In the foregoing, the application passes. Leave is granted to the Applicant to file his appeal in the Court of Appeal. As for the prayer costs, much as it is trite that costs should follow event, in the present case, the fact that the contenting parties are brothers who are expected, during and after the conclusion of the court proceedings, to coexist and live affectionately as

brothers, I have found it to be fair and just for them to share the costs by each of them shouldering its respective costs, as it is hereby ordered.

Dated and delivered at Moshi this 17th day of February, 2023.

2/17/2023

X _____

Signed by: J.L.MASABO

J.L MASABO
JUDGE
17/02/2023

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