

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 439 OF 2021

(Arising from the Judgment and decree of the High Court of Tanzania (Land Division) at Dar es Salaam by Hon. A. Z. Mgeyekwa, J. in Land Appeal No. 271 of 2020 dated 11th August 2021)

TABU MOHAMED SADANI.....APPLICANT

VERSUS

ISSA MAGWILA (as administrator of the estate of the late

MINISHA MOHAMED SADANI.....RESPONDENT


Date of last order: 9/5/2022

Date of ruling: 26/5/2022

RULING

A. MSAFIRI, J.

On 24th August 2021, the above named applicant lodged the present application, by chamber summons under Section 47(2) of the Land Disputes Court Act [CAP 216 R.E 2019] seeking for the following reliefs namely;

a. That, this Honourable Court may be pleased to grant leave to the applicant to appeal to the Court of Appeal of Tanzania. 

b. That this Honourable Court may be pleased to give any order as it may deem fit just to grant.

c. Costs to follow the event.

The application has been taken at the instance of the applicant and is supported by an affidavit sworn by Simon Lameck Mpina, learned counsel for the applicant.

When the application was called on for hearing on 9/5/2022, Mr. Simon Lameck Mpina learned advocate appeared for the applicant while the respondent did not enter appearance. It is on record that the respondent did not enter appearance on 23/3/2022 and 5/4/2022 despite lodging a counter affidavit. Hearing of this application therefore proceeded in the absence of the respondent.

Before canvassing the submissions in support of the present application, a brief background is necessary.

Parties to the present application had a dispute over a piece of land situated at Lumemo within Ifakara Township in Kilombero District. The respondent instituted Land Application No. 41 of 2018 before the District Land and Housing Tribunal for Kilombero/Ulanga at Ifakara (the trial

Acts

Tribunal) claiming the said land in dispute. It was contended before the trial Tribunal by the respondent that, the land in dispute formed part of the clan land in which its ownership passed by survivorship from one generation to another and therefore the respondent is the current owner of land in dispute.

After hearing the parties, the trial Tribunal decided in favour of the respondent. The applicant herein was aggrieved with the judgment and decree of the trial Tribunal hence he preferred appeal No. 271 of 2020 before this Court with six (6) grounds of appeal. However the applicant lost his appeal as it was dismissed with costs for lack of merits.

Being aggrieved again by the judgment of this Court sitting on the first appeal, the applicant lodged notice of intention to appeal to the Court of Appeal of Tanzania together with the present application for leave.

In the present application on paragraph 5 of the affidavit in support of the application, the applicant has raised a total of five (5) points to be addressed by the Court of Appeal as follows;

- a. Whether in the circumstances of the case, the burden of proof that the applicant's mother who occupied the suit land from 1970's* *Acts.*

to 1995 was not a licensee lied upon the applicant herein (then the respondent).

b. whether in the circumstances of the case, the doctrine of adverse possession was not applicable given the undisputed fact that the applicant herein has been in a long and uninterrupted occupancy and use of the suit land from 1995 to date.

c. Whether the learned judge was right to hold that the license alleged to have been issued to the applicant's mother for possession and use of the suit land had no time limit even after the demise of the alleged licensee.

d. Whether in the circumstances of the case, the alleged licence extended to the applicant herein who undisputedly occupied the suit land for more than 23 years after the demise of the alleged former licensee (applicant's mother).

e. Whether the trial Tribunal was correct to entertain the matter which appeared to have been preferred out of time.

As stated above, hearing of this application proceeded in the absence of the respondent. The application was argued orally in which the learned counsel for the applicant having adopted the affidavit in support of the

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application urged me to grant the same after arguing each of the point for determination by the Court of Appeal. The applicant's counsel also referred to me the decision of the Court of Appeal in **British Broadcasting Corporation v Erick Sikujua Ng'maryo**, Civil Application No. 138 of 2004 (unreported).

I have closely examined the affidavit in support of the application as well as submission in support of the application. The point for my determination is whether the application has merits.

In an application for leave like the present one there are conditions to be considered upon which leave to appeal is grantable. Such conditions were expounded in the decision of the Court of Appeal in **British Broadcasting Corporation v Erick Sikujua Ng'maryo** (supra) cited to me by the learned advocate for the applicant. In that case the Court of Appeal stated that;

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 judiciously exercised and on the materials before the court. As a matter of general principle, Aelle.

*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. 90 at page 91). However, where the grounds of appeal are frivolous, vexatious or useless or hypothetical no leave will be granted.*

From the foregoing quoted decision, it is imperative to note that the grant of leave is not automatic but conditional in that it can only be granted where the grounds of the intended appeal raise arguable issues in the intended appeal before the Court. Furthermore my duty in this application is not to determine the merits or demerits of the grounds of appeal raised when seeking leave to appeal. Instead a court has only to consider whether the proposed issues are embraced in conditions set out in **British Broadcasting Corporation v Eric Sikujua Ng'maryo [supra]**.

Unlike the submissions of the applicant in which he has forcefully submitted on each of the grounds intended to be determined by the Court of Appeal, it is not my duty to make decision on the substantive issues before the appeal itself is heard. In the case of **The Regional Manager-**

Adls.

TANROADS Lindi v DB Shapriya and Company Ltd, Civil Application

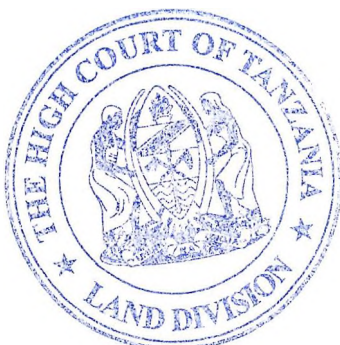
No. 29 of 2012 CAT (unreported), it was held;

"It is now settled that a Court hearing an application should restrain from considering substantive issues that are to be dealt with by the appellate Court. This is so in order to avoid making decisions on substantive issues before the appeal itself is heard".

Hence the applicant was only required to show in his affidavit the arguable grounds for determination by the Court of Appeal, which in the present matter, the applicant has successfully shown grounds worthy of consideration by the Court of Appeal. This is clearly seen on paragraph 5 of the affidavit in support of the application.

Consequently the application is meritorious and the applicant is hereby granted leave to appeal to the Court of Appeal of Tanzania.

Costs to follow the event.




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**A. MSAFIRI,
JUDGE
26/5/2022**