

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

MISC. LAND APPLICATION NO. 433 OF 2021

(Arising from Land Revision No. 37 of 2020 of the High Court Land Division)

CATHOLIC ARCHDIOCESE OF DAR ES SALAAM 1ST APPLICANT

ST. ANTHONY SECONDARY SCHOOL 2ND APPLICANT

VERSUS

**LATIFA SAID SAPHY (As Administratrix of
the late SHUKURU SAID SAPHY) RESPONDENT**

Date of last Order: 02/05/2022

Date of Ruling: 17/06/2022

RULING.

I. ARUFANI, J

This ruling is for the application filed in this court by the applicants seeking for leave of the court to appeal to the Court of Appeal against the decision of this court delivered in Land Revision No. 37 of 2021 dated 22nd July, 2021. The application is made under section 47 (2) of the Land Disputes Courts Act, Cap 216 R.E 2019 (hereinafter referred as LDCA) and is supported by an affidavit sworn by Mr. Robert Rutaihwa, advocate for the applicants. The application is opposed by counter affidavit sworn by Mr. Emily Laus Christant, advocate for the respondent.

For the purpose of being able to appreciate the nature of the application the court has found it is proper to start with a brief background

of the matter as can be deduced from the record of the matter. The record of the matters shows the respondent in the present application filed Land Application No. 18 of 2020 before the District Land and Housing Tribunal of Tememe at Tememe (hereinafter referred as the tribunal) against the applicants. After the applicants being served with the application, they raised several points of preliminary objection attacking the application of the respondent. The raised points of preliminary objection were overruled in their entirety and the respondent was ordered to amend her pleadings. The applicants were aggrieved by the decision of the tribunal and filed in this court Land Revision No. 37 of 2020 to challenge the decision and order of the tribunal.

After the respondent being served with the documents of the Land Revision No. 37 of 2020, she raised a point of preliminary objection that the application for revision filed in this court by the applicants is misconceived and unmaintainable in law as it was based on interlocutory orders contrary to section 79 (2) of the Civil Procedure Code Cap 33, R.E 2019 (hereinafter referred as the CPC). After hearing the parties on the raised point of preliminary objection the court upheld the point of preliminary objection raised by the respondent and dismissed the application with costs. The applicants were aggrieved by the decision of the court and now they wish to appeal to the Court of Appeal against the decision of this court.

When the present application came for hearing the applicants were represented by Mr. Robert Rutaihwa, learned advocate and the respondent was represented by Mr. Emily Laus Christant, learned advocate. The counsel for the parties were ordered by the court to argue the application by way of written submission. The counsel for the parties were also ordered to address the court in their submission whether the court has properly been moved under the provision of the law cited in the chamber summons.

The counsel for the applicants stated in his submission in respect of the point of law raised by the court *suo moto* that, the application was properly and correctly made under section 47 (2) of the LDCA. He stated that, section 5 (1) of the Appellate Jurisdiction Act, Cap 141 R.E 2019 (hereinafter referred as AJA) is not applicable in the matter at hand. He argued that, although both provisions of the law address one issue of leave but they apply in different circumstances. He stated that where the specific law provides for that matter, then section 5 of the AJA cannot be invoked in the concerned matter.

He argued that, section 47 (2) of the LDCA deals with appeals to the Court of Appeal in matters which the High Court was exercising its appellate or revisional jurisdiction. He submitted that, that shows the matter at hand falls squarely within the parameters of the cited provision of the law. He argued that the court is reluctant to invoke the two

provisions of the laws simultaneously especially when the specific law is certainly clear and covering a concerned circumstance.

To support his argument, he referred the court to the case of **Dorina N. Mkumwa V. Edwin David Hamis**, Civil Appeal No. 53 of 2017, CAT at Mwanza and **Aus Seleman V. Dalali Jalala**, Misc. Land Application No. 32 of 2019, HC at Shinyinga (both unreported). He argued that, it was stated in the latter decision that, citation of section 5 (1) of the AJA along with section 47 (2) of the LDCA was improperly cited as it is inapplicable in land matters. He submitted that, basing on what he has submitted hereinabove he is settled that, the court is vested with jurisdiction and was properly moved under the provision of section 47 (2) of the LDCA to entertain the matter.

