

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

MISC. LAND CASE APPLICATION NO. 562 OF 2021

(Originated from Misc. Land Application No. 242 of 2018 and 22 of 2020 of this court; Land Appeal No. 57 of 2017 of Mkuranga District Land and Housing Tribunal and Land Dispute No. 8 of 2017 of Mipeko Ward Tribunal)

OMARY BAKARI WAAKUWA APPLICANT

VERSUS

LEONARD ATHANAS KASAMBALA RESPONDENT

Date of last Hearing: 07/03/2022

Date of Ruling: 28/04/2022

RULING

I. ARUFANI, J

The applicant, Omary Bakari Waakuwa has moved this court under the provisions of section 5 (1) (c) of the Appellate Jurisdiction Act, Cap 141 [R.E 2019] and section 47 (1), (2) and (3) of the Land Disputes Courts Act Cap 216 [R.E 2019] urging the court to grant him leave to appeal to the Court of Appeal and certificate on points of law to be considered by the Court of Appeal in respect of the ruling made by this court (Hon. Maghimbi, J) in Miscellaneous Land Case Application No. 242 of 2018 delivered on 10th July 2019. The application is supported by an affidavit affirmed by the applicant and it was opposed by a counter affidavit sworn by the respondent.

The court has found it is pertinent to start with a brief background of the application for the purpose of making the ruling comprehensible. The court has found that, the affidavit supporting the application shows the respondent filed Land Dispute No. 8 of 2017 before Mipeko Ward Tribunal claiming the applicant had trespass into his land. The dispute was decided against the applicant and prompted him to institute Land Appeal No. 57 of 2017 before Mkuranga District Land and Housing Tribunal (hereinafter referred as the District Tribunal) without success. The applicant was aggrieved by the decision of the District Tribunal and as he delayed to appeal to the High Court within the time prescribed by the law, he applied for extension of time to appeal out of time through Miscellaneous Land Application No. 242 of 2018 but the application failed to succeed.

As he is still aggrieved by the ruling made by this court, he wants now to appeal to the Court of Appeal against the ruling of this court which denied him extension of time to appeal to this court out of time. However, the applicant delayed to lodge his notice of appeal in the court and he also delayed to apply for leave to appeal to the Court of Appeal. That caused him to file Miscellaneous Land Application No. 22 of 2020 in this court seeking for leave to lodge the notice of appeal out of time and filing an application for leave and certificate on points of law out of time. The

mentioned application was presided over by Hon. Msafiri, J and after being granted the order he was seeking from the court he instituted the present application in the court.

When the present application came for hearing, the parties appeared in the court in person and argued the application orally. The applicant told the court briefly that, he is praying for leave of the court to appeal to the Court of Appeal against the decision made by Honourable Msafiri, J. In his reply the respondent told the court that, the applicant has not stated the grounds he intends to be considered by the Court of Appeal which will move the Court of Appeal to reverse the decision made by this court and the District Tribunal. In his rejoinder the applicant prayed the court to rely on the documents he has filed in this court to grant his application.

After considering the submissions from the parties and going through the respective affidavit and counter affidavit, the court has found the issue to determine in this application is whether the applicant has managed to satisfy the court he deserves to be granted the order is seeking from this court. The court has found proper to state at this juncture that, although the applicant told the court the decision he intends to challenge if he will be granted the orders is seeking from this court is the decision made by Hon. Msafiri, J but the decision intended to be

challenged in the intended appeal as deposed in the affidavit supporting the application is the decision made by Hon. Maghimbi, J.

The court has come to the above finding after seeing the application heard and decided by Hon. Msafiri, J was the application whereby the applicant was seeking for leave to file the present application in the court and the application succeeded that is why he has managed to file the present application in the court. Nevertheless, the court has found the assertion by the applicant that he intends to appeal against the decision made by Hon. Msafiri, J instead of Maghimbi, J is just an oversight and it was not done intentionally. The court has also been of the view that, the said over sight can be ignored as there is no any indication that it has caused any injustice to the respondent.

