

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

**MISC LAND CASE APPLICATION NO. 427 OF 2021**  
(Originating from Land Case No. 99 of 2021)

**ROBERT B. MAPESE .....APPLICANT**

**VERSUS**

**MICHAEL NYARUBA.....RESPONDENT**

**R U L I N G**

*Date of last Order:28/09/2022*

*Date of Ruling: 30/9/2022*

**K. D. MHINA, J.**

The application is brought by way of Chamber summons made under Section 47 (2) of the Land Disputes Courts Act. R. E. 2019, Rule 45 (a) of the Court of Appeal Rules 2009 (as amended) and section 5 () of the Appellate Jurisdiction Act, Cap- (RE 2002).

The applicant is, *inter alia*, seeking the following orders;

- a) That the Honorable court be pleased to grant leave to appeal to the Court of Appeal against the Judgment and Decree of this court.**
- b) Costs of this application.**

**c) Any other order(s) of relief(s) this Court may deem just to grant.**

The grounds for the application were expounded in the supporting affidavit, which the applicant swore in support of the application.

The applicant intends to appeal against the Judgment of this Court dated 20 July 2021 in Land appeal No. 247 of 2020. The matter originated from the Land and Housing ("the DLHT") for Ilala at Ilala.

A brief summary of the matter is pertinent to understand the position better.

The Applicant, Robert B. Mapesi, instituted a Land Application No. 266 of 2019 at the DLHT for Ilala against Michael Nyaruba for trespassing into his portion of land located at Karakata Mji Mpya, Shina No 3 along Msimbazi River Village within Kipawa Ward-Ilala District.

Further, he prayed for the wall fence built by the respondent to be demolished and compensation for damage of TZS 10,000,00/=.

After a full hearing, the trial tribunal dismissed that application for want of merits; it held that;

*"What I have discovered from the evidence adduced before this tribunal in consideration to what did prevail on the locus in quo it is true that the triangular area which is in despite*

*one side of that area faces the Msimbazi river and as from circumstances I stand to believe that the applicant's case has not been proved at the standard of probabilities. He respited area seen as it has been said by DW1, DW 2 and DW 3 that it is within the reserved Msimbazi Rivers banks which the applicant cannot claim ownership and I hope it would be the proper authority to require the respondent to vacate form that reserved River bank and not the applicant.*

*The fact that the claimed area is proved not belong to the applicant. I stand to find that the applicant's case with no merit."*

Dissatisfied, the applicant appealed to this court (Land Appeal No 247 of 2020). In this court's decision dated 16/7/2021, the applicant's efforts went unrewarded after his appeal was dismissed for want of merits.

At page 16 of the Judgment, this court held that:

*"According to the drawing made by the tribunal, I hesitate to believe that the dispute area belonged to the appellant. I am saying so because the area is along the Msimbazi river on the respondent's side. .... The chairman evaluated the evidence and in his final analysis, he found that the appellant did not prove on the standard of probabilities that he is a lawful owner of the area despite which faces the Msimbazi".*

In the application at hand, in paragraphs 7, 8, and 9 of the affidavit, the applicant stated that being aggrieved by the impugned judgment, he

lodged a notice of appeal to the Court of appeal and requested to be supplied with the certified copies of the Judgment, decree, and proceedings.

The ground for appealing based on the following issues to be considered by the court of Appeal;

- i) Whether an area adjacent to Msimbazi River valley can be adjudged to be hazardous land without being proof of the same in accordance with the law.**
- ii) Whether under the law governing ownership of land citizens are not allowed to own land and that is adjacent and or along Msimbazi River valley.**
- iii) Whether in law a person who dispose a piece of land cannot legally prove the disposal of the same.**
- iv) Whether a person occupying a parcel of land along Msimbazi river Valleys lacks the right to complain of its encroachment for the reason only that it is hazardous.**

The application was argued by way of oral submissions. The applicant was represented by Mr. Makaki Masatu, learned counsel, while the respondent by Mr. Dastan Nyakomo, also a learned advocate.

In support of the application, Mr. Masatu argued that leave to appeal against the decision of the High Court emanated from the DLHT is not automatic.

In granting or refusing an application for leave, the Court is guided by a number of factors set out in **HTT In Franco Limited V Juliano Charles Mkongomi**,\_Misc. Civil Application, No. 24 of 2020 (HC) unreported,} at pages 7 and 8. The factors spelled out were;

One must demonstrate issues of general importance or a novel point of law.

Two, the grounds must show a prima facie or arguable appeal.

Three, where it involves matters of public importance.

Four, where the appeal raises serious issues of misdirection or non-direction, resulting in miscarriage of justice.

He further submitted that in paragraph 9 of the applicant's affidavit, four matters were raised as grounds for consideration for leave to be granted. The issues raised were the issues of law and the failure to appraise evidence on record that resulted in the failure of justice.

Failure to appraise evidence on the record is a matter of law, as it was held in **Jane Kambala Vs. NBC Ltd**, Civil Application No 198 of 2018 and

**Patrick Magologezi Mongela Vs. the Board of Trustees of PSSSF**, Civil Application No. 342/18 of 2018 (Both unreported).

In **Jane Kasambala (Supra)**, the court defined the term a question of law as a question on the conclusion arrived at by the tribunal.

On the 1<sup>st</sup> ground for seeking leave, Mr. Masatu informed this court that the High Court decision in the appeal was to the effect that the area in dispute being adjacent to Msimbazi Valley was hazardous and could not be owned by anyone. However, no evidence was tendered to prove that the area was so declared to be hazardous under Section 7 of the Land Act Cap 113 R. E. 2019.

