

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR-ES-SALAAM

MISC. LAND CASE APPLICATION NO. 657 OF 2020

(C/O Land Appeal No. 57/2018 and Land Application No. 81/2017 of Kibaha District Land and Housing Tribunal)

ADOLFU SITIVINI 1st APPLICANT

ROBERT LWEZAWLA 2nd APPLICANT

VERSUS

YALEDI SIMONI 1st RESPONDENT

ASHELI IRAMBA MSONJERA 2nd RESPONDENT

RULING

Date: 23 & 29/06/2021

Nkwabi, J.:

By chamber summons and an affidavit of their counsel one Nickson Ludovick, the applicants are moving this court to grant them leave to appeal to the Court of Appeal against the judgment of this court in Land appeal no. 57/2018 between the parties as they are herein.

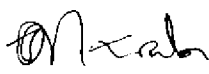
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The chamber summons was made under section 47(1) (2) of the Land Disputes Courts Act. In the affidavit of the learned counsel, the averment as to the dissatisfaction of the decision of this court are set out. Therein reference is made to two annexures namely annexure A which is on paragraph 3, the judgment of this court, and annexure B which is on paragraph 4, the letter applying for judgment, decree and proceedings for appeal purpose however, the same are not attached contrary to the reference made.

The application was resisted by the respondents who filed a joint counter-affidavit. In their short joint counter-affidavit, the respondents averred that the High Court was justified in reaching at the decision it reached at.

I ordered the hearing to proceed by way of oral submissions. Mr. Nickson Ludovick, learned advocate, appeared for the applicants while Mr. L.C. Mlelwa, learned advocate, appeared for the respondents. Both learned advocates argued forcefully but briefly for and against the application respectively. Mr. Ludovick insisted that the application be granted while Mr. Mlelwa urged the same be dismissed.

I am grateful to both counsel for their submissions. At the time of preparing my ruling I discovered that the annexures mentioned in the affidavit that they are annexed thereto were missing. I made an effort by asking the counsel for the applicant, before ruling, to find out if during submission of the application electronically on JSDS the annexures were annexed, but the same proved that the applicant's counsel did not attach the same. In essence, I asked the parties to address me on the anomaly and its effect. Mr. Nikson admitted not attaching the intended memorandum of appeal and explained that since the grounds of appeal are reflected in the affidavit in support of the application then it is not necessary to attach the intended memorandum of appeal. But on the rest of the documents, annexure A and B, he argued that he had attached the same and paid for the same. I even inquired to see in his casefile to see the paid fees for the admission of the application, but on looking at the same there is no proof that he paid for filing the attachment A and B.

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It is therefore, in the circumstances, difficult to determine whether the intended appeal is frivolous or vexatious, or useless or hypothetical. I am guided by **British Broadcasting Corporation v. Eric Sikujua Ng'maryo Civil Application No. 133/2004 (CAT)**:

*"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 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 RE Rep. 90 at Page 91**]. However, where the grounds of appeal are frivolous, vexatious or useless or hypothetical no leave will be granted."*

Mr. Nickson implored this court to apply the overriding principle and proceed without the annexures. Mr. Mlelwa on his side, left it to the court to decide whether to apply the overriding principle and decide on merits or otherwise.

With the greatest respect to Mr. Ludovick, I think that was negligence and the overriding objective principle cannot come to his rescue. One may ask why I have not applied the Overriding Objective Principle here? To answer that question, but in short, I demonstrate that those documents are very crucial not only at the admission stage for the admission officer to determine whether the matter was filed on time, case number and name of the parties are correct, but also for the presiding judge to determine matters which the registrar would have determined at the admission stage but also to determine whether the application has not been filed frivolously, vexatiously or uselessly or hypothetical, or the application is merely an abuse of the court process by assessing the same against the judgment of the court and other relevant documents and then give an informed ruling.

The importance of attaching the documents to the application could be seen even in paragraph 5 of the affidavit sworn by Mr. Nickson where he averred and I quote: "... *The applicants will rely on Annexure B above to fortify these assertions.*" However, the fortification was regrettably fatally not attached.

Failure to attach the annexures too has pecuniary implication to the court since the annexures were not on the application then assessment for payment for fees for the annexures surely, was not done as such, fee was not received by the court which is contrary to the law. Proceeding without the said documents being attached to the application, could lead to miscarriage of justice by granting application(s) which would be dismissed if the necessary documents were not attached. My decision, I hope is guided by the authority **Civil Appeal No. 66 of 2017 Mondorosi Village Council & 2 Others vs. Tanzania Breweries Limited** (CAT) (Unreported):

Regarding the overriding objective principle, we are of the considered view that, the same cannot be applied blindly against the mandatory provision of the procedural law which go to the very foundation of the case.

As such, and at this stage, I am left with no other option but to strike out the application. Since the anomaly was raised by the court suo motto, the application is struck out and each party to bear their own costs.

It is so ordered.

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Dated at Dar-es-Salaam this 29th day of June, 2021

J. F. Nkwabi,
Judge

Court: Ruling delivered in chambers this 29th day of June 2021 in the absence of the applicant but in the presence of Mr. Mielwa Ludiged, learned advocate for the respondent.


J.F. Nkwabi,
Judge