The court has also found that, although the applicant is seeking for omnibus orders of leave to appeal and certificate on points of law to be considered by the Court of Appeal but the impugned decision does not require certification of point of law to be considered by the Court of Appeal because it is a decision given by this court in its original jurisdiction. It is the decision filed in this court not to challenge the decision given by the tribunals but to seek for extension of time to lodge in the court an appeal against the decision made by the District Tribunal in its appellate jurisdiction.

That means the decision the applicant wants to appeal against is not the decision arising from the decision made by the District Tribunal and originating from the Ward Tribunal which would have required certification of point of law to be considered and determined by the Court of Appeal as provided under section 47 (3) of the Land Disputes Courts Act. To be more precise the cited provision of the law which provides for requirement of certificate on points of law for matters originating from the Ward Tribunal reads as follows: -

"Where an appeal to the Court of Appeal originates from the Ward Tribunal, the appellant shall be required to seek for the Certificate from the High Court certifying that there is point of law involved in the appeal".

The wording of the above quoted provision of the law shows that, the appeal which need certification of point of law is the appeal against the decision of the High Court which is arising from the decision the District Tribunal in its appellate jurisdiction and is originating from the Ward Tribunal. As there is no appeal originating from the Ward Tribunal which has been filed in this court and heard and decided by this court, the applicant is not required to seek from the High Court certification of points of law to be considered and determined by the Court of Appeal. To the view of this court the only order which the applicant is required to

seek from this court as provided under section 5 (1) (c) of the Appellate Jurisdiction Act, is leave to appeal to the Court of Appeal.

The court has also arrived to the above view after seeing that, the appeal the applicant intends to lodge in the Court of Appeal is not against the decree entered by the High Court in its original jurisdiction which under section 47 (1) of the Land Disputes Courts Act and section 5 (1) (a) of the Appellate Jurisdiction Act the applicant would have been allowed to appeal without leave of the court. To the contrary the court has found the decision intended to be challenged in the intended appeal is the order of the court arising from the ruling of the court when determining the application for extension of time to appeal to the High Court out of time. Under that circumstances the applicant is required to seek for only leave to appeal to the Court of Appeal under section 5 (1) (c) of the Appellate Jurisdiction Act which states that as follows:-

"5 (1) In civil proceedings, except where any other written law for the time being in force provides otherwise, an appeal shall lie to the Court of Appeal-

*(c) with leave of the High Court or of the Court of Appeal, against every other decree, order, judgment, **decision or finding of the High Court.**"*[Emphasis added].

While being guided by the above quoted provision of the law the court has found the decision which the applicant wants to appeal against

is not a decree of the court issued in its original jurisdiction which as provided under section 5 (1) (a) of the Appellate Jurisdiction Act he would have been allowed to appeal to the Court of Appeal without leave of this court or the Court of Appeal. The court has also found that the order the applicant wants to appeal against is not an order emanating from the orders provided under section 5 (1) (b) of the Appellate Jurisdiction Act which would have also allowed him to appeal to the Court of Appeal without leave of this court or the Court of Appeal.

Therefore, as the applicant wants to appeal against the ruling of this court which refused to allow him to lodge in this court his appeal from the decision of the District Tribunal out of time, that decision is falling under the category of other decision or finding of the court which are governed by section 5 (1) (c) of the Appellate Jurisdiction Act quoted hereinabove. In the premises the court has found the applicant is required by section 5 (1) (c) of the Appellate Jurisdiction Act to apply for leave to appeal to the Court of Appeal. That makes the court to find the application for certification of point of law to be determined by the Court of Appeal filed in this court by the applicant is superfluous.

