IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 28 OF 2021

(Arising from Land Revision No. 7 of 2020 of the High Court Land Division)

DORA MWAKIKOSA ..... APPLICANT

VERSUS

ERASTO CHUSI ..... RESPONDENT

Date of last Order: 13/05/2022

Date of Ruling: 24/06/2022

RULING.

I. ARUFANI, J

Before me is an application for leave to appeal to the Court of Appeal of Tanzania against the ruling and order of this court issued by Hon. V. L. Makani, J in Land Revision No. 07 of 2020 delivered on 18th December, 2020. The application is made under section 5 (1) (c) of the Appellate Jurisdiction Act Cap 141 of the laws (hereinafter referred as the AJA) and is supported by an affidavit sworn by the applicant and it was opposed by the counter affidavit sworn by the respondent.

When the matter came for hearing the applicant was represented by Mr. Alex Mashamba Balomi, Senior Learned Advocate and the respondent appeared in the court unrepresented. The counsel for the

applicant prayed the application be argued by way of written submission and as the respondent is unrepresented the prayer was granted and court ordered the application be argued by the way of written submission.

In supporting the application, the counsel for the applicant told the court the application is made under section 47 (1) of the Land Disputes Courts Act, 2002, Cap 216 (Revised Edition 2019) (hereinafter referred as LDCA). He went on telling the court that, paragraphs 1 to 10 of the affidavit supporting the application discloses good cause or points worthy for the Court of Appeal to hear the applicant challenging the ruling and order of this court.

He argued that, the judge grossly erred in dismissing the application for revision filed in this court by the applicant instead of determining it on merit basing on the principle of overriding objective. He stated that, the amendment made in the Civil Procedure Code, Cap 33 R.E 2019 (hereinafter referred as the CPC) introduced the overriding objective in civil litigation, thereby giving rise to the Oxygen Rule or principle which states how the said principle is expected to be used to facilitate dispensation of justice. He argued that, the court did not put into consideration the guiding principles provided in the law which

amounts to disturbing features required to be determined by the Court of Appeal.

He stated that, all paragraphs of the counter affidavit filed in the court by the respondent are mere evasive denials which does not oppose the application. He stated further that, the counter affidavit does not state to what extent the applicant should not be granted the order sought in the Chamber Summons. He argued that, leave is of paramount to enable the applicant to exercise her constitutional rights enshrined under Article 13 (6) (a) of the **Constitution of the United Republic of Tanzania, 1977** as amended from time to time.

He argued the applicant has a point worth to appeal to the Court of Appeal and referred the court to the case of **Nurbhai N. Ratansi V. Ministry of Water Construction Energy Land and Development & Another** [2005] TLR 2005 where it was stated that, as the trial judge did not deal with the appeal on merit but he dismissed it on other ground which did not feature in the trial that is a contentious legal issue worth consideration of the Court of Appeal.

He submitted that, the judge did not deal with the main application on revision and instead the court laboured much on the technicalities raised by the respondent. He stated the applicant has

contentious point of law worth determination of the Court of Appeal about the correctness of such a holding. He supported his argument with the case of **Said Ramadhani Mayange V. Abdallah Salehe,** [1996] TLR 74 where it was stated that, as the matter raises contentious issues of law it was a fit case for consideration by the Court of Appeal.

He submitted further that, according to the circumstances surrounding the application the court is vested with power to invoke its discretionary powers derived from common law principles not necessarily from statutes. He stated the court can exercise its discretionary power provided under the provision of section 95 of the CPC and referred the court to the case of **Mwita Ibrahim V. R,** [2005] TLR 1007 where how the court can exercise its discretionary power was considered. He argued that, the intended appeal has overwhelming chances of success if the matter is finally determined by the Court of Appeal.

He added that, if the leave to appeal will be granted it will cause no any injustice to the respondent. In his conclusion he borrowed the words of Lord Denning, Britain's Master of Rolls where while addressing

Magistrates in Nairobi he stated let justice be done even if it costs heaven. At the end he prayed the application be granted with costs.

In reply the respondent stated that, the argument by the counsel for the applicant that Land Revision No. 07 of 2020 was not heard on merit is baseless because the objection raised were purely point of law that the application was time barred and was brought under wrong provision of the law. He referred the court to the case of **Mukisa Biscuit Manufacturing Co. Ltd V. West End Distributors Ltd,** [1969] EA 696 where the term preliminary objection was defined to mean a point of law which may dispose of the suit.

