

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

AT DAR ES SALAAM

MISC. LAND CASE APPLICATION NO. 317 OF 2022

GODFREY MALASSY.....APPLICANT

VERSUS

PROSPER RWEYENDERA.....1st RESPONDENT

CITY CHRISTIAN FELLOWSHIP.....2nd RESPONDENT

RULING

29/09/2022 & 15/12/2022

Masoud, J.

The applicant is seeking leave to appeal to the Court of Appeal against the ruling of this court in Misc. Land Application No. 448 of 2021. The application was made under section 5(1) of the Appellate Jurisdiction Act, cap. 41 R.E 2019. It was supported by affidavit of the applicant in which it was averred that the applicant has already lodged notice of appeal as he intends to appeal against the decision of this court as aforesaid. The application was however only opposed by the first respondent who filed counter affidavit.

It was stated that the decision sought to be challenged was made against a non-existing party, namely, the second respondent herein as the

said party has never been registered as a society as was alleged by the first respondent. Such fact was, it was further stated, contrary to the holding of this court in Land Case No. 237 of 2004 as per Mgetta J.

It was also stated by the applicant in his affidavit that the learned counsel for the first respondent was aware of the fact as per the evidence of the search that he conducted. Yet, he proceeded to mislead the court that the first respondent was registered whilst was not.

With the above revelations, the option available for the applicant was to apply for review. As the applicant was already out of time, he had to apply for extension of time, namely, Misc Land Application No. 448 of 2021, with a view to applying for review of the judgment by Hon. Mgetta J. dated 28/4/2016.

The ground advanced in support of the said application was illegality of the decision of Hon. Mgetta J. which is apparent on the face of the record as evidenced in the official search conducted whose report was also in the possession of the first applicant when he instituted the suit.

According to the applicant, the decision sought to be appealed against raises a point of law which is worthwhile to be considered and determined by the Court of Appeal. The issue as stated in the applicant's affidavit is thus:

"whether this court was right in law, having agreed with the applicant that the judgment sought to be reviewed is tainted with illegality, to go on disallowing the application for extension of time on the ground that the applicant had failed to account for delay thus departing from laid down principles of law that illegality in a decision is a sufficient cause for an extension of time."

In a bid to convince this court to grant leave, I was told by Anna Lugendo, learned counsel for the applicant in her written submission in chief, that this court, as per Hon Mwenegoha J., failed to exercise his discretion judiciously having misconstrued the settled position of the Court of Appeal on illegality as a ground of extension of time. **See for instance Attorney General v Tanzania Ports Authority**, Civil Application No. 87 of 2016. And was also shown how the applicant has made necessary steps in relation to the intended appeal.

I was shown that, by virtue of **Harban Haji Mosi and Another vs Omar Hilal Seif and Another**, Civil Reference No. 19 of 1997 (unreported) which was cited with approval in **British Broadcasting Corporation v Eric Sikujua Ng'maryo**, Civil Application No. 138 of 2004, it is in the discretion of this court to consider whether or not to grant leave. I was also shown things that the court ought to consider, which

include whether the intended appeal raises issues of general importance or novel points, or whether the proceedings reveal such disturbing features.

In his replying written submission, Mr Erick Simon, learned Counsel for the first respondent, attacked the application on the ground that the application was incompetent as it was supported by an affidavit which was sworn by Mr Edward Chua on his own knowledge while he did not represent the applicant in Land Case No. 237 of 2004.

I was in this respect told that paragraphs 2,3,4,5 and 6 of the affidavit supporting the application cannot be held to be matters within the knowledge of the applicant's advocate. I was referred to the case of **Khairoon Inderjit Jandu vs Bharat Purshattam Borkhataria and another** Misc Civil Application No. 308 of 2021; **Lalago Cotton Ginnery and Oil Mills Co. Ltd v Loand and Advances Realisation Trust (LART)**, Civil Application No. 80 of 2002, CAT; and **Adnan Kitwana Kondo and Three Others v National Housing Corporation**, Civil Application No. 208 of 2014, CAT.

