

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

MISC. LAND APPLICATION NO.151 OF 2021

(Originating from Land Appeal No.72 of 2020)

SWEETBERT MATHIAS KUTAGA (As duly constituted Attorney of
Alizara Kassamali Rajani) **APPLICANT**

VERSUS

EUGENIA RUTATORA.....**1ST RESPONDENT**

WILSON MUJWAHUZI RUTATORA.....**2ND RESPONDENT**

RAVJI CONSTRUCTION LIMITED.....**3RD**

RESPONDENT

JOSHUA E. MWAITUKA (t/a Fosters Auctioneers
& General Traders)**4TH RESPONDENT**

Date of Last Order: 24.02.2022

Date of Ruling: 21.03.2022

RULING

V.L. MAKANI, J

The applicant SWEETBERT MATHIAS KUTAGA is seeking leave of this court to appeal to the Court of Appeal of Tanzania against the decision of this court in Land Case No.72 of 2020. The application is under section 5(1) (c) of The Appellate Jurisdiction Act CAP 141 RE 2019 RE 2019 and is supported by the affidavit sworn by Elisa Abel Msuya, Advocate for the applicant. The 1st, 2nd and 3rd respondents filed their counter affidavits in opposition.

The matter proceeded by way of written submissions. Mr. Elisa Abel Msuya drew and filed submissions on behalf of the applicant. Mr. Philemon Mutakyamirwa, Advocate drew and filed submissions in reply on behalf of the 1st and 2nd respondents; while Mr. Thomas J. Massawe, Advocate drew and filed submissions in reply on behalf of the 3rd respondent.

Submitting in support of the application Mr. Msuya gave a brief background of the matter and added that the points of law which the applicant seeks to invite the Court of Appeal to decide upon are contained in paragraph 4(i) to (iv) of his affidavit. That they all constitute sufficient points of importance requiring determination by the Court of Appeal of Tanzania. He said that the applicant seeks to challenge the holding of this Court which qualified the applicant's rights to file suit contrary to Order XXI rule 62 of the Civil Procedure Code, CAP 33 RE 2019 (the **CPC**).

That the second ground is mix of law and facts and relates to the holding of this court that the applicant's ownership rights over Plot No.105 Mbezi Light Industrial Area – CT No.44521 (the **suit property**) were extinguished after a Consent Decree was entered.

That the Court of Appeal shall be invited to look into the contents of the Consent Decree which was somewhat conditional and its fulfilments which are mandatory before rights of the parties can be executed.

He said the third ground is the issue of *locus standi*. At what point a party loses his rights to pursue a matter in court. Whether a party loses his rights because he merely signed a Consent Settlement Decree.

In the fourth ground, he said, the Court of Appeal shall be invited to decide on issues of law and facts. Whether the applicant's ownership rights over the suit property can be determined without filing a suit (fresh suit) and hearing parties on merit especially because applicant's ownership on the suit property and decree in Land Case No.95 of 2014 is now taken away in judgment and decree in Land Case No.141 of 2012 in which the 1st and 2nd respondents are owners of 2 ½ unsurvey piece of land located at Bagamoyo Salasala area. He said it shall be contended on appeal that section 38 cannot be invoked as a forum of deliberating and deciding on ownership of rights.

Counsel said that the last issue relates to fraud and misperception. That is whether proof thereof could be met and discharged by merely the filing of affidavits.

To support his argument Mr. Msuya relied on the cases of **Wambula Mtumwa Chante vs Asha June, Civil Application No. 45 of 1999 (CAT)** (unreported), **Gaudenzia Mzungu vs, IDM Mzumbe, Civil Case Application No. 94 of 1999 (CAT)** (unreported) and **Citbank Tanzania Limited vs. Tanzania Telecommunication Company Limited And 3 Others, Misc. Civil Case No.6 of 2003 (HC-Commercial Division)** (unreported). He prayed for the application to be granted and the costs be in the course.

In reply, Mr. Mutakyamirwa prayed to adopt the contents of his counter-affidavit. He said that there is no dispute that vide Land Case No.95 of 2014 the applicant lodged the claim against the 3rd respondent claiming for the payment of the remaining purchase price of the suit property. That on 24/02/2017 the decree on the Deed of Settlement was executed. That the decree did not compel the 3rd respondent to affect the balance of purchase price to the applicant. That if at all there was avoidance of the terms of Deed of Settlement

then the applicant was expected to commence execution proceedings against the 3rd respondent on payment of the purchase price. That since entering into the Deed of Settlement no any claim has been brought by the applicant against the 3rd respondent. That the applicant had relinquished her interest of ownership over the suit property. That the Land Case No.72 of 2020 was an abuse of the court process. That upon relinquishing her right of ownership in Land Case No.95 of 2014, the applicant was barred to institute the case against the 3rd respondent and others. He therefore insisted that this application wastes the courts time and relied in the case of **Efficient International Freight Ltd & Another vs. Office Du The Du Burundi, Civil application No.23 of 2005 (CAT)** (unreported). He insisted that the application lacks merit and the same should be struck out with costs.

