

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC.LAND CASE APPLICATION NO. 644 OF 2022

(Arising from the Judgment and Decree of the High Court, Hon. T.N.

Mwenegoha, J in Land Appeal No. 68 of 2021 delivered on 23rd

September, 2021)

MWASILI JUMA RAMADHANI APPLICANT

VERSUS

LUFINGO MWAIPOPO TENDELA RESPONDENT

RULING

Date of last Order 08.12.2022

Date of Ruling 14.12.2022

A.Z.MGEYEKWA, J

This application is brought under section 5 (1) (c) of the Appellate Jurisdiction Act, Cap. 141 [R.E 2019] and section 45 (a) of the Tanzania Court of Appeal Rules, 2009 as amended by GN. No. 362 of 2017. The applicant seeks leave to appeal to the Court of Appeal of Tanzania to

impugn the decision of this Court in Land Appeal No. 68 of 2021 delivered on 23rd September, 2021. The application is supported by an affidavit deposed by Mwasili Juma Ramadhani, the applicant. The respondent feverishly opposed the application. In a counter-affidavit sworn by Kutingo Mwaipopo Tendela, the respondent.

When the matter was called for hearing before this court on 24th November, 2022 the applicant had the legal service of Mr. Bwana Ally Chipaso, learned counsel also holding brief for Mr. Charo Shogholo, learned Advocate for the respondent. By the court order and consent by the parties, the application was argued by way of written submissions whereas, the applicant's Advocate and the respondents' Advocate complied with the Court order save for the applicant's counsel who waived his rights to file a rejoinder.

Mr. Chipaso, learned counsel for the applicant was the first one to kick the ball rolling. Reiterating what was deposed in the supporting affidavit, the learned counsel urged this court to adopt the applicant's application and form part of his submission. Mr. Chipaso stated that the trial Tribunal impugned Judgment in Land Application No. 98 of 2018 and proceedings of the trial tribunal together with this Court Judgment in land Appeal No. 68 of 2021 are tainted with material illegality. He went on to point out the points of law; that at the tribunal the respondent had no cause of action to

sue the applicant on her own capacity and in Land Appeal No. 68 of 2021 it was wrongly ordered rectification of the trial tribunal records without nullifying the proceedings of the trial tribunals and the tribunal determined a probate matter.

The learned counsel for the applicant went on to submit that the respondent filed a Land Application No. 98 of 2018 against the applicant in her own capacity instead of suing the administrators of the late Johari Maganga and the appellate Court entertained the appeal. To fortify his submission he cited section 99 of the Probate and Administration of the estate Act, Cap. 352 and the case of **Monica Nkoma & another v Emmanuel Keneth Mbeyela & another**, Misc. Application No. 44 of 2020 HC at Iringa (unreported). Mr. Chipaso asserted that this Court irregularly entertained the appeal while it was against a person who had no *locus standi*. To buttress his submission he cited the case of **Lujuna Shubi Ballonzi, Senior v Registered Trustees of Chama cha Mapinduzi** (1996) TLR 203. He added that this Court Judgment contains contradictions that attracts the Court to determine.

On the strength of the above submission, the learned counsel for the applicant beckoned upon this court to grant leave to the applicant to file an appeal to the Court of Appeal of Tanzania.

Responding, the learned counsel for the respondent urged this court to adopt the respondent's counter-affidavit and form part of his submission. Mr. Charo submitted that the allegations that the applicant has no cause of action against the respondent in her own capacity lack substance as the applicant had a cause of action against the trespasser. He added that the applicant stated her address to be Mwansili Juma Ramadhani and displayed her mobile number as her address. He asserted that the applicant did not introduce herself in any other capacity. Mr. Charo beseeched this Court to refer to paragraph 2 of the Written Statement of Defence in the trial tribunal records.

Mr. Charo valiantly submitted that the applicant attempted to deny her own address and litigate over the matter contravenes the provision of section 123 of the Tanzania Evidence Act, Cap.6 [R.E 2019], the law prohibits a party to litigate on matters previously noted and settled. He went on to state that it was upon the respondent to prove his case on the balance of convenience that he was the owner of the house and the trespasser was unlawful inside the house.

Mr. Charo went on to submit that this Court did not wrongly ordered rectification of the tribunal records.

In conclusion, Mr. Charo urged this court to find that the application before this court is devoid of merit hence the same be dismissed with costs.

Having heard the submissions of the learned counsel for the applicant and the respondent for and against the application. A review of the rival depositions is centered on one grand question for settlement by the Court, this is *whether the application demonstrates sufficient ground or a disturbing feature that requires the attention of the Court of Appeal of Tanzania.*

It is trite law that grant of leave to appeal to the Court of Appeal is premised on the applicant's ability to demonstrate that there are points of law or fact that have been decided by the High Court which need to be revisited by the Court of Appeal before rights of the contending parties are conclusively determined. These said points of law are gathered from the affidavit that supports the application. This means, therefore, that grant of leave to appeal is not automatic. Relatively, is discretionary and the Court can only exercise such discretion if the party has been able to present a prima facie case. This position was accentuated in the case **Gaudensia Mzungu v IDM Mzumbe**, Civil Application No. 94 of 1994 (unreported), the Court of Appeal of Tanzania held that:-

“ Leave will be granted if, prima facie there are grounds meriting the attention and decision of the Court of Appeal.”

I am aware that in determining whether this court can grant leave or not, this court will do the same without assuming the power of the appellate

Court as this court is bound to assume such power which is vested in the Court of Appeal of Tanzania. In the case of **Grupp v Jangwani Sea Breeze Lodge Ltd**, Commercial case No.93 of 2002 (unreported) my brother Massati, J (as he then was) expressed the matter this way:-

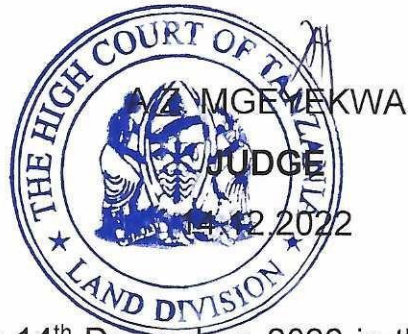
"... I have no jurisdiction to go into merits or deficiencies of the judgment or orders of my sister judge in this application. All that I am required to determine is whether there are arguable issues fit for the consideration of the Court of Appeal..."

The applicant's argument is based on the grounds deposed in paragraph 8 of his affidavit. These are the grounds that the applicant believes that they are guaranteed a ticket to the Court of Appeal. The respondent's counsel opposed the application, he contended that there is no arguable case. I hold a divergent view from what the respondent's counsel stated. I take the view that there are pertinent questions that constitute an arguable case, which attracts the Justices of the Court of Appeal. Issues such as whether the respondent had a cause of action to sue the applicant in his own name and whether the appellate Court order to rectify the trial tribunal records without nullifying the proceedings of the trial tribunal was proper.

In my considered view, the two points of law are fit in respect of which the guidance of the Court of Appeal is required.

In consequence, this application succeeds. The applicant is granted leave to appeal to the Court of Appeal of Tanzania. Costs to be in the cause.

Dated at Dar es Salaam this date 14th December, 2022.



Ruling delivered on 14th December, 2022 in the presence of Ms. Subira, learned counsel for the respondent also holding brief for Mr. Mbwana Ally, counsel for the applicant.