The above point was countered by the counsel for the applicant that it was wrongly raised and argued without notice and should as such be disregarded. It was however further argued in reply that the argument by the counsel for the first respondent is misplaced as Mr. Edward Chua who

deponed the affidavit supporting the application represented the applicant in the application whose ruling is sought to be appealed against.

The above issue needs not detain me much in that it is clear in the record that Mr. Edward Chua represented the applicant in the proceedings whose ruling is sought to be appealed against. It is also in the affidavit as to how he acted for the applicant.

If I may add, even if paragraphs 2,3,4,5, and 6 are found to be offensive, I would only be inclined to expunge them from the affidavit. I am fortified that the remaining paragraphs, namely, paragraphs 1,7,8,9,10,11,12,13,14 and 15 of the affidavit would sufficiently sustain the application for they are not merely introductory or consequential.

I say so as I am mindful that the remaining paragraphs are not merely introductory or consequential. Rather, they provide prerequisite materials supporting the application for leave, and in particular the issue relating to illegality as a sufficient reason for extension of time clearly captured in paragraph 13, which the court of Appeal will have the opportunity to address if the sought leave would be granted.

In **Adnan Kitwana Kondo** (supra), the entire affidavit was held to be defective and felt short of supporting the Notice of motion as the remaining paragraphs were merely introductory or consequential. In the instant case, as already shown the position is different as the remaining

paragraphs very well support the application. In this connection, it was held in the case of **Rustamali Shivji Karim Merani v Kamal Buhan Joshi** Civil Application No. 80 of 2009 CAT that:

In Tanzania, after expunging the offensive paragraphs of an affidavit, courts are enjoined to examine whether the reminder of the affidavit can support the application. If the remaining parts are insufficient to support it, the application must also go, but a party may file a fresh affidavit.

In his further reply to the submission in chief by the applicant's learned counsel, the learned counsel for the first respondent disputed that the learned judge in his ruling did not admit that the judgment as per Mgetta J. was tainted with illegality. The learned counsel therefore contended that what the judge accepted was the principle about existence of illegality as a ground of extension whilst referring to the case of **Attorney General vs Tanzania Ports Authority**, Civil Application No. 87 of 2016. In this respect, he argued that there was nothing in the decision sought to be appealed against to be brought to the attention of the Court of Appeal.

In his rejoinder, the counsel for the applicant argued that the argument by the first respondent's counsel that the learned judge did not admit that there was an illegality and that illegality is not an issue to be determined by the Court of Appeal is in the mandate of the Court of Appeal when determining the intended appeal. Nonetheless, the court was shown in the ruling sought to be appealed from the place in the said ruling where the court, according to the learned counsel for the applicant, admitted the existence of the illegality.

From the rival submissions, it was not in dispute that the applicant has taken steps in compliance with the law to enable him to appeal against the ruling of this court if the leave of this court is granted. It was also not in dispute that the applicant's contention is on the existence of illegality in the decision of this court as per Mgetta J, whose principle applicable in granting extension was according to the applicant's counsel misconstrued by this court in Misc Land Application No.448 of 2021. The argument against the applicant's submission is that the court did not admit that there was illegality and hence the issue as raised by the counsel for the applicant is baseless.

I agree with the counsel for the applicant that it is not within the mandate of this court to determine whether or not the court admitted that there was indeed illegality in the decision, and if I may add whether it

properly interpreted the principle obtaining from **Tanzania Ports Authority case** (supra). Rather, it is within the mandate of this court to determine in its discretion whether the issue raised is of such importance that it deserves the attention of the Court of Appeal.

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 further guided by the principle obtaining in **British Broadcasting Corporation vs Eric Sikujua Ng'aro**, Civil Application No. 138 of 2004 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.

In view of the issue raised for the intended appeal, I am of the finding that the intended appeal is hinged on an issue of general importance that relates to the principle on illegality as a sufficient ground of appeal which again boils down to a party's right to be heard. The issue, in my considered opinion, presents an arguable appeal which is worthwhile for determination of the Court of Appeal. I am thus persuaded that this is a fit case for granting leave.

In the result and for the foregoing reasons, I would grant the application for leave as I hereby do so. Costs in the cause. It is so ordered.

DATED and DELIVERED at Dar es Salaam this 15th day of December,
2022




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B. S. Masoud
Judge