

**IN THE HIGH COURT OF
THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

MISC. LAND APPLICATION NO.04 OF 2019
(Arising from Land Appeal No.118 of 2017)

MWITA CHACHA GASAYA.....APPLICANT

VERSUS

ABDALAAH RASHID MTUMBO.....RESPONDENT

Date of Last Order: 30.07.2020
Date of Ruling: 14.09.2020

RULING

V.L.MAKANI, J

The applicant in this application is MWITA CHACHA GASAYA. He is seeking for leave to appeal to the Court of Appeal and a certification that there is a point of law involved for determination by the Court of Appeal. The application is against the decision of this court in Land Appeal No 118 of 2017 (Hon. De-Mello, J). The application is supported by the affidavit of the applicant.

By the order of the court this application was argued by the way of written submissions. Advocate Benedict Bahati Bagiliye drew and filed submissions on behalf of the applicant while submissions by the respondent were drawn and filed by Emmanuel Joachim Msengezi, Advocate.

Submitting in support of the application Mr. Benedict prayed to adopt the contents of applicant's affidavit and contended that, this case involves seven points of law to be determined by the court of appeal of Tanzania as shown in paragraphs 25, 26, 27,28,29,30 and 31 of the applicant's affidavit. He said that the applicant herein was complainant at Msongola Ward Tribunal (the **Ward tribunal**) where the matter proceeded ex-parte against him and the Ward Tribunal entered judgment against him instead of dismissing the suit which ultimately lead to the demolition of the applicant's hut on the suit land. He contended further that the remedy when an applicant fails to attend a case is dismissal for non-appearance instead of proceeding ex-parte. He insisted that even the applicant was not notified of the date of ex-parte judgment so that he could appear; he said that such failure to notify the applicant the date of ex-parte judgment is a fatal legal point which renders the whole proceedings a nullity. He said the points are worth certification to the Court of Appeal of Tanzania. To support this position Mr. Benedict cited the case of **Cosmas Construction Co. Limited vs. Arrow Garments Ltd [1992] TLR 127.**

Mr. Benedict further submitted that the Ward Tribunal was satisfied that the land in dispute was the property of the respondent's deceased father. He said that the respondent would not successfully defend the interest in that dispute land unless he is appointed administrator of the estate of his deceased father therefore the Court of Appeal can determine whether a person who is not an administrator of the

deceased's estate (respondent) was right in defending deceased property at the Ward Tribunal.

Mr. Benedict went on to say that in execution of the ex-parte decree, the court Broker demolished the hut and handed over the suit land to one THOMAS NYANDULI who is neither the decree holder nor a party to the case subject of the decree. The applicant is therefore praying that the Court of Appeal intervenes to see if the decree can legally be said to have been executed where the Court Broker is said to handed over the suit land subject of the decree to another person who is not a decree holder neither a party to the case.

He further submitted that, the judgment of the High Court shows that it determined an appeal from the District Land and Housing Tribunal for Mkuranga, instead of determining the appeal lodged by the applicant originating from the decision of the District Land and Housing Tribunal of Ilala. The decision of Ilala District Tribunal refused the application for extension of time for the applicant to file an application for revision against the ex-parte judgment. Further he said that the court did not address itself to the grounds of appeal and it gave judgment which does not arise from the grounds of appeal.

In conclusion Mr. Benedict said that this court in its appellate jurisdiction maintained at page 4 of the judgment that the applicant was not justified to apply for extension of time rather would have applied for setting aside the ex-parte judgment under Rule 11 (2) of the Land Disputes Courts (The District Land and Housing Tribunal)

Regulations, GN No.174. He insisted that these are not Rules rather Regulations, further they are not applicable in the Ward Tribunals. He said the intervention of the Court of Appeal is important to determine whether GN. No. 174 is referred as *rules* or *regulations* and whether Rule 11(2) of the regulation is applicable in setting aside ex-parte judgments. He prayed for the application to be granted.

