IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND CASE APPLICATION NO. 20 OF 2020

(Arising from the Judgment and Decree of the High Court Land Division in Land Appeal No.50 of 2018 Dated 16th December 2019)

MBENA SADANI & 9OTHERS ..... APPLICANTS

VERSUS

ZAINABU MIGEGELE & 26 OTHERS ..... RESPONDENTS

RULING

Date of Last Order: 05/10/2021 &
Date of Ruling: 26/10/2021.

A. MSAFIRI, J:

In the Land Appeal No. 50 of 2018 before this Court (*Hon. S. M. Maghimbi, J.*) the present applicants had lost their appeal against the present respondents. Aggrieved with that decision they started to process their second appeal to the Court of Appeal of Tanzania. In compliance with the requirements of the law, the applicants has filed this Application seeking for the leave to appeal to the Court of Appeal of Tanzania. The Application has been brought under Section 5 (1) (c) of the Appellate Jurisdiction Act, Cap. 141 and duly supported with an affidavit deponed by January Raphael Kambamwene learned counsel for Applicants.

In this Application, the applicants were represented by J.R Kambamwene while the respondents were represented by Mr. Batholomeo L. Tarimo, learned counsel. By consent of both parties, the Application was argued by way of written submissions.

In his submission Mr. Kambamwene prayed to adopt the contents of his affidavit and the same to form part of his submissions. He argued that the Application has met the standard of law for the Application to seek for the leave to appeal to Court of Appeal whereby there are some issues of law in the impugned decision capable of calling the attention of the Court of Appeal as provided for in the case of **British Broadcasting Limited Corporation Vs. Erick Sikujua Ng'maryo,** Civil Case No. 138 of 2004 where it was laid down that;

> *"As matter of general principle, leave to appeal will be granted where the grounds of appeal raise issues of general importance or novel point of law or where the grounds show a prima facie arguable appeal"*

In his opinion, the impugned decision upon which the appeal is intended, has approved categorization of the appellants as trespassers to the land in dispute for the reason that the repondents were allegedly said to have been allocate plots in 2003 while the appellants were also allegedly to have been allocated the same on the year 2010. The allocations are said to be carried out by the Village Council, but the allocation by the appellants were not approved by the Village Assembly as per section 8 of the Village Land Act Cap 114 R.E 2019. Mr. Kambamwene maintained that, however, there is no evidence to support claims that there was approval of allocations in 2003 to the

respondents or allocation to the appellants in 2010. He argued that, failure by the Village Assembly to approve allocations by the Village Council cannot declare grantees as trespassers. The High Court decision has resulted in miscarriage of justice to the appellants, they will be evicted and also be condemned to costs in subsequent suit.

In conclusion, he prayed for the Application be allowed to proceed on appeal to the Court of Appeal so that the Court can decide on the trespass and failure to conduct locus in quo by the trial Tribunal since the same was never done.

In reply to the above averment, Mr. Tarimo learned counsel for respondents submitted that, the respondents are yet to be served with the Notice of Appeal contrary to Rule 84 (1) of the Court of Appeal Rules, 2009 and there is no proof of its existence. He further argued that, there was no stone left unturned in both the trial Tribunal decision and that of the High Court intended to be appealed against. The contention of the applicants that failure by the Village Assembly to approve allocations makes the allocation unlawful, their argument is contrary to section 8 (5) of the Village Land Act (Cap. 114 R.E 2019). It his submission that the respondents are the one who are qualified according to the law by complying with every requirement under Section 8(4) of Cap.114 by being allocated the Land in dispute by the Village Council and approved by the Village Assembly dated 02/03/2014.

He further submitted, the issue of locus in quo was not raised during appeal neither was it stated in the affidavit in support of this Application. It is a new issue raised that was not pleaded. I do agree with the respondents' counsel on this point that the learned counsel for

the applicants has misdirected himself by arguing in his submission, facts which are not pleaded in the affidavit to this Application and the same cannot be considered in the submission since it falls within the principle of law that parties are bound by their pleadings and not submission therefore, I choose to disregard the issue raised on failure to conduct locus in quo by the trial Tribunal.

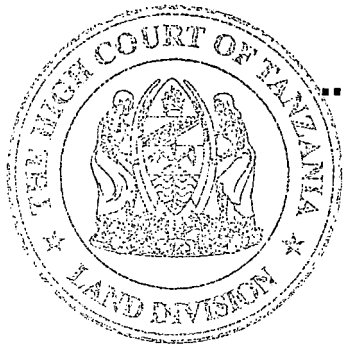
Now, having gone through the parties' submissions and affidavits, my duty r is to determine whether the Application has merit. In an Application for leave to appeal under Section 5 (1) (c) of the Appellate Jurisdiction Act, like the present one, leave may be granted where there is likelihood of success of the intended appeal. The court have no reason to canvass on the merits and demerits of the intended appeal. In the above case of **Harban Haji Mosi and another vs. Omari Hilal Seif and another (2001) TLR,** the Court insisted that in such Applications leave is grantable 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.

According to Mr. Kambamwene, the issue of law which call the attention of the Court of Appeal and its intervention is whether the failure by the Village Assembly to approve allocations done by the Village Council can be used to declare grantees as trespassers? In my opinion, this amount to sufficient reason to be granted the Application. I say so because according to the evidence on record, the applicants were allocated the Land in disputes in the year 2003 but there is no evidence of the said allocation being approved by the Village Assembly while on the

other hand the respondents were also allocated the Land in dispute in the year 2010 and it was approved by Mbwande Village General Assembly on 02/03/2014. **I believe there is the issue of law which calls for Court of Appeal wisdom on the issue as to whether the first priority principles can apply in these circumstances and whether the issue of approval of allocation of land by the Village Assembly as per the law can be waived under these circumstances.**

Having carefully considered the Application and the serious tug of war existing between the parties, I am convinced that this is a fit case for grant of leave to appeal to the Court of Appeal of Tanzania as requested. Application is hereby granted as prayed. Costs shall be in the cause.
It is so ordered.

Dated at Dar es Salaam this 25th of October, 2021.



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A. MSAFIRI

JUDGE