

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

**MISC. LAND CASE APPLICATION NO. 225 OF 2022  
(Arising from Misc. Land Application No.11 of 2022)**

**ELIUS A. MWAKALINGA.....APPLICANT**

**VERSUS**

**DOMINA KAGARUKI.....1<sup>st</sup> RESPONDENT  
FARIDA F. MBARAK.....2<sup>nd</sup> RESPONDENT  
FARID AHMED MBARAK.....3<sup>rd</sup> RESPONDENT  
THE COMMISSIONER FOR LANDS.....4<sup>th</sup> RESPONDENT  
THE TANZANIA BUILDING AGENCY.....5<sup>th</sup> RESPONDENT  
THE ATTORNEY GENERAL.....6<sup>th</sup> RESPONDENT**

**RULING**

*Date of Last Order: 03/10/2022*

*Date of Ruling: 07/10/2022*

**KHALFAN, J.**

This ruling relates to an application for leave to appeal to the Court of Appeal of Tanzania against the ruling and order of this court in Misc. Land Application No. 11 of 2022 delivered on 13/04/2022. It was brought *inter alia* under Section 5(1) of the Appellate Jurisdiction Act, Cap. 141 R. E 2019 and Rules 45(a), 45(b), 46(1) and 49(3) of the Tanzania Court of Appeal Rules, 2009 as amended by G.Ns. Nos. 36 of 2010, 362 of 2017 and 344 of 2019.

The application is supported by the affidavit of Mr. Gaspar Nyika, Learned Advocate for the applicant. The affidavit has it that the applicant intends to appeal to the Court of Appeal against the




above-mentioned decision of this court which struck out Misc. Land Application No. 11 of 2022. The decision is in respect of preliminary objection raised by the first respondent challenging Misc. Land Application No. 11 of 2022. The same was to the effect that the Court could not interfere with administrative power of the Commissioner for Lands. Having sustained the objection and struck out the application, this Court declined to jurisdiction.

In the affidavit supporting the instant application, the Court was told that in Misc. Land Application No. 11 of 2022, the applicant challenged the steps taken by the fourth respondent on how she intended to carry out the directives of the Court of Appeal in Civil Appeal No. 60 of 2016 to subdivide Plots No. 105 and 106.

In respect of the said steps, the applicant was asked in writing to surrender the Certificate of Title whose details were not provided to permit subdivision of Plots No. 105 and 106 in execution of decree. As the applicant was aggrieved by the steps taken by the fourth respondent which he considered to be beyond the directive of the decision of the Court of Appeal, he filed the said Misc. Land Application No. 11 of 2022 which ended up being struck out.

According to the affidavit supporting the instant application, the grounds that the applicant intends to raise in the intended appeal



are, that, the Court erred in declining jurisdiction to hear and determine the application; that the Court erred in failing to note that the questions being raised in the application arose from the application for execution pending before the Court.

Furthermore, the Court erred in holding that the application was challenging the decision of the Court of Appeal while the application was only challenging the execution which went beyond the direction of the Court of Appeal; that, the Court erred in holding that the raised matters in Misc. Land Application No. 11 of 2022 were purely administrative; and that the Court failed to note that the application for execution arose from a land matter.

The counter affidavit for the fourth, fifth and sixth respondents sworn by Ms. Leonia Maneno, learned State Attorney for the said respondents, had it that disputed the allegations contained in the applicant's affidavit. Opposing the said application, it was stated in the said counter affidavit that the steps taken by the fourth respondent ordering the applicant to surrender the certificate of title was within his power.

It was further stated that in order to comply with the decision of the Court of Appeal the applicant, the second and third respondents, must surrender their certificates of title as the survey



and subsequent division of the plots will affect the said titles and new particulars would be inserted in the new certificates and new map will be appended.

In addition to the above, it was contended that there was no proof that the applicant had already filed notice of appeal as alleged. Be that as it may, it was also averred in the said counter affidavit that the grounds of the intended appeal do not raise an arguable case for the consideration of the Court of Appeal.