For the 3rd respondent, Mr. Thomas said that the major part of the applicant's submission is based on historical background of the dispute and summary of the judgments at the High Court of Tanzania-Land Division. He said that the main issue in this application is that the applicant is looking for leave to appeal to the Court of Appeal against the order of this court to strike out the land Case No.72 of

2020 on lack of *locus standi* to claim the property which no longer belong to him. That as rightly stated by the applicant in his submission that the dispute between the applicant and the 3rd respondent was already determined in Land Case No.95 of 2014 and the decree had already been issued. He said that reaching into settlement and decree to that effect means that the issue of ownership was already concluded upon satisfaction of the decree by payment of consideration. He said that reliefs in Land Case No.95 of 2014 and 72 of 2020 do not have any difference because in one hand the applicant was requesting the court to avoid the Deed of Settlement which facilitated the transfer of the land to the 3rd respondent.

On the other hand the applicant is claiming for ownership of the same land with CT No.44512 in respect of Plot No.105 Mbezi area Dar es Salaam. That this court is deliberating on Land Case No.72 of 2020 right noticed that there is existing decree of this court which was never challenged to the date of filing land case No.72 of 2020. Counsel said that four points of law alleged by the applicant in paragraph 4 (i) to (iv) of affidavit can be summarized on whether the applicant can still maintain the claim over the title on the land after disposition of the same to another person. That the 3rd respondent

did not consider that alone because other points which are objection proceedings and ownership were already determined by courts of competent jurisdiction. He further said that the issue of fraud and misrepresentation raised in the submission is without any explanation. On the case of **CITI Bank** (supra) cited by the applicant, he said it was more useful to the respondent than the applicant himself. He prayed for the application to be dismissed with costs.

In rejoinder, Mr. Msuya reiterated his main submission.

The guiding principle in grant of application for leave to appeal to the Court of Appeal is found in the case of **Harban Haji Mosi & Another vs. Omar Hilal Seif & Another, Civil Reference No. 19 of 1997 (CAT)** (unreported) where it was held 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 un-meriting matters and to enable it to give adequate attention to cases of true public importance."

Also, in the case of **British Broadcasting Cooperation vs. Erick Sikujua Ng'maryo Civil Application No.138 of 2004 (CAT-DSM)** (unreported) it was held:

*"Needless to say, leave to appeal is not automatic. It is within the discretion of the Court to grant or refuse leave. The discretion must, however, be judiciously exercised on the materials before the court. 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 or arguable appeal (see: **Buckle v Holmes** (1926) ALL E.R. Rep. 90 at page 91). However, where the grounds of appeal are frivolous, vexatious or useless or hypothetical, no leave will be granted".*

The rationale behind application for leave is to spare the Court of Appeal of stream of matters, which have no merit, and or which have already been dealt with by the lower courts. It is the law that the court to which an application for leave to appeal has been filed has the discretion to grant that leave or refuse it. However, that discretion must be judiciously exercised and the court in so doing must act on the materials before it. Those facts must be shown by the applicant both in his affidavit and the submissions in support of the application and the deficiencies so moving him to appeal must be clearly seen in the proceedings and decision sought to be impugned. It is, therefore, the duty of the applicant to demonstrate serious points of law that

need to be considered by the Court of Appeal (see **Simon Kabaka Daniel vs. Mwita Marwa Nyanga'nyi & 11 Others [1989] TLR 64**).

I have given a careful look at the application and the affidavit in support thereof, as well as the submissions for and against the application. For instance, the points in the affidavit of Elisa Msuya specifically in paragraphs 4(i), (ii), (iii) and (v) require the intervention of the Court of Appeal. In other words, the application has raised points arguable for appeal before the Court of Appeal. In that regard I find the application at hand to have merit as it meets the conditions laid down in the above authorities.

In the end result, leave to appeal to the Court of Appeal is granted as prayed. There shall be no order as to costs.

It is so ordered.


V.L. MAKANI
JUDGE
21/03/2022

