

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

MISC. LAND CASE APPLICATION NO. 582 OF 2021

(Arising from Land Revision No. 04 of 2020 of the High Court and originating from Execution Application No. 09 of 2006 of the District Land and Housing Tribunal for Kinondoni at Mwananyamala)

DEVOTA DELFINA ELISEI APPLICANT

VERSUS

ALIA SHARIFF RESPONDENT

Date of last Order: 24/03/2022

Date of Ruling: 27/05/2022

RULING.

I. ARUFANI, J

The applicant, Devota Delifina Elisei filed in this court the application at hand seeking for leave to appeal to the Court of Appeal of Tanzania against the ruling and drawn order of this court (Hon. Madam Justice A. Msafiri) delivered in Land Revision No. 04 of 2020 dated 29th September, 2021. The application is made under section 5 (1) (c) of the Appellate Jurisdiction Act, Cap 141 [R.E 2019] and section 47 (1) of the Land Disputes Courts Act Cap 216 [R.E 2019] and any other enabling provision of the law for the time being in force.

The application is supported by an affidavit sworn by the applicant and it was opposed by counter affidavit affirmed by the respondent. While

the applicant was represented in the matter by Mr. Elieza Kileo, learned advocate the respondent was represented by Ms. Nuru Said Mussa under Power of Attorney donated to her by the respondent. By consent of the parties' representatives the application was argued by way of written submission.

The court has found before going to the merit of the application it is pertinent to say something about propriety of the provisions of the law upon which the application is made. The court has found that, while it is shown in the chamber summons that the application is made under sections 5 (1) (c) of the Appellate Jurisdiction Act and section 47 (1) of the Land Disputes Courts Act but it is stated in the written submission of the applicant that the application is made under section 5 (1) (c) of the Appellate Jurisdiction Act and section 47 (2) of the Land Disputes Courts Act.

The court has found that, as the applicant is seeking for leave to appeal to the Court of Appeal against the decision of this court while exercising its revisional jurisdiction then the appropriate provision of the law upon which the application was supposed to be made is subsection (2) and not subsection (1) of section 47 of the Land Disputes Courts Act cited in the chamber summons. The court has arrived to the above view after seeing section 47 (1) of the Land Disputes Courts Act is dealing with appeals to the Court of Appeal for judgment, decree, decision or order

made by the High Court in its original jurisdiction. For clarity purposes section 47 (1) of the Land Disputes Courts Act states that: -

*"A person who is aggrieved by the decision of the High Court in the **exercise of its original jurisdiction** may appeal to the Court of Appeal in accordance with the provisions of the Appellate Jurisdiction Act."*[Emphasis added].

As the applicant is intending to appeal to the Court of Appeal against the decision of this court made in its revisional jurisdiction, the applicant was required to move the court by citing section 47 (2) of the Land Disputes Courts Act which states 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."*[Emphasis added]

Therefore, the above two quoted provisions of the law show clearly that, as the applicant is seeking for leave to appeal to the Court of Appeal against the decision made by this court in its revisional jurisdiction and not in its original jurisdiction the applicant ought to have cited subsection (2) and not subsection (1) of section 47 of the Land Disputes Courts Act in her application. The court has found that, although the correct provision of the law to move the court to entertain the application of the applicant is cited in the submission of the applicant and not in the chamber

summons but to the view of this court the correct provision of the law was supposed to be cited in the chamber summons and not in the submission.

The court has arrived to the above stated view after seeing what moves the court to entertain an application is a chamber summons supported by an affidavit and not submission filed in the court by the parties. Submission elaborates and expounds what is stated in the chamber summons and in the affidavit and it cannot be used to correct error contained in a chamber summons or in an affidavit. The question here is what is the effect of citing wrong subsection of the law in an application where the correct law and section which gives court jurisdiction to entertain the matter is cited.

The court has found the answer to the above question is that the said error is curable under the principle of overriding objective provided under sections 3A and 3B of the Civil Procedure Code, Cap 33, [R.E 2019]. The above finding of this court is getting support from the case of **Antipas Romani Tairo V. Sikudhani Jafari**, Misc. Land Application No. 531 of 2020, HC Land Division at DSM (unreported). When the court was dealing with the similar issue in the above cited case it stated that, where citation of law giving jurisdiction to the court to entertain an application is correct and the defect is on subsection or provision of the law upon which the application is made the court can order the said error be corrected or

ignore the error and continue to entertain the application for the purpose of expediting determination of the matter.

As the parties have already argued the application by way written submission and the application is at the stage of preparing the ruling the court has found to order the defect to be correct will not be for the interest of expediting disposal of the matter. In lieu thereof the court has found the appropriate step to take in the circumstances of this matter is to ignore the said error as section 47 (2) of the Land Disputes Courts Act which is giving this court jurisdiction to entertain the applicant's application is in existence.

Back to the merit of the application, the court has found it is stated in the submission of the applicant that, the applicant wants to appeal to the Court of Appeal to challenge the decision of this court because the court misdirected itself by jumping into the matters relating to appeal while the application before the court was about application for execution. It is stated the respondent was summoned to show cause in the said execution application and he did not challenge the orders sought in the application for execution.