As the application for leave to appeal to the Court of Appeal is correctly made in the application filed in this court by the applicant the court has found proper and justifiable to ignore the application for

certificate on points of law the applicant is seeking from this court. To the contrary the court will continue with determination of the prayer of leave to appeal to the Court of Appeal which is a requirement provided under section 5 (1) (c) of the Appellate Jurisdiction Act.

It is a trite law as stated in numerous cases decided by this court and the Court of Appeal of Tanzania that, in an application for leave to appeal to the Court of Appeal the court is required to be satisfied the grounds of appeal intended to be taken to the Court of Appeal show prima facie case or arguable appeal before granting the application. The above stated position of the law can be seen in the case of **British Broadcasting Corporation V. Eric Sikujua Ngyimaryo**, Civil Application No. 138 of 2004, CAT at DSM (unreported) cited with approval in the case of **Hamis Mdida and Another V. The Registered Trustees of Islamic Foundation**, CAT at Tabora, Civil Appeal No. 232 of 2018, (unreported) cited and attached in the submission of the respondent where the Court of Appeal stated that:-

"As a matter of general principle, leave to appeal will be granted where the grounds of appeal raise issues of general importance or a novel point of law or where the grounds show a prima facie case or arguable appeal."

As alluded earlier in this ruling the applicant stated in his submission that he is praying for leave of the court to appeal to the Court of Appeal to challenge the decision of this court which denied him extension of time to lodge in this court his appeal against the decision of the District Tribunal. The court has found that, although the respondent stated the applicant has not stated the grounds he intends to be considered and determined by the Court of Appeal but the court has found the applicant has stated at paragraph 8 of his affidavit as follows:-

"That, I intended to appeal to the Court of Appeal against the whole decision delivered erroneously by Hon. Madam Judge S. M. Maghimbi in Misc. Land Application No. 242/2018, who untouched and oversighted other sufficient and suffice grounds for extension of time of which make the intended appeal to the Court of Appeal to be arguable and stand overwhelming chances of success for that failure of the trial judge to exercise her discretionary powers vested on her judicially in granting the extension of time to the applicant."

The court has found the applicant stated at paragraph 6 of his affidavit that, the reason which caused him to delay to lodge his appeal in the court with the time which was untouched and oversighted by the trial judge is sickness and financial constraints. The court has found the trial judge stated in the ruling of the court the reason advanced by the applicant as the cause for his delay to appeal within the time is delay to

be supplied with the copies of judgment and decree which was found was not good cause for granting extension of time to appeal out of time.

The court has found the applicant has deposed further at paragraph 9 of his affidavit the other reasons which were oversights and untouched by the trial judge were based on the lack of locus standi of the respondent, violation of the principle of res judicata and illegality apparent on the face of judgment of the District Tribunal which was not duly constituted at the time of giving its decision. The above stated reasons caused the court to find they are of sufficient importance to move the court to grant the applicant the order of leave to appeal to the Court of Appeal is seeking from this court.

In the premises the application of the applicant seeking for leave to appeal to the Court of Appeal is hereby granted and the applicant is granted leave to appeal to the Court of Appeal against the ruling of this court delivered in Misc. Land Application No. 242 of 2018. After taking into consideration the nature of the application the court has found proper and justifiable to make no order as to costs. It is so ordered

Dated at Dar es Salaam this 28th day of April, 2022



I. Arufani

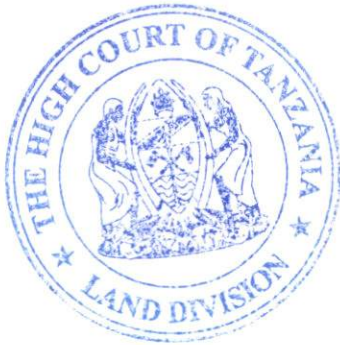
I. Arufani

JUDGE

28/04/2022

Court:

Ruling delivered today 28th day of April, 2022 in the presence of both applicant and the respondent in person and right of appeal to the Court of Appeal is fully explained.



I. Arufani

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JUDGE

28/04/2022