

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 514 OF 2021

*(Arising from Misc. Land Application No. 574 of 2020 and Land Appeal
No. 29 of 2019)*

ALHAJ ALLY UTOTO.....APPLICANT

VERSUS

PETER KISOKA.....1ST RESPONDENT

PAULO KISOKA.....2ND RESPONDENT

THOMAS MASSAWE.....3RD RESPONDENT

Date of Last Order: 15/12/2021

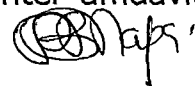
Date of Ruling: 7/2/2022

RULING

MKAPA, J

The applicant herein feeling aggrieved and dissatisfied with the decision in **Land Appeal No. 29 of 2019** dated 4th May 2020 (**Maghimbi J**), in which this Court dismissed the said appeal on the ground that the same was pre-maturely filed, has lodged this application by way of Chamber Summons supported by a sworn affidavit of one Alphonse Nachipyangu, learned advocate for the applicant. The applicant intends to challenge the said decision thus urging this Court to grant leave to appeal to the Court of Appeal.

The instant application has been preferred under the provisions of section 47(2) of the Land Disputes Act, Cap 216 [R.E 2019]. The respondents opposed the application and filed a joint counter affidavit



supported by a sworn affidavit of one Augustine Mathern Kusalika, learned advocate for the respondents.

According to paragraph 10 of the affidavit deposed by the deponent on 20th September 2021. The following are grounds for leave to appeal:

- (i) That, the Court made a decision based on the issue which was never raised on the grounds of appeal without affording the parties right to be heard on that specific issue.
- (ii) That, the Court disregarded submissions by the parties herein for and against the grounds of appeal.

At the hearing of this application on 15th December 2021, the applicant was represented by Mr. Alphonse Nachipyangu, learned advocate while respondents had the services of Mr. Augustine Kusalika also learned advocate.

Mr Nachipyangu for the applicant first submitted that, the affidavit supporting the application of the applicant be adopted as part of his submission. He then submitted that, the applicant is seeking leave to appeal to the Court of Appeal as per the grounds of appeal deposed under paragraph 10 of the affidavit. He went on submitting the fact that, the trial judge made a decision based on an issue which was never raised in the grounds of appeal and without affording parties the right to be heard. He referred the last sentence to the last paragraph of the judgment which states;

"on those findings the appeal before me is pre-mature and is consequently struck out with no order to costs"

It was Mr. Nachipyangu's submission that, although a trial judge can raise an issue *suo motto* and decide on it, yet parties have to be

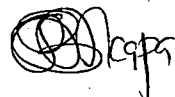
afforded an opportunity to be heard as the issue of filing premature was never raised as one of the grounds of appeal.

As for the second ground for leave to appeal, the learned advocate briefly submitted that, the court disregarded the submission for and against the ground of appeal. He further acknowledged the fact that, in order for leave to appeal to the Court of Appeal to be granted, the applicant has to demonstrate that there exist a point of law worth determination by the Court of Appeal. The learned counsel relied upon the decision in the cases of **Shaban Mkakanze Vs. Teresia Judi Mkakanze, Civil Application No. 135/13 of 2020, Mariam Mula Letifhoussein & 2 Others Vs Mohamed Hatibu Mbwane, Civil Application No. 5 of 2014 (unreported)** and the case of **Nurbhai N. Rattans Vs. Ministry of Water Construction Energy Land and Environment & Another, 2005 TLR 220** in which in the case of **Shaban Mkakanze (supra)** at page 5, the Court of Appeal emphatically held that;

"In determining an application for leave to appeal to the Court of Appeal, the court must ascertain if there is a legal point worth of being considered by the Court of Appeal."

Finally, he submitted that, the two grounds of appeal are pure point of law worth determination by Court of Appeal thus he prayed for the application to be granted.

In reply Mr. Kusalika for the respondents also adopted his affidavit in reply. He resisted the application and urged the court to dismiss the application contending that the appeal was properly dismissed. He went



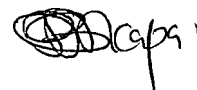
on submitting that, in determining the appeal the trial appellate judge had the opportunity of examining the order which the appellant appealed against and revisited records of the trial tribunal (the District Land and Housing Tribunal for Kilombero and Ulanga District at Ifakara) which fortified the fact that the application was dismissed for non-appearance of the applicant herein. He submitted further that, it was the duty of the applicant to exhaust all remedies before filing the appeal to set aside the dismissal order.