Back to the merit of the application the counsel for the applicant argued that, the application before the court is seeking for leave to appeal to the Court of Appeal against the ruling of the court which found the revisional proceedings filed in the court by the applicants is interlocutory. He stated that the applicants are aggrieved by the ruling of the court and they want to appeal to the Court of Appeal. He argued that as the appeal is not automatic, they are now seeking for leave of the court to appeal to the Court of Appeal as required by the law.

He submitted that, it has been clearly demonstrated under paragraphs 6 and 7 of the affidavit supporting the application that, the

appeal raises novel points or issues or fundamental points worth consideration by the Court of Appeal. He argued that, there is a dichotomy behind the application of section 43 (1) and (2) of the LDCA and section 79 (1) and (2) of the CPC on the aspect of revision. He submitted that the former provision does not address the question of interlocutory decision or order while the latter provision addresses the same under subsection 2 of the cited provision of section 79 of the CPC. He argued that constitutes a novel point which when argued will address even the framers of the two provisions of the law on how the same should be reconciled.

He argued that, among the issues raised in the revisional proceedings was the issue of limitation which ordinarily goes to the root of the matter to vest the court or tribunal with jurisdiction. He argued that the applicant wishes to ask the Court of Appeal whether or not the question of jurisdiction of the court can be challenged merely on the argument and finding that the matter is interlocutory. He stated that, another issue intended to be taken to the Court of Appeal is whether when the rights of an individual or litigant have been extinguished and the challenge is brought on the basis of the enabling provisions of the law as cited that section 47 and 49 of the Land Act, Cap 113, R.E 2019 the same can be overruled on the basis of the same being interlocutory.

He referred the court to the case of **British Broadcasting Corporation V. Erick Sikujua Ng'imaryo**, Civil Application No. 138 of

2004, CAT at DSM (unreported) where it was stated leave is grantable where the grounds of appeal raise issues of general importance or that the proceedings as a whole reveal such disturbing features as to require the guidance of the Court of Appeal. He stated this is a fit case where leave has to be granted for the applicants to get the guidance of the Court of Appeal and prayed the application to be granted with costs.

In reply the counsel for the respondent stated in his submission in respect of the issue raised by the court *suo moto* that, the court has not been properly moved because section 47 (2) of the LDCA is required to be read together with section 5 (1) (c) of the AJA. He stated that, section 47 (2) of the LDCA imposes leave as a precondition for an aggrieved person to appeal to the Court of Appeal in matters concerning land. He stated that, section 5 (1) (c) of the AJA contains the list of decisions from which appeal lies to the Court of Appeal with leave of the High Court as a precondition for a person aggrieved to appeal to the Court of Appeal.

The counsel for the respondent argued that, basing on the above discussed provisions of the law it was improper for the applicants to file application in the court seeking for leave of the High court to appeal to the Court of Appeal by citing only section 47 (2) of the LDCA without section 5 (1) (c) of the AJA. He stated that, the argument by the counsel for the applicants that, where there is a specific law providing for a certain

matter section 5 of the AJA does not apply is misconception of the cited provision of section 5 of the AJA.

He submitted that, section 5 of the AJA is applicable in the case at hand because it lists down the decisions and orders of the High Court which are subject to appeal to the Court of Appeal. He argued that the case of **Dorina N. Mkumwa** (Supra) cited by the counsel for the applicant in his submission is distinguishable from the case at hand as it was issued basing on section 47 (2) of the former Land Disputes Courts Act, Cap 216 R.E 2002.

He argued further, the above cited case is also distinguishable from the case at hand because it was dealing with matters originating from Ward Tribunals where certificate on point of law is required from the High Court to appeal to the Court of Appeal. He submitted that as the applicant has not cited section 5 (1) (c) of the AJA in the chamber summons then as stated in the case of **Edward Bachwa & Another V. The AG & Another**, Civil Application No. 128 of 2006, CAT at DSM (unreported) the application is incompetent.

He argued in relation to the merit of the application that, in the application of this nature leave is not automatic. It is on the discretion of the court whether to grant or not and the stated discretion must be exercised judiciously depending on the materials before the court. He referred the court to the case of **British Broadcasting Corporation V.**

Erick Sikujua Ng'imaryo, Civil Application No. 133 of 2004, CAT (unreported) where it was stated the applicant is required to demonstrate to the court the intended appeal has some merits whether factual or legal, meaning that there is arguable appeal with chances of success.

