

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC LAND APPLICATION NO. 185 OF 2021

(Originating from appeal for the Judgement and Decree of the High Court of Tanzania at Dar es Salaam Her Ladyship V.L. Makani, J dated 09th April 2021 in Land appeal No. 117 of 2020)

PAULINA MACKENZIE KAPALASULA 1ST APPLICANT

JANE KAPALASULA MPANGALA (As Administratrix of Estate of Late

MACKENZIE J. KAPALASULA 2ND APPLICANT

VERSUS

BASIL STEVEN KAYOMBO (As Administrator of the Estate of the

Late EMANUEL S. KAYOMGO 1ST RESPONDENT

KADELE ALLY SUNGULWA (As Administrator of the Estate of the

late ALLY K. SUNGULWA 2ND RESPONDENT

RULING

Date of Last Order: 04/11/2021

Date Ruling: 23/11/2021

A. MSAFIRI, J

This is an application by the applicants Paulina Mackenzie Kapalasula and Jane Kapalasula Mpangala who is administratrix of the Estate of the late Mackenzie J. Kapalasula. They are applying for leave to appeal to the Court of appeal of Tanzania against the decision of the High Court Land Division at Dar es salaam in Land Appeal No. 117 of 2020 by

Adls.

Hon. Makani, J. The application is made under section 47 (2) of the Land Disputes Courts Act, Cap 216. It is supported by an affidavit sworn by Obed Kasambala, an Advocate of the applicants. The 1st respondent Basil Steven Kayombo, the administrator of the estate of the late Emanuel S. Kayombo, filed counter affidavit opposing the application. Similarly, the 2nd respondent one Kadele Ally Sungulwa, the administrator of the estate of the late Ally K. Sungulwa also filed his counter affidavit.

The brief background giving rise to this application is that, the original dispute was filed at Kibaha District Land and Housing Tribunal in land Application No. 97 of 2014 where the 1st respondent was declared the lawful owner of the land located at Mwendapole Area in Kibaha (the suit land). Being dissatisfied with the decision of the trial Tribunal, the applicants filed an appeal to this Court. The High court decided that the appellants failed to prove their case to the standards required and the balance leaned more in favour of the evidence by the 2nd respondent.

The Court quashed and set aside the other orders made by the Tribunal and dismissed the appeal. The appellants were aggrieved hence this application of leave to appeal to the Court of Appeal.

By request of the parties, the application was disposed of by way of written submissions. Mr. Obed Kasambala, Advocate drew and filed submissions on behalf of the applicants. While Richard Mathias Kinawari drew and filed submission on behalf of the 1st and 2nd respondents.

Alle

Supporting the application, Mr. Kasambala stated that this application is necessary due to the fact that the judgment of High Court and of trial Tribunal contains some illegalities and irregularities which both courts failed to discover hence once the leave to appeal will be granted, the Court of Appeal will be in a good position to determine all irregularities and illegalities.

Mr. Kasambala submitted that when the appeal was brought before the High Court, the applicants (then respondents) raised six grounds of appeal but when the Hon. Judge was composing the appeal sat as trial Court by establishing her own issue on who is the lawful owner of the suit land instead of deciding each and every issue raised by the applicants separately. That the Courts of law must limit themselves to the issues raised by the parties in the pleadings. Mr. Kasambala argued further that the trial Tribunal decided in favour of the 1st respondent who had never appeared before the Tribunal so it was ex-parte judgment.

That during appeal, this Court suo motu raised the issue that the land Tribunal was wrong, since the 1st respondent was not defended. That this Court reversed the decision of the trial Tribunal and granted ownership of the suit land to the 2nd respondent while at the same time uphold the judgment of the trial Tribunal.


To cement his argument counsel for the applicant referred this court to numerous authorities among them being the cases of **Adelina Koku Anifa & another vs. Byarugaba Alex**, Civil Appeal No. 46 of 2019, CAT at *Alls.*

Bukoba (unreported) and **Omary Abdallah Kilua vs. Joseph Rashid Mtunguja**, Civil Appeal No. 178 of 2019 CAT at Tanga (unreported).