In reply Mr. Msengezi said that most of the averments in applicant's affidavits are not for certifying the points of law but rather facts which ought to be considered by the appellate Tribunal or appellate High Court. He further said that, since the respondent did not file a counter affidavit then it should not be taken that the affidavit by the applicant is not resisted. He said, the applicant was misguided by his Counsel when he was advised to withdraw the first application for extension of time to file an appeal and instead after more than one year, he filed another application for extension of time to file revision. He further contended that the applicant was aware of the ex-parte judgment against him at the Ward Tribunal, but he never went back to complain and assign good cause on his non-appearance so that the matter could be restored. In other words, he never applied to set aside the ex-parte judgment and the High Court said that was the remedy that was available for the applicant.

Mr. Msengezi averred further that, there is nowhere in the proceedings that the respondent indicated the suit property belonged to his deceased father but rather it was given to the respondent by his

deceased father during his lifetime. He said Counsel has failed to comprehend the facts and this cannot be certified as point of law.

Mr. Msengezi pointed out that the errors alleged in paragraphs 29 and 31 of the affidavit of the applicant are clerical errors which can be remedied either by the court in its own motion and/or by being moved by a party under section 96 of the Civil Procedure Code, CAP 33, RE 2002 (the **CPC**). He added that even the complaint that the property was handed over to another person ought to have been referred to the executing court for determination under section 38 (1) (2) and (3) of the CPC. He insisted that the applicant has failed to raise the issue of general importance or novel point of law or prima facie case necessitating the intervention of the Court of Appeal as stressed in the case of **British Broadcasting Corporation vs. Eric Sikujua Ng'maryo, Civil Application No. 133 of 2004** (unreported). He prayed for the application to be dismissed with costs.

Having gone through the submissions, the affidavit and counter affidavit filed in court together with the records pertaining to the matter at the Ward Tribunal, District Tribunal and the High Court; the issue is whether the applicant has advanced points of law which needs certification for intervention by the Court of Appeal.

The applicant has listed seven points at paragraph 25 to 31 of his affidavit upon which he is seeking certificate and leave of this court to appeal to the Court of Appeal. These points can be summarized into four: **One**, the legality of the Ward Tribunal to proceed ex-parte

against the applicant. **Two**, the legality of the respondent to appear at the Ward Tribunal without having letters of administration. **Three** the legality of handing over the suit land to a person who was not a party to the suit in the Ward Tribunal. **Four**, the legality of the alleged errors in the judgment of the high court regarding names of the Tribunals and the laws cited (are they referred to as *Rules* or *Regulations?*).

The first issue was answered at page 4 of the High Court judgment where it was stated that the applicant herein should have applied to set aside the ex-parte judgment entered against him at the Ward Tribunal, that he should have exhausted the available remedies at the said Tribunal before resorting to other remedies.

As for the second, issue that the respondent herein had no letters of administration, the records at the High Court reveal that the applicant (then appellant) never raised this issue at the High Court, neither was it raised at the Ward Tribunal therefore it would be strange for the applicant to appeal to the Court of Appeal on a ground which has never been raised anywhere at the lower courts subordinate to the Court of Appeal. Likewise, the applicant did not challenge the execution process in which he is claiming the suit land was handed over to a strange person who was not party to the case at the Ward Tribunal.

The issue of names, that is, Mkurunga District and Land and Housing Tribunal instead of Ilala District Land and Housing Tribunal and the

fact that GN. No.174 was referred as *Rules* and not *Regulations* does not need the attention of the Court of Appeal. As correctly submitted by Mr. Msengezi, these are clerical errors which are remedied by the court which gave the decision, either by its own motion and/or by being moved by a party to the case.

Leave to appeal is granted where the proposed appeal stands reasonable chances of success or where, but not necessarily, the proceedings as a whole reveal such disturbing features as to require the guidance of the Court of Appeal. The rationale behind is to spare the Court of Appeal a stream of matters, which have no merit, and to enable it to give adequate attention to cases of true public importance (see the case of **British Broadcasting Corporation vs. Eric Sikujua Ng'maryo** (supra). In this application as narrated hereinabove, there are no disturbing things requiring the attention of the Court of Appeal.

In the result, the application is dismissed with costs for want of merit.

It is so ordered.


V.L. MAKANI
JUDGE
14/09/2020