He also referred the court to the case of **Wambele Mtimwa Shamte V. Asha Juma**, Civil Application No. 45 of 1999 CAT, (Unreported) where it was stated that, leave to appeal to the Court of Appeal will only be granted if the intended appeal has some merits whether factual or legal. He submitted that, the issue the court is required to determine in this application is whether the grounds advanced by the counsel for the applicants have prima facie or arguable appeal or there is a novel issue to be determined by the Court of Appeal.

He submitted further that, the argument raised at paragraph 7 of the affidavit supporting the application that there is a dichotomy behind the application of the provision of section 43 (1) and (2) of the LDCA and section 79 (1) and (2) of the CPC is not a ground raising a novel issue to be determined by the Court of Appeal. He submitted that, although the counsel for the applicant stated section 79 (1) and (2) of the CPC is not applicable in the application at hand but to their view the cited provision of the law is applicable in the application at hand.

He stated that, as there is no provision of the law in the LDCA covering the issue of appeal against interlocutory orders which means

there is a lacuna, then section 79 (1) and (2) of the CPC is applicable in the matter at hand. He argued in relation to the ground of issue of limitation of time which asked whether jurisdiction of the court to entertain a matter cannot be challenged merely on the argument that the matter is interlocutory is not a novel point worth to be determined by the Court of Appeal.

He argued that, bringing an application for revision after the preliminary objection on jurisdiction basing on limitation of time being overruled was improper. He stated the applicants were required to wait for the final determination of the application and if they would have been aggrieved by the decision, they would have used that point as a ground of appeal and not to apply for revision of an interlocutory decision.

He submitted that, the objection based on section 47 and 49 of the Land Act would have been overruled on ground of being interlocutory and added that is not a novel point worth to be taken to the Court of Appeal. He concluded his submission by stating the proposed grounds lacks merit and are vexatious, frivolous and only intended to waste the time of the court and prayed the application be dismissed with costs. In his rejoinder the counsel for the applicant reiterated what he argued in his submission in chief hence there is no reason to repeat what has found already been covered in the submission in chief of the applicant.

Having carefully considered the rival submission filed in this court by the counsel for the parties the court has found the main issue to determine in the application at hand is whether the applicants deserve to be granted leave to appeal to the Court of Appeal they are seeking from this court. Before dealing with the stated issue the court has found proper to start with the issue of propriety of the provision of the law upon which the application is made which was raised by the court *suo moto*.

The court raised the said issue after seeing the decision which the applicants are seeking for leave to appeal against was made on point of preliminary objection raised in the application for revision filed in this court by the applicants. As the submission of the counsel for the parties in relation to the said point is centred on two provisions of the law which are section 47 (2) of the LDCA and section 5 (1) (c) of the AJA it is to the view of this court proper to have a look on what is provided under the said provision of the law so as to be able to determine whether the application is made under correct provision of the law or not. Section 47 (2) of the LDCA read as follows: -

"A person who is aggrieved by the decision of the High Court in the exercise of its revisional or appellate jurisdiction may, with leave of the High Court or Court of Appeal, appeal to the Court of Appeal."

Section 5 (1) (c) of the AJA read 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 the leave of the High Court or of the Court of Appeal, against every other decree, order, judgment, decision or finding of the High Court."

From the wording of the above quoted provisions of the law it is crystal clear that section 47 (2) of the LDCA is providing for requirement of leave to appeal to the Court of Appeal against the decision made by the High Court in land matters while exercising its revisional or appellate jurisdiction. As for section 5 (1) (c) of the AJA the court has found its wording is very clear that it is providing for requirement of leave to appeal to the Court of Appeal against decree, order, judgment, decision or finding made by the High Court while not exercising its original jurisdiction and where there is no other written law for the time being in force providing otherwise.

