

IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

HIGH COURT OF TANZANIA

MOSHI SUB- REGISTRY

AT MOSHI

MISCELLANEOUS CIVIL APPLICATION NO. 40 OF 2023

(C/F Land Appeal No. 68 of 2022 originating from Land Application No. 64 of 2022 in the District Land and Housing Tribunal for Moshi at Moshi)

NANCY MANASE KIDIN (As Administrator

of Estate of the Late Manase Kidini).....**1st APPLICANT**

NANCY MANASE KIDIN**2ND APPLICANT**

VERSUS

MBORANDUMI SILAA.....**1ST RESPONDENT**

SEGI MRAMBA.....**2ND RESPONDENT**

RULING

Date of Last Order: 20.02.2024

Date of Ruling : 02.04.2024

MONGELLA, J.

The applicants herein have preferred this application under **Section 47(1) of the Land Disputes Courts Act** [Cap 216 RE 2019] and **Rule 45 (a), 46(1) and 49(3) of the Tanzania Court of Appeal Rules, 2009** seeking for this court to grant them leave to appeal to the Court of Appeal against the decision of this court in Land Appeal No. 68 of 2022 delivered on 27.03.2023.

The application was supported by the sworn affidavit of Mr. Elikunda George Kipoko, learned advocate representing them. It was opposed by the counter affidavit sworn by Mr. Willence Elisonguo Shayo, learned advocate for the respondents. The application was argued by written submissions.

Under paragraph 8 of his supporting affidavit, Mr. Kipoko alleged that the decision of this court was tainted with legalities on points of law that occasioned miscarriage of justice. He advanced four points of law on which the applicants intend to argue for determination by the Court of Appeal. The same are as hereunder:

- a. *Whether the trial tribunal and the High Court were legally right in finding that the claim against the respondents was a res judicata.*
- b. *Whether the trial tribunal and the High Court were legally right in finding that the claim against the respondents was time barred.*
- c. *Whether the trial tribunal and the appellate High Court were legally right to determine the case without calling of evidence.*
- d. *Whether the trial tribunal was duly composed and the decision was procedurally delivered according to the law.*

Mr. Kipoko commenced his submissions by stating that this application was a creature of the law enshrined under **Section 47 (1) of the Land Disputes Courts Act**. He stated that the applicants had already filed their notice of appeal in the Court of Appeal, intending to challenge illegalities in the decision of this court. He considered the issues raised being novel points of law and fact deserving the attention of the Court of Appeal.

He further contended that the right to appeal is open to any party and that the respondents have no right to oppose the leave from being granted. He alleged that the respondents had not shown in their affidavit that they would be prejudiced in case the applicants are granted leave to appeal. He insisted that this court has the mandate to grant leave if the applicant has complied with necessary procedures including filing notice of appeal and if the application shows novel points of law and fact and illegalities to be challenged before the Court of Appeal.

Mr. Kipoko went into details on the four raised issues, I will not reproduce such details for reasons I will later point out. He was of view that the applicants met all criteria for application for leave to appeal. He thus prayed for the applicants to be granted leave to appeal to the Court of Appeal.

In reply, Mr. Shayo started with a prayer to adopt his counter affidavit. Thereafter, he challenged the applicant's application on the reason that the applicants failed to substantiate why leave

should be granted. He averred that the Court of Appeal has well established the factors that ought to be considered prior to granting leave. In respect thereof, he referred the case of **British Broadcasting Corporation vs. Eric Sikujua Ng'maryo**, Civil Application No. 138 of 2004 insisting that the applicants have failed to demonstrate how the intended grounds of appeal raise issues of general importance or novel point of law or prima facie appeal.

Further, he contended that this court is barred from determining the application on account of merits of the intended appeal as emphasized in **Bulyanhulu Gold Mine Ltd & Others vs. Petrolube T. Ltd & Another** (Civil Application 364 of 2017) [2020] TZCA 1844 TANZLII. That, this court is only confined into looking whether the three principles on leave to appeal have been fulfilled by the applicant. However, holding the view that the applicant has failed to fulfil the three principles, he urged the court not to entertain the application and called for its dismissal.

Rejoining, Mr. Kipoko argued that through his sworn affidavit and submission in chief, he established that there are novel points of law, issues of general importance and prima facie case worthy of determination by the Court of Appeal. He contended that one of the issues to be addressed by the Court of Appeal is whether a party, the 1st applicant for that matter, by developing and using the land for more than twenty (20) years acquires legal right over the land and is entitled to be protected by the laws of the country. he added that the Court of Appeal will also be required to ascertain

whether after passing of a decree, and in absence of execution, a fresh cause can arise between the same parties thereby not rendering the suit *res judicata*.