Moreover, on page 2 of the Judgment, the Court noted that the applicant acquired his land in 1997 when the Land Act was not yet in force. The Land Act came into force via G.N No 484 of 2001, published on 1<sup>st</sup> May 2001. Therefore, when the Land Act came into force, it acknowledged that there were occupiers and users of Land under granted or customary right of occupancy under Sections 7 (8) and (9).

The 2<sup>nd</sup> ground, as submitted by Mr. Masatu, was premised on the fact that the ownership of the disputed land passed from the previous owner through customary ownership. This evidence was not believed by the Court.

Therefore, the issue was whether citizens were allowed to own land along the Msimbazi River.

On the 3<sup>rd</sup> ground, Mr. Masatu submitted that it was on the record that PW3 sold a piece of land to the applicant. But on page 14 of the judgment, his evidence was not considered to determine whether the applicant or respondent owned the land in dispute.

On the 4<sup>th</sup> ground, Mr. Masatu stated that the applicant's complaint was a trespass and demolition of his properties in the suit land. But the complaints were rejected because the area in issue was hazardous.

In response, Mr. Nyakamo advocate strongly opposed the application by submitting that the Court has already set the factors to consider when granting leave. In this regard, he cited **Erasto Daima Sanga Vs. Peter Mwonga**, Misc. Land Application No. 66 of 2019 (HC) unreported.

He said, in that case, it was held that.

*"The applicants must adduce grounds for leave, and such grounds must be content with merits."*

Again on page 5, of the same judgment, it was held that

*"Leave is not granted because there is an argued appeal."*

He further submitted that the issues raised in paragraph 9 of the affidavit were meaningless because of the evidence on record and the site visit to the

disputed land. The tribunal found that the applicant did not own the land. Although adjacent to the Msimbazi river, the disputed land was near the respondent's house and far away from the applicant's building.

Furthermore, the applicant did not tender any document to prove his ownership.

Mr. Nyakomo further stated that the chances of success if leave is granted were narrow because the applicant was claiming the land, which is not in his ownership. The High Court appropriately evaluated the evidence in reaching that decision. Therefore, it was not true that the evidence was misapprehended.

On the evidence of PW3, Mr. Nyakomo submitted that he was not a critical witness. He sold a piece of land to the respondent but was unaware of the disputed land.

He concluded by submitting that there were no serious issues of law and fact fit to be considered by the Court of Appeal.

In a brief rejoinder, Masatu reiterated that there is no proof that the area has been declared hazardous under Section 7 of the land Act.



On the evidence of PW3, he rejoined that on page 14 of the Judgement, there was evidence that the respondent exceeded the area he purchased, but the Court did not evaluate it.

The issue for determination in this matter is:

*"whether or not there is the existence or otherwise of points of law worth to be considered by the Court of Appeal."*

Before traversing to the merits or demerits of the application, it is essential to highlight the factors to consider before granting or refusing leave.

From the case laws, the following factors are essential.

One, the Court must ascertain if there is a legal point worth being considered by the Court of Appeal. See **Marcus Kindole Vs. Burton Mdinde**, Civil Application No. 137/13 of 2020 (Tanzlii).

Two, the Applicant must demonstrate that the intended appeal raises issues of general importance or novel point of law. See **HTT Infranco Ltd (Supra)**

Three, there must be prime facie grounds meriting an appeal. See **Erasto Daima Sanga (Supra)**.

Four, if the matters are of public importance and raise serious issues of misdirection or non-direction results in a failure of justice. See **Erasto Daima Sanga (Supra)**.

Five, there must be serious and contentious issues of law or fact fit for consideration by the Court of Appeal.

Furthermore, in the application of this nature, it is a well-established principle that this Court should refrain from determining the merits or otherwise of the substantive issue. See **Regional Manager TANROADS Lindi Vs. DB Shapriya and Co. Ltd**, Civil Application No. 29 of 2012.

At this stage, this Court is to confine itself to whether the proposed grounds pass the test of the factors to be considered before granting leave.

In the impugned Judgment, this Court held that (on page 16)

*"The chairman evaluated the evidence and in his final analysis he found that the appellant did not prove on standard of probability that he is a lawful owner of the area in dispute which faces the Msimbazi."*

It further held".

*"I have read the original trial Tribunal proceedings, the tribunal visited locus in quo on 11<sup>th</sup> September 2020, and*

*they drew sketch map which shows that the appellant's and respondent's plots face the Msimbazi river and the disputed area is triangular in shape which is beside the respondent's plot side. According to the drawings made I hesitate to believe that the disputed area belonged to the appellant. I am saying so because the area is along the Msimbazi River on the respondent's side".*

On reading that decision, I found the Court evaluated the evidence of the trial tribunal available on records, including the evidence of PW3, who disposed of the piece of land to the applicant.

From the above, I hold that the High Court considered the available evidence on record, analyzed it, and reached that decision.

Therefore, I do not find if there are prima facie grounds meriting an appeal. This is because the first, second, and fourth grounds don't raise any point worth being considered by the Court of Appeal for the reason that the dispute was ownership of land, and the Court decided that the applicant failed to prove his ownership.

For that reason, the arguments on whether the area was declared hazardous or the citizens are not allowed to own land along the Msimbazi


River valley are immaterial concerning the ownership issue. The arguments do not fit within the factors to consider in granting of leave to appeal to the Court of Appeal. Furthermore, as I said earlier, the evidence on record was analyzed by the Court, including the evidence of PW3.

In the upshot, the grounds raised in the application are not worth for consideration in granting the application for leave.

Consequently, the application lacks merit, and I dismiss it with costs.

It is so ordered.



  
**K. D. MHINA**  
**JUDGE**  
**30/09/2022**