That being the position of the law the court has found that, as the decision which the applicant is seeking for leave to appeal to the Court of Appeal was made by the court while exercising its revisional jurisdiction then as rightly argued by the counsel for the applicant section 47 (2) of the LDCA is an appropriate provision of the law to move the court to entertain the order the applicant is seeking from the court. The court has found there is no need of invoking section 5 (1) (c) of the AJA in the

application at hand because there is a specific written law for the time being governing appeal to the Court of Appeal from the decision of the High Court when exercising its revisional jurisdiction in land matters which is section 47 (2) of the LDCA.

In the premises the court has agreed with the counsel for the applicant that the application is made under the correct and proper provision of the law which is section 47 (2) of the LDCA which empowers the court to grant leave to appeal to the Court of Appeal against the decision of this court made while exercising its revisional jurisdiction. The court has found there was no need of citing section 47 (2) of the LDCA together with section 5 (1) (c) of the AJA in the application because section 47 (2) is sufficient enough to move the court to entertain the application at hand. Therefore, the court has found the point it has raised was wrongly raised as the application is made under the correct provision of the law.

Back to the merit of the application, the court has found it is a well settled law that, appeal against a decision made by a lower court or tribunal is a constitutional right enshrined under Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977 as amended from time to time. However, as rightly argued by the counsel for the applicants the stated right is not automatic in some of the decisions and orders and sometimes when a case has reached a certain stage. In some matters like

the one at hand the law requires leave to appeal to be sought from the court before lodging appeal in the Court of Appeal.

As stated in number of cases the court is vested with discretionary power to grant or refuse to grant leave to appeal to the Court of Appeal. However, as rightly stated by the counsel for the applicant the stated discretion must be exercised judiciously and in doing so the court is required to act on materials facts before the court. The court is required to see the grounds moving the applicant to appeal to the Court of Appeal are vividly appearing in the proceedings and decision sought to be impugned. The above view of this court is getting support from the case of **British Broadcasting Corporation** (supra) where the Court of Appeal stated that: -

*"Leave to appeal is not automatic. It is within the discretion of the court to grant or refuse leave. The discretion must, however judiciously exercised and on the materials before the court. As a matter of general principle, leave to appeal will be granted where the grounds of appeal raise issue of general importance or a novel point of law or where the grounds show a prima facie or arguable appeal, (see **Buckle V. Holmes** (1926) All ER Rep. 90 at page 91). However, where the grounds of appeal are frivolous, vexatious, or useless or hypothetical, no leave will be granted."*

It was also stated by the Court of Appeal in the case of **Harban Haji Mosi & Another V. Omar Hilal Seif & Another**, Civil Reference No. 19 of 1997 (unreported) that: -

"Leave is grantable where the proposed appeal stands reasonable chances of success or where, but not necessarily the proceedings as a whole reveals such disturbing feature as to require the guidance of the Court of Appeal. The purpose of the provision is therefore to spare the court the spectre of unmeriting matters and to enable it to give adequate attention to cases of true public importance"

While being guided by the position of the law stated in the cases quoted hereinabove the court has found it is undisputed facts that, the applicants were praying the court in Land Revision No. 37 of 2020 to revise the ruling and order made by the tribunal in the Application No. 18 of 2020. The tribunal overruled the points of preliminary objection raised by the applicants in the mentioned land application and allowed the respondent to amend the applicant and thereafter to proceed with hearing of the application on merit.

It is also undisputed fact that the Land Revision No. 37 of 2020 filed in this court by the applicant seeking to revise the above stated decision of the tribunal was dismissed after the respondent raised an objection that the application for revision was misconceived and unmaintainable in law for being based on interlocutory decision. The dispute as stated in the

issue framed earlier in this ruling is whether the applicant deserve to be granted leave to appeal to the Court of Appeal against the impugned decision of this court.

The court has found that, although the counsel for the applicant stated the applicant has deposed at paragraph 6 of the affidavit supporting the appeal that he has already started the initial steps of appealing to the Court of Appeal. He stated the applicant has already lodged in the court a notice of appeal to appeal to the Court of Appeal and he has written to the court a letter of requesting for certified copies of proceedings, ruling and drawn order for appeal process. The court has found those steps are not enough to move the court to grant the applicants leave they are seeking from the court.