Mr. Kipoko maintained his stance that the issues advanced by the applicant are novel, of general importance and raise a *prima facie* case worthy of attention by Court of Appeal. That the applicant has met all the legal requirements warranting grant of leave to appeal to the Court of Appeal.

Prior to determining this application, I wish first to note that, there are amendments introduced by **Section 10 the Legal Sector Laws (Miscellaneous Amendment) Act, No. 11 of 2023** that came into force on 1st December 2023. The said amendment has affected **Section 47 of the Land Disputes Courts Act** and **Section 5 of the Appellate Jurisdiction Act** by eliminating the requirement for parties to seek leave prior to filing their appeal in the Court of Appeal. In **Petro Robert Myavilwa vs. Zera Myavilwa & Another** (Civil Application No. 117/06 of 2022) [2023] TZCA 17947 TANZLII, the Court of Appeal affirmed the amendments stating that:

“... the changes have done away with leave requirement for one to appeal to Court against the decision of the High Court regardless of whether the impugned decision is an order, decree, an ex-parte decree or a preliminary decree when exercising its original, appellate or revisional jurisdiction. In other words, obtaining leave has ceased to be a

requisite before one can appeal to Court effective the 1st December, 2023."

Unfortunately, the amendment found the parties amid a fixed Schedule to file their submissions issued on 09.11. 2023. I am aware that being a procedural law, the same operates retrospectively, thus requirement for leave is no longer mandatory from the date the amendment entered into force. This position was also affirmed in the above decision. However, considering the stage this matter had progressed into when the amendment took effect, I find it plausible to determine this application for interest of both parties in consideration of time limitation effects.

It is well settled that in granting leave to appeal, the court must observe the presence of novel points of law or matters of general importance which ought to be determined by the Court of Appeal. This was well expounded in **British Broadcasting Corporation vs Eric Sikujua Ng'maryo** (supra) whereby the apex Court stated:

"... leave to appeal is not automatic. It is within the discretion of the court to grant or to refuse leave. The discretion must, however be judiciously exercised and on the materials before the court...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...However, where the grounds of appeal are frivolous, vexatious or useless or hypothetical, no leave will be granted."

The same position was also settled in **Rutagatina C.L vs. The Advocates Committee & Another** (Civil Application No. 98 of 2010) [2011] TZCA 143; **Lightness Damian & Others vs. Said Kasim Chageka** (Civil Application 450 of 2020) [2022] TZCA 713; and; **Henry Julius Nyela vs. Sauda Mtunguja Rajabu** (Civil Application No. 514 of 2020) [2023] TZCA 115 (14 March 2023), all at TANZLII.

The issues raised, can be either legal and/or factual. All this court has to consider is whether the intended appeal has merit. This was well explained in **Henry Julius Nyela vs. Sauda Mtunguja Rajabu** (supra), whereby it was stated:

“As good luck would have it, the law on this area is fairly settled in this jurisdiction. In applications for leave to appeal to the Court, what the court confronted with that application is supposed to do is to see if the intended appeal, *prima facie*, has some merits, whether factual or legal. In applications of this nature, the courts have all along been wary to withhold leave to appeal to a superior court if there are grounds meriting the attention of that superior court. Put differently, leave to appeal from an order in civil proceedings will be granted where, *prima facie*, it appears to the court seized with that application that there are grounds of appeal which merit serious judicial consideration.”

While parties to the case have the right to appeal, where leave is required, it ought to be sought but that does not mean that the application would not be challenged by the opposite party as contended by Mr. Kipoko. The adverse party retains the right to challenge the said application on basis of whether the applicant has demonstrated matters of merit to be determined by the Court of Appeal.

I have observed the raised issues and I hold a view that the same raise matters of general importance to be determined by the court of Appeal. The applicants challenge the findings of the trial Tribunal and this Court to the effect that the matter was *res judicata* and time barred. They as well fault the evaluation of evidence and observance of composition and procedures in the Tribunal. These are matters that go to the core of the case affecting the substantive rights of the parties. In that regard, this application is well with merit and granted accordingly. Each party shall bear his/her own costs of the case.

Dated and delivered at Moshi on this 02nd day of April 2024.



X

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

