

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

MISC. LAND CASE APPLICATION No.16 OF 2021
(Arising from Misc. Land Application No. 264 of 2020., High Court Land Division)

KABULA AZARIA N'GONDI1ST APPLICANT
ADIEL KUNDASENY MUSHI.....2ND APPLICANT
NEEMA ADIEL MUSHI.....3RD APPLICANT

VERSUS

MARIA FRANCIS ZUMBA.....1st RESPONDENT
IGALULA AUCTION MART LIMITED.....2ND RESPONDENT

Date of last Order: 08.12.2021
Date of Ruling: 21.12.2021

RULING

V.L MAKANI, J:

The applicants named above have moved this Court under section 47 (1) of the Land Dispute Courts Act, CAP 216 RE 2019, section 5(1)(c) of the Appellate Jurisdiction Act CAP 141 RE 2019 Rule 49(a) of the Tanzania Court of Appeal Rules, 2009 GN 344 of 2019 as amended. The applicants are seeking for leave to appeal to the Court of Appeal of Tanzania against the decision of this Court in Land Appeal No.264 of 2020 (Hon. Maige, J as he then was). The application is supported by the affidavit of ADIEL KUNDASENY MUSHI the 1st applicant herein.

With leave of the court the application was argued by way of written submissions. The submissions on behalf of the applicants were drawn and filed by Mr. Peter Nyangi, Advocate; while submissions on behalf of the respondent were drawn and filed by Regina Herman, Advocate.

Submitting in support of the application Mr. Nyangi said the principles for grant of leave to appeal to the Court of Appeal are, firstly if the proceedings reveal such disturbing features as to require the guidance of the Court of appeal; secondly, whether there are prima facie grounds meriting an appeal to the Court of Appeal. He said the principles are stated in the case of **Gaudensia Mzungu vs. IDM Mzumbe, Civil Application No. 94 of 1999 (CAT)** (unreported) which was quoted with approval in the case of **Loyce Butto Shushu Macdougall (as an aminsitratrix of the Estate of the Late Neil Richard Macdougall vs. Studi Bakers Tanzania Limited & Khalid Shabani Mtwangi, Misc. Land Application No. 392 of 2016 (HC-Land Division)** (unreported).

Mr. Nyangi said the first thing for determination by the Court of Appeal is whether the allegation of illegality as the ground extension

of time has time limit or not. He submitted that the allegation of illegality as the ground of extension of time or enlargement of time has no time limit or a limit in a particular number of frequencies to invoke it as a ground for extension of time. He pointed out that as it is now an allegation of illegality can be invoked in an application for extension of time in court as a sufficient reason for the court to grant the order for enlargement or extension of time for the applicants to file their application for review. Mr. Nyangi said extension of time is synonymous with enlargement of time as was stated in the cases of **Principal Secretary Ministry of Defence & National Service vs. Devram P. Valambhia [1992] TLR 387** and **Kalunga & Company Advocates limited vs. National Bank of Commerce Limited [2006] TLR 235; TANESCO vs. Mafungo Lornard Majura & 15 Others, Civil Application No. 94 of 2016 (CAT-DSM) (unreported) and VIP Engineering & Marketing Limited & 2 Others vs. Citibank Tanzania Limited, Consolidated Civil Reference NO. 6,7, & 8 of 2006.** He said since the allegation of illegality had been advanced in respect of the decision in Misc. Land Application No. 932 of 2017 (which was the subject of review after the grant of leave to file an application for review in Misc. Land Application No. 198 of 2018), he said there is a point of law fit for

determination by the Court of Appeal after the refusal of obtaining the enlargement of time by this court (Hon. Maige, J as he then was).

The second question fit for consideration by the Court of Appeal according to Mr. Nyangi is whether the sickness of the applicant's advocate was a sufficient ground for enlargement of time or not. Mr. Nyangi submitted that the sickness of the applicants' advocate was beyond the control of the applicants which led to the failure by the applicants to file the said application for review. He said the reason was never disputed by the 1st respondent which is the subject of leave to appeal to the Court of Appeal.