The court has found as stated in the cases of **British Broadcasting Corporation** and **Harban Haji Mosi** cited earlier in this ruling the applicant is required to satisfy the court there is an arguable ground of appeal worth to be considered by the Court of Appeal before the leave is granted. The court has found the counsel for the applicants has stated in his submission the applicants have listed at paragraph 7 of his affidavit the grounds which raises novel and important issues worth to be taken to the Court of Appeal for determination by the Court of Appeal.

The court has gone through the proposed issues intended to be determined by the Court of Appeal and after going through the submission filed in this court by both sides and the record of the matter it has found that, although it is true that the application for this court to revise decision made on land matters by the tribunal was dismissed, which means the application for revision was determined to its finality but there is no justifiable reason for the court to grant the applicant leave to appeal to the Court of Appeal. The court has come to the above finding after seeing the decision which the applicant intends to appeal against was arrived by the court after the court seeing the application for revision filed in the court by the applicants was against an interlocutory decision made by the tribunal which as provided under section 79 (2) of the CPC is not revisable.

The court has found the counsel for the applicant stated the applicants want to challenge the decision of this court in the Court of Appeal on the ground that, section 79 (2) of the CPC could have not been used to find the application for revision of the decision of the tribunal could have not been revised because it was made against interlocutory decision while the application for revision was made under section 43 of the LDCA which does not bar application for revision against interlocutory decision of the tribunal.

The court has been of the view that, it is true that section 43 of the LDCA is not barring application for revision to be made against an

interlocutory decision or order issued by the tribunal. However, it cannot be said a person aggrieved by decision of the High Court refusing to entertain application for revision arising from an interlocutory decision or order of the tribunal can be granted leave to appeal to the Court of Appeal against the decision of the High Court. The court has come to the stated finding after being of the view that, when it comes to an issue of application for revision of an interlocutory decision or order, section 43 of the LDCA is supposed to be read together with section 79 (2) of the CPC which bars application for revision on interlocutory decision or order.

The court has come to the stated view after seeing the position of the law stated under section 79 (2) of the CPC is similar to the position of the law stated under section 5 (2) (d) of the AJA which bars application for revision or appeal to be made to the Court of Appeal on interlocutory decision or order made by the High Court in civil matters. If application for revision or appeal on interlocutory decision or order made in other civil matters are prohibited by law, the court has failed to see any reason which can make it to say application for revision of interlocutory decision or order made by the tribunal on land matters can be made to this court so as to find the applicant is entitled to be granted leave to appeal to the Court of Appeal against the decision of this court which refused to entertain an application for revision of an interlocutory decision or order made by the tribunal.

To the view of this court there is no justifiable reason for the court to exercise its discretionary power to grant leave to the applicant to appeal to the Court of Appeal on decision which its genesis is an interlocutory decision made by the District Tribunal which as stated hereinabove is prohibited by law to be revised by this court. The court has found to grant leave to the applicant to appeal to the Court of Appeal is to continue to delay the Application No. 18 of 2020 which is still pending before the tribunal awaiting the application filed in this court by the applicants to be determined.

The court has also come to the above view after seeing that, the issues the applicants wanted to be revised by this court which one of them was about jurisdiction of the tribunal to entertain the application can be taken as grounds of challenging the decision which will be arrived by the tribunal after the application pending before the tribunal being determined to its finality. In the premises the court has found to grant the applicants leave to appeal to the Court of Appeal in the circumstances of the application at hand is to go contrary to the purpose of leave to appeal to the Court of Appeal which as stated in the case of **Harban Haji Mosi** (supra) is to spare the Court of Appeal with the spectre of unmeriting matters and to enable it to give adequate attention to cases of true public importance.

It is because of the above stated reasons the court has found the applicants have not managed to satisfy the court there is any novel or important point of law or arguable ground warranting the court to exercise its discretionary power to grant them leave to appeal to the Court of appeal against the impugned decision of this court. Consequently, the application is hereby dismissed in its entirety and the costs to follow the event.

Dated at Dar es Salaam this 17th day of June, 2022



Court:

I. Arufani

I. Arufani

JUDGE

17/06/2022

Ruling delivered today 17th day of June, 2022 in the absence of the applicants and in the presence of Mr. Emily Laus Christant, learned advocate for the respondent. Right of appeal to the Court of Appeal is fully explained.



I. Arufani

I. Arufani

JUDGE

17/06/2022