It is stated further in the submission of the applicant that, the applicant was aggrieved by the ruling and drawn order of the court as they are tainted with irregularities and illegalities. The alleged irregularities and illegalities were expounded in detail in the submission of

the applicant and various authorities were cited to support the submission of the applicant. However, the court has found that, as the role of this court is just to see whether the applicant has an arguable case worth to be determined by the Court of Appeal and not to determine the merit and demerit of the alleged irregularities and illegalities, the court has found there is no need of reproducing at this juncture the alleged irregularities and illegalities together with the authorities cited in the submission of the applicant to support the application. To the contrary the court will deal with them later in the course of determining the application. The applicant urged the court to grant her leave to appeal to the Court of Appeal.

In reply, it is stated in the submission of the respondent that, the respondent did not contest the judgment of the Land Application No. 09 of 2006 of the District Land and Housing Tribunal but he applied for revision of the application for execution No. 09 of 2006 which he sated the Tribunal Chairperson misdirected himself in allowing execution to be carried out on properties which were not mentioned in the judgment and decree of the trial tribunal.

It was argued in the submission of the respondent that, although it is stated at page 1 of the judgment of the trial tribunal that the dispute in Land Application No. 9 of 2006 was over a piece of land located at Mbezi Juu, Kawe Ward near Kunguru area, Kinzudi along a road to Goba measuring a quarter of an acre but the chairperson allowed execution to

be carried out on various surveyed plots of land owned by different people which were not among the disputed land in the case.

It was submitted further in the submission of the respondent that the applicant has failed to show if she has an arguable case and she has overwhelming chance to succeed and cited various cases supporting his submission. At the end the respondent prayed the applicant's application be dismissed for failure to provide for arguable points of law to be determined by the court of appeal. The applicant filed in the court a rejoinder which the court finds in principle is reiterating what was stated in the submission in chief filed in the court to support the application.

Having carefully considered the submission from the parties and after going through the affidavit and counter affidavit filed in the court by the parties the court has found the issue to determine in this application is whether the applicant has managed to satisfy the court, she deserves to be granted leave to appeal to the Court of Appeal. The court has found it has been 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) 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."

The similar view was stated in case of **Said Ramadhani Muyanga V. Abdallah Salehe**, [1996] TLR 75 cited in the submission of the respondent where it was stated that, leave to appeal to the Court of Appeal is grantable where the applicant has shown there is a legal and factual issues for determination by the Court of Appeal. It was also stated in the case of **Grupp V. Jangwani Sea Breeze Lodge Ltd**, Commercial Case No. 93 of 2002 cited with approval in the case of **Fortunatus Lwanyantika Mosha V. Icea Lion Insurance Co. Ltd & Another**, Misc. Civil Application No. 143 of 2020 HC at Mwanza (unreported) cited in the rejoinder of the applicant that, this court has no jurisdiction to go into merits or deficiencies of the impugned decision of this court but only to determine whether there is arguable issues fit for consideration by the Court of Appeal.

While being guided by the position of the law stated in the above cited cases the court has found that, as alluded earlier in this ruling the applicant stated in her chamber summons and in her submission that, she is praying for leave to appeal to the Court of Appeal to challenge the decision of this court which is alleging is tainted with irregularities and illegalities. The alleged irregularities and illegalities are listed at paragraph 8 of the affidavit supporting the application. The alleged irregularities and illegalities which are also listed and argued in detail in the submission of the applicant read as follows: -

- (1) *The High Court of Tanzania Land Division made revision on matters which were on Land Application No. 9 of 2006 which was not challenged by way of appeal by the respondent, instead of Execution Application No. 9 of 2006.*
- (2) *The Land Application which the High Court acted upon was not appealed nor reviewed.*
- (3) *The High Court misconstrued the decree to the property being executed were raised out of the disputed piece of land and that, the plots were not surveyed prior to the filing of the said land application.*
- (4) *The High Court did not afford parties chance to address the matters of facts arising out of the said plots to be executed and hence denied their right to be heard and defend."*

After considering the above alleged irregularities and illegalities the court has found they are showing the applicant is alleging there are matters which were raised in the application for execution and were not disputed by the respondent but were raised in the decision of the court and determined before giving the parties chance to address the court about them. The court has found one of the irregularities or illegalities raised in the above grounds is the point that the parties were not afforded chance of addressing the court on matters arising out of the plots involved in the execution allowed to be carried on by the tribunal.

The issue as to whether the parties were afforded chance to address the court on the issue of the plots upon which execution was allowed to be carried on or not and what is its effect is to the view of this court an arguable ground worth to be considered and determined by the Court of Appeal. The stated issue which has been derived from the irregularities and illegalities alleged are in the impugned decision of this court has made the court to find the applicant has managed to satisfy the court there are arguable mixed grounds of law and facts worth to be considered and determined by the Court of Appeal.

In the premises the applicant is granted leave to appeal to the Court of Appeal against the ruling of this court delivered in Land Revision No. 04 of 2020. 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 27th day of May, 2022



I. Arufani

JUDGE

27/05/2022

Court:

Ruling delivered today 27th day of May, 2022 in the presence of the son of the applicant namely Anangisye Jacob and in the presence of Ms. Nuru Said Mussa, under power of attorney of the respondent. Right of appeal to the Court of Appeal is fully explained to the representative of the parties.



I. Arufani

JUDGE

27/05/2022