

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

MISCELLANEOUS LAND APPLICATION NO. 83 OF 2022

(Originating from decision of the High Court of Tanzania (Land Division) at Dar es Salaam, Her Ladyship, A.Z. Mgeyekwa, J Misc. Land Case Application No. 648 of 2021 delivered on 7th day of February 2022)

BASHIRU SAID MTUMBAAPPLICANT

VERSUS

ANOLD PETER KAVISHE..... 1ST RESPONDENT

ABDI OMARY 2ND RESPONDENT

RULING

Date of last Order: 21/09/2022
Date of Ruling: 06/10/2022

KHALFAN, J.

The applicant has filed this application seeking for leave to appeal to the Court of Appeal against the decision of this Court (Hon. K. Mteule, J.), in Land Appeal No. 11 of 2011 delivered on 9th August 2021. The applicant has moved the Court under Section 5(2) (a) of the Appellate Jurisdiction Act Cap 141 R.E 2019, Rule 45(a) of the Court of Appeal Rules, 2009 GN. No. 362 of 22nd September 2017) and Section 47(2) of the Land Disputes Courts Act, Cap. 216 R.E. 2019. The application is supported by the affidavit of Bashiru Said Mtumba, the applicant.



A brief summary of the application is that, the applicant unsuccessfully sued, the respondents for trespassing on his suit property situated at Chamazi within Temeke Municipality in Land Application No. 304 of 2015 in the District Land and Housing Tribunal for Temeke. The judgment of the trial tribunal was delivered on 14th October 2020. The applicant was aggrieved by the said decision. He thereafter appealed to this Court. However, the applicant's appeal was dismissed. The applicant filed an application for extension of time to file application for leave, in Misc. Case No. 648 of 2021, which was granted hence this application.

At the hearing of the application, Mr. Ambros Malamsha, learned Counsel appeared for the applicant, while the first respondent was represented by Mr. Yuda Paul, learned Counsel. Mr. Malamsha submitted that the position of the law under Section 47 (2) of Land Disputes Courts Act, Cap. 216 R.E. 2019 reads that:

'A person who is aggrieved by the decision of the High Court in the exercise of its revisional or appellate jurisdiction may, with leave of the



High Court or Court of Appeal, appeal to the Court of Appeal.'

He submitted further that it is trite law that leave of the Court of Appeal is granted if the prima facie grounds are shown to be permitted to appeal to the Court of Appeal. He cited the case of **Sango Bay v Dresdner Bank A.G.** [1971] EA 17, as echoed in the case of **Caroline Kivamba v Mosi Bakari Ally and Another** (unreported), Misc. Land Application No. 746 of 2020, and **Gaudensia Mzungu v IDM Mzumbe**, Civil Application No. 94 of 1994, to support his submission. Mr. Malamsha argued that the decision of the lower court is tainted with illegalities and irregularities as established under paragraph 4 of the affidavit.

On the part of the respondents, Mr. Paul submitted that the grounds as mentioned in paragraph 12 of the affidavit are not really grounds of illegality and irregularities. He argued that, the same were grounds of appeal and the Court decided these grounds properly. He went further submitting that the respondents do not see any reasons for this Court to allow the applicant to go to the Court of Appeal because the matter was properly decided. He concluded his submission by praying for this Court to reject the application with costs.



Mr. Malamsha, in his rejoinder, submitted briefly that, there is illegality where the Trial Tribunal admitted the document while it was not stamped under the Stamp Duty Act. As for irregularities, he submitted on the legal requirement for a sale agreement to describe the property which is the subject of sale, whose requirement was not adhered to by the Trial Tribunal. He concluded his rejoinder by praying this Court to grant leave to the applicant to appeal to the Court of Appeal.

I have carefully considered the rival submissions of learned Counsels for both sides and the supporting authorities as well as the available pleadings. The issue before this Court is whether the application has merits.

It is the trite law that, leave to appeal to the Court of Appeal is granted if prima facie grounds or arguable appeal are mentioned to deserve the attention of the Court of Appeal. It was held in the case of **Harban Haji Mosi and Another v Omar Hilal Seif and Another**, [2001] TLR 409, where the Court of Appeal of Tanzania underscored that leave is grantable where the proposed appeal stands reasonable chances of success or there are irregularities in the proceedings.



Again, in the case of **British Broadcasting Corporation vs. Erick Sikujua Ng'maryo**, Civil Application No. 138 of 2004 (unreported), where the Court of Appeal on discretionary powers in granting leave emphasized 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 judiciously exercised and 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 novel point of law or where the grounds show a prima facie or arguable appeal... However, where the grounds of appeal are frivolous, vexatious or useless or hypothetical, no leave will be granted..."

In this application, Mr. Malamsha has referred this Court to the position of law in the case of **Caroline Kivamba v Mosi Bakari Ally and Another**, (supra) in which my sister, Hon. A.Z. Mgeyekwa J., stated at page 4 that:



'Leave to appeal will be granted where prima facie it appears that there are grounds which merit serious judicial attention and determination by a superior Court.'

Applying the above position of the law, I have considered the parties' submissions for and against the application. On my part, I have considered the issue whether it was legal and proper for the first appellate Court to rely and enforce sale agreement that had not been tasked for stamp duty; in this respect, leave is not granted on this point. The reason is not far-fetched as that point was not raised at the Trial Tribunal.

However, I will grant leave for the applicant to appeal to the Court of Appeal pursuant to paragraph 12. (b), (c), (d) and (e) of his affidavit which states:

'12(b) Whether it was legal and proper for the 1st Appellate Court to rely and enforce the sale agreement that had not described the suit property as the subject matter of the sale nor made reference to the loan agreement made on 09/09/2014.



- (c) *Whether it was legal and proper for the 1st Appellate Court to rely and enforce the sale agreement that had not indicated that it becomes enforceable after a loan agreement between appellant (albeit applicant) and respondent made on 09/09/2014.*
- (d) *Whether it was legal and proper for the 1st Appellate Court to put credence and rely on contradictory testimonies of Defence witness namely DW2, TW1 and TW2 on the sale agreement where DW2 the wife of the 1st respondent testified that she witnessed the sale agreement at the office of WEO of Chamazi named AMINA while the testimony of TW1 & TW2 stated they signed the agreement at the work place of 1st respondent.*
- (e) *Whether it was legal and proper for the 1st Appellate Court to put credence and rely on contradictory and unreliable testimonies of the defence and tribunal witnesses.'*

Much as I cannot determine the above points whether the decisions of Trial Tribunal and 1st Appellate Court were proper because I am not the Appellate Court, I am satisfied that under the cited case of **Caroline**




Kivamba v Mosi Bakari Ally and Another (supra) the issues call for the attention of the Court of Appeal as they are also issues of law.

Owing to the circumstances herein, leave is hereby granted for the applicant to appeal to the Court of Appeal against the decision of this Court in Land Appeal No. 11 of 2021. I accordingly grant leave to appeal to the Court of Appeal as sought.

Dated at Dar es Salaam this 6th day of October, 2022.





F.R. KHALFAN
JUDGE
06/10/2022

Court

Ruling delivered this 6th day of October, 2022 in the presence of Mr. Bashiru Said Mtumba, the applicant.




F. R. KHALFAN
JUDGE
06/10/2022