The counter affidavit in respect of the first respondent also opposed the application saying that the steps by the fourth respondent were administrative which could not be challenged by an application. It also maintained that the application was partly challenging the decision of the Court of Appeal which ordered subdivision of the plots of which this Court has no jurisdiction to question. In the end, the Court was told that there was no point warranting granting of the sought leave.

The rival oral submissions that ensued by and large reflected matters which were set out in the affidavit and counter affidavits on the record respectively, adopted as part of the rival submissions. One thing that is apparent from the rival submissions was whether or not the applicant can appeal against the ruling



bearing in mind that the application for execution is still pending before the Court. In relation to this, there is another question as to whether this Court can competently determine whether or not the applicant can appeal against the said ruling.

I have considered the above submissions in relation to the issue whether this is a fit case for this court to grant leave for the applicant to appeal to the Court of Appeal of Tanzania (CAT) against the impugned decision of this court as shown herein above.

See, **Harban Haji Mosi and Another vs Omar Hilal Seif and Another**, Civil Reference No. 19 of 1997 (unreported); and **Shaban Hamimu and Others vs Said Abeid John and Another** Misc. Civil Application No. 4 of 2015 (unreported). The thrust of the two cases is on the position of the law that leave is grantable where the proposed appeal stands reasonable chances or where the proceedings reveal such disturbing features as to require the guidance of the Court of Appeal.

I was also considerate of the decision of the Court of Appeal in **British Broadcasting Corporation vs. Eric Sikujua Ng'maryo**, Civil Application No. 138 of 2004 in which it was stated that:

*'...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 and on materials before the court. As a matter of general principle, leave to appeal will be granted where grounds of appeal raise issues of general importance or novel point of law or where the grounds show a prima facie or arguable appeal.'*

It is not in dispute that the steps which were taken by the fourth respondent, which were challenged by the applicant were in relation to the execution of the decision of the Court of Appeal as afore stated. The same ordered subdivision of Plots No. 105 and 106. Pursuance to the said steps, the applicant was directed to surrender his certificate of title.

It is in the counter affidavit of the fourth, fifth and sixths respondents which was not replied by the applicant that the steps taken requiring the applicant to surrender his certificate of title as was the second and third respondent was in compliance with the decision of the Court of Appeal.

It was also in the same counter affidavit stated that the subdivision ordered by the Court of Appeal would necessarily affect the titles and particulars thereof and hence issuance of new certificates and maps.





In other words, the fourth, fifth and sixth respondents were saying that compliance with the decision of the Court of Appeal would necessarily change the titles held by the applicant, second and third respondents, and necessarily require the said applicant and respondents to surrender their respective certificates of title.

It is not within the jurisdiction of this court to determine the points raised by the applicant as intended grounds of appeal. Rather, it is within the jurisdiction of this court to see if the application reveals a contentious issue or a disturbing issue or raises issues of general importance or the intended grounds of appeal show prima facie or arguable appeal which has to be determined by the Court of Appeal or whether the application stands reasonable chances of success in view of the point(s) raised. In any case, it is not in the domain of this court to determine the merit of the issue or issues raised.

I am not persuaded that this is a fit case to grant the leave as sought by the applicant. I am thus not prepared to grant the application. I am in this respect persuaded by the averments in the counter affidavit of the fourth, fifth and sixth respondents in their counter affidavit summarised herein above. In view of the affidavit supporting the application, I do not see that the application fits the



requirements set out in the authorities relied upon to warrant the court to exercise its discretion to grant the leave.

In the result, the application stands dismissed with costs. It is so ordered.

**DATED at DAR ES SALAAM** this 7<sup>th</sup> October 2022.



**Court:**

  
**F. R. KHALFAN**  
**JUDGE**

**07/10/2022**

Ruling delivered this 7<sup>th</sup> day of October, 2022, in the presence of Ms. F. Mgunya, learned Advocate for the applicant, Ms. Wivina Rwebangira, learned Advocate for the first respondent, also holding brief for Mr. John James, learned advocate for the second and third respondents, and Mr. Amos. Enock, learned Advocate, holding brief for Ms. Leonia Maneno, learned Advocate for the fourth, fifth and sixth respondents.



  
**F. R. KHALFAN**  
**JUDGE**

**07/10/2022**