In reply, Mr. Kinawari vehemently opposed the application and stated that the Honourable appellate judge was right in her findings and decision so there was no irregularities. That the Hon. Judge did not suo motu raise the new issue of ownership of the suit land but rather it was established by the trial Tribunal. In addition, Mr. Kinawari was of the view that the appellate Court have same powers and duties as the trial court and it may determine if the trial or lower Court correctly applied the law. That the Hon. Judge was right to vacate from an order of Tribunal on the issue of ownership as it is not disputed that at the trial Tribunal the case went ex-parte against the 1st respondent.

On the issue of exhibits which were tendered during the trial Tribunal, Mr. Kinawari averred that the same was not objected during the trial so the Hon. Judge was right on deciding that the issue of defectiveness of exhibits cannot be raised at an appeal stage.

To cement his arguments, he referred this Court to numerous cases among them the case of **Kilombero Sugar Company Ltd vs. Commissioner General (TRA)**, Civil Appeal No. 261 of 2018, CAT at Dodoma (unreported).

In rejoinder, the applicants reiterated their submissions in chief and added that the issue of defectiveness of the exhibits is on a point of law which can be raised even at the appellate stage. 

Having gone through the submissions of parties, the authorities cited by which I am grateful to both parties, and the court records, the issue before me for determination is whether this application has merit.

It is trite law that, for the Court to grant leave to the Court of Appeal, the application has to establish by affidavit or otherwise that the intended appeal involves serious points of law which require the attention of the Court of Appeal. In the famous case of **British Broadcasting Corporation vs. Eric Sikujua Ng'maryo**, Civil Application No. 138 of 2004 CAT, Dar es Salaam (unreported), the Court of Appeal among other things, set a principle on the circumstances when the Court can grant leave to appeal to the Court of Appeal. This was as follows;

"... as 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".

Basing on that principle, I turn to the current application to see whether the pleadings i.e. the affidavit supported by the submissions from the applicants, reveal issues of general importance or a novel point of law, or reveal such disturbing features as to require the guidance of the Court of Appeal. *Aelle*

Cautioning myself from deliberating the merit of the intended appeal, I have gathered that;

First; the applicants are claiming that during the hearing of the first appeal before this Court, the 1st respondent appeared as administrator of an estate of his late father but could not bring proof that he was legally appointed. Despite that, the court proceeded to determine the case with the person who lacked locus standi to defend the case.

Second; that the appellate court, suo motu raised its own grounds of appeal which was not raised by parties without giving chance for the same to defend the said grounds of appeal hence the parties were denied their right to be heard.

Third; there is the issue on whether at the appeal stage, it is proper to raise or cite the defectiveness of the facts already admitted during the trial. The applicants believes that the validity or defectiveness of the exhibits was on point of law and not based on facts hence they were justified to raise the same at the appeal stage.

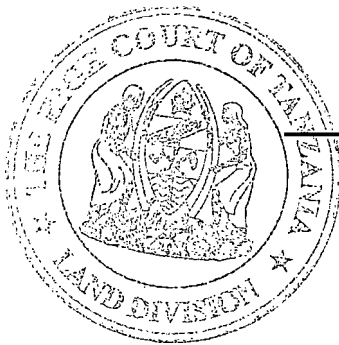
I am satisfied that these three issues I have pointed herein above are ones of general importance which to my view, require the guidance of the Court of Appeal. This is beside other issues raised by the applicants regarding the analysis of evidence during the trial and the first appeal.

Taking into account the above analysis, I hereby allow the application. The applicants are to file their appeal to the Court of Appeal as per the

Atts.

requirements of the guiding laws. Costs will follow the events in the appeal. It is hereby ordered.

Dated at Dar es Salaam this 23rd day of November, 2021.



A handwritten signature in black ink, appearing to read "A. Msafiri", is written over a horizontal line.

A. MSAFIRI.
JUDGE