Before winding up, Counsel put to the court to judicial notice under section 58 and 59 of the Evidence Act that the 1st respondent was late to file her counter affidavit and she also was late in filing her submissions and so the same should be regarded by the court. In conclusion, Mr. Nyangi said there are two prima facie grounds which warrant the intervention of the Court of Appeal and prayed for this application to be granted.

Ms. Regina Herman in her submissions in reply stated that from the affidavit to the submissions filed it is not clear what points of law are to be determined by the court of appeal or the question of law involved. She said the applicant was given 15 days and deliberately and without justifiable cause failed to comply with the court's order and she questioned whether this act of negligence could be an arguable point to be determined by the Court of Appeal. Counsel relied on the case of **William Kasian Nchimbi (as Legal Personal Representative of Kasian Kizito Nchimbi (deceased) & 3 Others vs. Abas Mfaume Sekapala & 2 Others, Civil Application No.144 of 2015 (CAT)** (unreported) and **Devram Valambhia's** case (supra) where the court said illegality cannot be used as a shield to hide against inaction on the part of the applicants. In conclusion Ms. Herman submitted that the applicants are using illegality as a shield to hide against their inaction, and they have failed to show good cause why they failed to comply with the court's given time. She prayed for the application to be dismissed with costs.

In rejoinder, apart from Mr. Nyangi complaining that the counter affidavit and submissions were filed out of time and without leave of

the court, he basically reiterated what was stated in his submissions in chief.

I will deal with the issues of the late filing of the 1st respondent's written submissions. Mr. Nyangi prayed for the 1st respondent's submissions filed out of time to be disregarded. But according to the records the submissions by the 1st respondent were filed on time according to the Exchequer Receipt No. 25016252 dated 04/10/2021 which is the date ordered by the court. The learned Advocate Mr. Nyangi appeared in court on 21/10/2021 for extension of time to file his rejoinder as he was served late. So, the claim that the submissions by the 1st respondent were not filed in time are without merit. If at all there was an issue of submissions being filed out of time Mr. Nyangi would have raised it on 21/10/2021 when he entered appearance and not in his submissions as is the case now.

Now for the substantive application. Leave to appeal to the Court of 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 of stream of matters, which have no merit, and or which have already been dealt with by the lower courts.

In the case of **British Broadcasting Corporation vs. Eric Sikujua Ng'maryo, Civil Application No. 133 of 2004** (unreported) as follows: -

*"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 E.R. Rep. 90 at page 91). However, where the grounds of appeal are frivolous, vexatious or useless or hypothetical, no leave will be granted".*

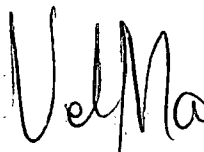
It is, therefore, the duty of the applicants herein to demonstrate the serious points of law that need to be considered by the Court of Appeal (see **Simon Kabaka Daniel vs. Mwita Marwa Nyanga'nyi & 11 Others [1989] TLR 64**).

The applicants have argued two issues which require the intervention of the Court of Appeal these are, the issue of illegality, that is, whether it has time limit, and the issue of the sickness of the learned Counsel. In my considered view, these issues were well covered in the ruling

of this court in Misc. Land Application No. 264 of 2020 at pages 3 and 4. And specifically on the issue of illegality, the court elaborated in the said ruling that the applicants were given the opportunity to be heard on this issue, but they did not pursue this right. In such a situation they cannot now complain that the court failed to consider the reason of illegality basing on time limit.

In the result, I find nothing that would require the intervention of the Court of Appeal, and thus, the application for leave to appeal to the Court of Appeal has no merit and it is hereby dismissed with costs.

It is so ordered.


V.L. MAKANI
JUDGE
21/12/2021

