

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)**

AT DAR ES SALAAM

MISC. LAND CASE APPLICATION NO. 304 OF 2021

ELIA MAKALA MASANGYA.....APPLICANT

VERSUS

BENEDICT JAMES TEMBA.....1st RESPONDENT

REBECCA BENEDICT TEMBA.....2nd RESPONDENT

SHILILIANDUM HUMPHREY MAKERE.....3rd RESPONDENT

RUKIA JUMA ZIDADU.....4th RESPONDENT

MUSSA JOHN.....5th RESPONDENT

MR. EMMANUEL.....6th RESPONDENT

RULING

22/09/2022 & 26/10/2022

Masoud, J.

The applicant sought leave of this court to enable him to appeal to the Court of Appeal against the decision of this court in Land Appeal No. 42 of 2020 as per Mango J. delivered on 04/06/2021. The applicant invoked section 47(2) of the Land Disputes Courts Act, 2002 cap. 216 R.E 2019.

In his affidavit supporting the application, the applicant indicated that he has already lodged notice of appeal and applied for certified copies of judgment, decree and proceedings for purposes of preparing a record of appeal and memorandum of appeal.

In paragraph 6 of the said affidavit, the applicant identified points of law which he wishes the same to be determined by the Court of Appeal.

They are as follow:

- (i) *whether it was proper for the learned Judge to make a finding on the ownership of the disputed land after the first and second respondents failed to prove their case on balance of probabilities;*
- (ii) *Whether the learned Judge having found that the first and second respondents did not prove ownership over the disputed land on balance of probabilities she was right and correct to proceed to nullify the applicant's survey over Farm No. 500 Mbezi Area in Kinondoni Municipality;*
- (iii) *Even if the first and second respondents were able to prove on balance of probabilities the ownership of the disputed land (one and half acres) whether it was proper for the learned Judge to nullify the whole survey of Farm No. 500 Mbezi Area in Kinondoni Municipality which had almost ten acres (3.73 hectares) instead of directing the Director of Mapping and Survey to resurvey and exclude the disputed land;*
- (iv) *Whether the burden of proof to prove the instant case was required to be under section 110 and 111 of the Tanzania Law of Evidence Act or section 119 of the Tanzania Law of Evidence Cap. 6 R.E 2019;*

- (v) *The learned Judge erred in law and facts in failure to re-evaluate, examine and re-assess the evidence tendered before the trial tribunal hence she reached at a wrong conclusion;*
- (vi) *The learned Judge having found that the survey was conducted by a private surveyor over disputed area in 1980s whether it was condition precedent to involve the purported neighbours under the Town and Country Act, cap. 355 R.E 2002 and whether the provision of section 19 of the Urban Planning Act 2007 applied retrospective to the survey conducted before 2007.*

As to the 4th, 5th, and 6th respondents, they neither entered appearance nor filed any counter affidavit, and nor filed written submission. The 3rd respondent, who was represented by Ms Neema Ndosu, Advocate, did not wish to oppose the application and the court was accordingly so informed by the said counsel.

The first and second respondent resisted the application. They filed a counter affidavit sworn by Mr Roman Selasini Lamwai, their learned counsel. They disputed the points of law raised. As to the first, second, third and fifth points, it was contended that they were not points of law and have very adequately been covered in the judgment sought to be appealed against.

With regard to the issue of ownership, it was averred in the said counter affidavit that the applicant was not exempted from proving that he was the lawful owner of the suit land before he sold the same to 3rd and 6th

respondents. Further that the failure of the 1st and 2nd respondents to prove ownership does not automatically give the applicant ownership of the disputed land.

With regard to 4th point of law as shown in the applicant's affidavit, it was averred that it was never canvassed in this court as was in the District Land and Housing Tribunal while the issue as to burden of proof was not in question between the applicant and respondents and was however exhaustively adjudicated upon. As to the sixth point of law, it was averred that the applicability of a private surveyor and relevant law was not canvassed in this court as was in the District Land and Housing Tribunal.

In his written submission in support of the application, Mr Cleoplace Manyagu, learned counsel for the applicant, referred the court to section 47(2) of Cap.216. He said that the said section does not provide for any criteria for granting of leave. It is as such in the discretion of the court, which must be exercised judiciously, to consider whether or not to grant the leave.

Thus, saying that there was, it was argued, no legal issue as implied by the counsel for the 1st and 2nd respondents was a mere wishful thinking which does not make it a requirement under the relevant section. Reliance was made on **Yahaya Rajabu vs Ibrahim Salum Tahfif and Another**, Misc. Land Application No. 4 of 2009 HC Mtwara to the effect that the duty

of the court in an application for leave to appeal is just to ensure that a party intending to appeal to the Court of Appeal complies with the law.

Mr Manyangu told the court that the applicant complied with the law having brought this application for leave to appeal by way of chamber summons. Relied further on **Rutagatatina C.L vs the Advocates Committee and Another**, Civil Application No. 98 of 2010 (unreported) with respect to its holding at page 5 that:

"An application for leave is usually granted if there is good reason, normally on a point of law or on a point of public importance that calls for this Court's [i.e the Court of Appeal's] intervention."

With the above principle in mind, Mr Manyangu took the court through the issues averred in the affidavit supporting the application which according to him need the attention of the Court of Appeal. In his view, the issues set out in paragraph 6 of the affidavit of the applicant are serious but they were overlooked by this court sitting as the first appellate court. Such issues, it was added, were not objected or opposed by the respondents other than the first and second respondent; for they did not file any counter affidavit and any written submission in reply.

Replying to the submissions by Mr Manyangu, Mr Lamwai disputed that this is a fit case for the sought leave to be granted. He referred to the criteria set out in the case of **British Broadcasting Corporation vs Eric**

Sikujua Ng'aro, Civil Application No. 138 of 2004. The same are to the effect that leave to appeal is not automatic, but it is within the discretion of the court based on materials before the court, and that 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 prima facie or arguable appeal.

Quite forcefully, and in so many words, Mr Lamwai was, to put it simply and succinctly, saying that the applicant did not disclose in his affidavit issues which merit consideration of the Court of Appeal. However, in so doing, he went as far as arguing and seemingly considering the merit of the grounds envisaging the issues, while such undertaking is not within the mandate of this court.

The question is whether this is a fit case to grant the leave. I am in my determination guided by the case of **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) which restated 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 equally and particularly guided by the principle in **British Broadcasting Corporation** (supra) where the Court of Appeal, among other things, insisted that leave to appeal is not automatic, but it is within the discretion of the court based on materials before the court, and that 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 prima facie or arguable appeal.

As already indicated herein above, Mr Lamwai traded on a thin line between showing that there was not prima facie case or an arguable appeal, and arguing on the merit of the grounds and the issues raised for the intended appeal. With respect to the above principles, I must say that the more Mr Lamwai was painstakingly arguing to show that the grounds and the issues raised do not present a prima facie case or arguable appeal, the more I was increasingly inclined that there was indeed an arguable appeal.

In view of the grounds of the intended appeal and the issues which they present, I am of the finding that they clearly demonstrate a prima facie case. They equally, in my considered opinion, show an arguable appeal which is worthwhile for determination by the Court of Appeal.

I am thus persuaded that this is a fit case for granting leave on the issues raised in paragraph 6 of the applicant's affidavit.

In the result, and for the foregoing reasons, I would grant the application as I hereby do so. Accordingly, the sought leave is ordered in the favour of the applicant based on the issues set out in the affidavit supporting the application. Costs shall follow events. It is so ordered.

Dated at Dar es Salaam this 26th October 2021.


B. S. Masoud
Judge