Opposing the first ground for grant of leave as submitted by the applicant's counsel, Mr Kusalika submitted that, the records and submission speaks louder that the appeal before Hon. **Maghimbi, J** was *premature*.

Countering the submission on the second ground for leave to appeal that, applicant's submissions were disregarded by the trial judge, it was Mr. Kusalika's submission that, as clearly stipulated at page 4 of the judgment that the trial judge did consider the applicant's submissions. He referred the relevant paragraph which reads:

".....examining grounds of this appeal let me draw attention to the principles laid down in the case of Wanguko vs. Karia, [1986-1989] 1 EA (CAK)/Page 597 of [1986-1989] 1 EA 593 (CAK)".

From the foregoing paragraph it was Mr. Kusalika's view that, the trial court did examine the grounds for appeal and concluded that the appeal was premature before the court as the applicant did not exhaust the remedies available to him before filing his appeal. Finally the counsel for the respondents submitted that, no legal issue exists which invites the



Court of Appeal's determination. He prayed for the application to be dismissed with costs.

Rejoining the submission Mr Nachipyangu simply reiterated his submission in chief and maintained that the issue of premature appeal required trial judge to invite the applicant to be heard on the same and further that, the conclusion by Hon. (Maghimbi, J) did not incorporate submissions by the counsel for the applicant thus prayed for this court to grant the application sought.

Having heard the submissions of learned counsels for both parties and taking into account the affidavit of Mr. Nachipyangu counsel for the applicant and affidavit in reply of Mr. Kusalika counsel for the respondents the only question for determination is whether the applicant has demonstrated serious and contentious point of law fit for consideration by the Court of Appeal.

This position has been affirmed in numerous decisions including in **Simon Kabaka Daniel V. Mwita Marwa Nyang'anyi & 11 others** (1989) TLR 64 where the Court held;

"In application for leave to the Court of Appeal the application must demonstrate that there is a point of law involved for the attention of the Court of Appeal....."

This position was echoed in the case of **British Broadcasting Corporation V. Eric Sikujua Ng'maryo, Civil Application No. 133 of 2004 (Unreported)** where the Court held:

"Needless to say, leave to appeal is not automatic. It is within the discretion of the Court to grant or refuse. The discretion must however, be judiciously exercised on the materials before the Court. As a matter

of principle, leave to appeal will be granted where the ground of appeal raises issues of general importance or novel point of law where the grounds show prima facie arguable appeal. However, where the grounds of appeal are frivolous, vexatious or useless or hypothetical, no leave will be granted.

In this application the applicant in the first ground contends that the trial judge reached a conclusion to the effect that the appeal was filed before this court prematurely. He submitted that, this was an issue which required an applicant to be afforded right to be heard. On the other hand the counsel for the respondents argued that the trial judge had the opportunity of going through the order which the appellant (applicant herein) was appealing against and also revisited the records of the trial tribunal before coming to a conclusion that the appeal was premature. It was his further argument that, the applicant had a duty to exhaust all remedies before filing his appeal.

From the issues raised by both counsels for the applicant and respondents there can be no doubt that the issues are arguable and more so, it is not the duty of this court to discuss issues rather, to find out whether the same are meritorious and require determination by the Court of Appeal as was held in **Jireys Nestory Mutalemwa Vs. Ngorogoro Conservation Area Authority / Civil Application No. 154 of 2016 TZ CA 9**, where the Court of Appeal emphatically held;

"The duty of the Court at this stage is to confine itself to the determination of whether the proposed grounds raise an arguable issue (s) before the Court in the event leave is granted. It is for this reason the Court brushes away the requirement to show that the appeal stands better chances

of success a factor to be considered for the grant of leave to appeal. It is logical that holding so at this stage amounts to prejudging the merits of the appeal.”

Guided by the above legal position as to the first ground for leave, the point of law which arises concerns jurisdiction namely, ineffective to confer appellate jurisdiction occasioned by pre-mature filing of the appeal which in my view worth the consideration of the Court of Appeal.

As for the second ground of appeal that the appellant (applicant herein) submissions were disregarded by the appellate Judge, unfortunately the affidavit does not reveal what need to be considered by the Court of appeal rather, is a general statement thus lacking the test of a point of law.

In the final analysis this Court is satisfied that, the application raises issues or matters worth the consideration of and determination by the Court of Appeal, to the extent herein.

For the reasons discussed, leave to appeal is granted as prayed. There shall be order as to costs

It is so ordered.

Dated and delivered at Dar-Es-Salaam, this 7th day of February 2022.




S. B. MKAPA
JUDGE
7/2/2022