

IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
MISC. LAND APPLICATION NO. 556 OF 2022

(Arising from the decision of the High Court of Tanzania at Dar es Salaam (Land Division) Hon. Arufani, J in Land Appeal No. 110 of 2021, originating from the decision of Kinondoni District Land and Housing Tribunal in Land Application No. 253 of 2010)

EZRON MNYONGE APPLICANT

VERSUS

DOTTO BENEZETI (as Administrator of the estate of

the late HEBEN BAFUTA) **1ST RESPONDENT**

GATISON JULIUS AMAN **2ND RESPONDENT**

RABSON NDYABANIGWA **3RD RESPONDENT**

EZARI ZAKARIA NKOKO **4TH RESPONDENT**

RULING

Date of last Order: 19.12.2022

Date of Ruling: 20.12.2022

A.Z.MGEYEKWA, J

This application is brought under section 47 (1) of the Land Disputes Courts Act, Cap. 216 [R.E 2019]. The applicant seeks leave to appeal to the Court

of Appeal of Tanzania to impugn the decision of this Court in Land Appeal No. 110 of 2021 delivered on 12th August, 2022. The application is supported by an affidavit deposed by Ezron Mnyonge, the applicant. The 1st and 3rd 4th respondents did not object the application. The 1st, 2nd, and 3rd respondents filed a joint counter affidavit.

When the matter was called for hearing on 6th December, 2022 the applicant appeared in person, unrepresented. The 1st, 2nd, and 3rd respondent had the legal service of Mr. Kagambo holding brief for Mr. Godfrey Samwel, counsels, the 4th respondent did not show appearance, and nothing has been filed by the 1st, 2nd, and 3rd respondents, to date, and no word has been heard from them nor their counsel on the reason for the inability to conform to the court schedule.

This being the position, the question that follows is: what is the next course of action? The settled position is that failure to file written submissions, when ordered to do so, constitutes a waiver of the party's right to be heard and prosecute his matter. Where the inability is on the part of the 1st, 2nd, and 3rd respondents, the consequence is to order that the matter be heard ex-parte. This position is consistent with the Court of Appeal of Tanzania holding in the case of **National Insurance Corporation of (T) Ltd & Another v**

Shengena Ltd, Civil Application No. 20 of 2007 at DSM (unreported), it was held that:

"The applicant did not file submission on the due date as ordered. Naturally, the Court could not be made impotent by the party's inaction. It had to act. ... it is trite law that failure to file submission(s) is tantamount to failure to prosecute one's case."

The stance taken in the above-cited case is consistent with an earlier position, taken by this Court in **Tanzania Harbours Authority v Mohamed R. Mohamed** [2002] TLR 76. Filing written submissions are tantamount to a hearing and; therefore, failure to file the submission as ordered is equivalent to non-appearance at a hearing or want of prosecution. The attendant consequence of failure to file written submissions are similar to those of failure to appear and prosecute or defend, as the case may be. In consequence of the foregoing, it is ordered that the matters be determined *ex-parte*, by considering the application based on the submission filed by the applicant and 4th respondent.

Having adopted the contents of the Chamber summons as well as the applicant's affidavit, Mr. Mshana took the floor to make elaborations in support of the order sought. He urged this Court to adopt the applicant's

affidavit to form part of his submission. He submitted that the principle of law that guide this Court to grant leave was given by the Court of Appeal in the case of **Abubakar Ali Himid v Edward Nyelushe**, Civil Application No. 51 of 2007 (unreported). The counsel submitted that the applicant stated that there are irregularities in the proceedings of the trial tribunal which require the guidance of the Court of Appeal and the same is stated in paragraph 5 of the affidavit. The counsel stated that the applicant has alleged that there are apparent irregularities in the trial tribunal such as the attendance and involvement of assessors in the course of the trial since two assessors did not participate fully during hearing. He added that despite being on and off the trial Chairman invited them to give their opinion and considered their opinion in the judgment.

The counsel went on to submit that the irregularities pointed out are related to compliance with section 23 (3) of the Land Disputes Courts Act, Cap. 216 [R.E 2019]. To support his submission he cited the case of **Tubone Mwambeta v Mbeya City Council**, Civil Appeal No. 287 of 2017. He also referred this Court to another irregularity that proceedings of the trial tribunal relate to compliance with section 19 (2) of the Land Disputes (District Land and Housing Tribunal) Regulations GN. 174 of 2003. He stated that the applicant wishes to bring those irregularities before the Court of Appeal for

corrections. He stated that the procedure does not show whether the assessors' opinions were read over.

The counsel submitted that the continued to submit that he understands that leave to the Court of Appeal is not automatic, it is discretionary, however, basing on the affidavit in support of the submission the applicant has established that there is an arguable appeal or point of law worth consideration by the Court of Appeal.

In conclusion, the learned counsel for the applicant beckoned upon this Court to grant the applicant's application.

The 4th respondent in his written submission had not much to say rather he conceded to the applicant's application.

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.*

From the parties' rival submissions, the pertinent question is whether the applicant has raised an arguable case worthy of the attention of the Court of Appeal. The law requires that a party who seeks leave to appeal to the Court

of Appeal must demonstrate that the appeal he intends to lodge at the Court of Appeal carries with it an arguable case, strong enough to draw the attention and engross the mind of the Court of Appeal. It implies, therefore, that grant of leave is not automatic, rather, it is an arduous process, and the applicant of such leave carries a duty of demonstrating the grounds of contention are premised on serious points of law or fact. See the cases of **Abubakari Ally Himid v Edward Nyalusye**, CAT-Civil Application No. 51 of 2007; **Rutagatina C.L. v The Advocates Committee & Another**, CAT, Civil Application No. 98 of 2010 and **British Broadcasting Corporation v Eric Sikujua Ng'maryo**, CAT Civil Application No. 138 of 2004 (all unreported). The collective message is that leave is only grantable where the intended appeal raises a novel point of law or where there is a prima facie or arguable appeal.

In **Harban HajiMosi& Another v Omar HiiiaiSeif & Another**, CAT Civil Reference No. 19 of 1999 (unreported), the Court held that:-

"Leave is grantable where the proposed appeal stands reasonable chances of success or where, but not necessarily, the proceedings as a whole reveal such disturbing features as to require the guidance of the Court of Appeal. The purpose of the provision is therefore to

spare the Court the specter of unmeriting matters and to enable it to give adequate attention to cases of true public importance."

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 5 of his affidavit. These are the grounds that the applicant believes that they are guaranteed a ticket to the Court of Appeal. Grounds number (a) to (d) are related to the involvement of assessors during the trial and the opinion of assessors, although the same were not raised at the first appellate court, as long as their points of law then they can be raised at any stage. Therefore, I take the view that there are pertinent questions that constitute an arguable case, worth consideration by the Justices of the Court of Appeal.

In my considered view, the last point of law is fit in respect of which the guidance of the Court of Appeal is required.

In the upshot, leave is granted to the applicant to file an appeal before the Court of Appeal. Costs to be in the cause.

Order accordingly.

Dated at Dar es Salaam this date 20th December, 2022



Ruling delivered on 20th December, 2022 in the presence of the applicant, 2nd, 3rd and 4th respondents