He argued that, although the applicant's counsel lamented the judge erred in not relying on principle of overriding objective but that principle cannot be used where the matter was brought out of time and its consequence as provided under section 3 (1) of the Law of Limitation Act, Cap 89, R.E 2019 (hereinafter referred as the LLA) is dismissal notwithstanding limitation has been raised as a defence or not.

He submitted that, it is undisputed fact that Land Revision No. 07 of 2020 was filed in this court after the elapse of 821 days from 12th December, 2017 when the date of delivery of the impugned judgment of Land Appeal No. 96 of 2016 of Kinondoni District Land and Housing

Tribunal. He went on arguing that, the said application for revision of the impugned judgment of the Kinondoni District Land and Housing Tribunal was filed in the court out of time and without leave of the court. He submitted that its consequences as provided under section 3 (1) of the LLA referred hereinabove is dismissal of the application.

He supported his argument with the case of **Simon Kabaka Daniel V. Mwita Marwa Nyang'anyi and 11 Others**, [1989] TLR 64 where it was stated inter alia that, in application for leave to appeal to the Court of Appeal the applicant must demonstrate there is a point of law involved for the attention of the Court of Appeal. He submitted that the applicant has failed to demonstrate existence of a point of law worth to be determined by the Court of Appeal.

He submitted further that throughout the submission of the applicant the claim is that the application was not determined on merit. He cited in his submission the case of **Shahida Abdul Hassanali Kasam V. Mahed Mohamed Gulamali Kanji,** Civil Application No. 42 of 1999 where it was stated the aim of preliminary objection is to serve the time of the court and parties by not going into merits of the application because there is a point of law that will dispose of the matter summarily.

He continued to submit that, the applicant has no any chance of success in the intended appeal and she has failed to demonstrate if there is any issue to be determined by the Court of Appeal. In bolstering his submission, he cited the case of **British Broadcasting Corporation V. Erick Sikujua Ng'yimaryo**, Miscellaneous Civil Application No. 138 of 2004 (unreported) where it was stated that, leave to appeal is not automatic. It was stated leave 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.

He stated that the applicant has failed to establish existence of any point of law or arguable ground of appeal worth to be determined by the Court of Appeal. He submitted that, basing on the above stated reasons it is inappropriate to allow the application at hand. Finally, he prayed the application be dismissed in its entirety.

After carefully considered the rival submission from both sides the court has found the main issue to determine in this application is whether the applicant in the present application deserve to be granted leave to appeal to the Court of Appeal against the ruling and order issued by this court in Land Revision No. 07 of 2020. Before going to

the merit of the application the court has found proper to state at this juncture that, if you read the chamber summons and the submission of the counsel for the applicant you will find there is a confusion in the application at hand about whether the application was made under correct or wrong provision of the law.

The court has come to the above observation after seeing that, although the chamber summons shows the application was made under section 5 (1) (c) of the AJA the counsel for the applicant stated in the submission he filed in the court that, the application was made under section 47 (1) of the LDCA. The above stated situation creates a confusion about which provision of the law upon which the application is made. Is it made under section 5 (1) (c) of the AJA or under section 47 (1) of the LDCA stated in the submission of the counsel for the applicant?

If it will be taken the application is made under section 47 (1) of the LDCA stated in the submission of the counsel for the applicant it is crystal clear that the application is made under wrong provision of the law. The court has come to the above finding after seeing that, section 47 (1) of the LDCA is not dealing with application for leave to appeal to the Court of Appeal against decisions of this court made in its revisional

jurisdiction. It governs appeal to the Court of Appeal against the decision of this court made in its original jurisdiction. For clarity purpose the cited provision of the law read as follows: -

> *"47. - (1) 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."*

The court has also found that, if it will be said the application is made under section 5 (1) (c) of the AJA indicated in the chamber summons, it is crystal clear that the application is also not made under correct provision of the law. The court has come to the above finding after seeing the cited provision of the law is governing appeal to the Court of Appeal against decisions or orders which there is no other provision of the law governing the same. For clarity purpose the cited provision of the law states 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 provision of the law it is crystal clear that the cited provision of the law is governing appeals from the decree, order, judgment, decision or finding of the High Court where there is no any other written law for the time being providing otherwise. The question to ask here is whether there is any other written law for the time being providing otherwise. The court has found there is section 47 (2) of the LDCA which is governing appeal to the Court of Appeal from the decision of the High Court when exercising its revisional jurisdiction in land matters. The cited provision of the law states as follows: -

> *"47 (2) 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."*

From the above quoted provision of the law, it is obvious that the application at hand which is an application for leave to appeal to the Court of Appeal against the decision of this court made when the court was exercising its revisional jurisdiction was required to be made under section 47 (2) of the LDCA and not under section 47 (1) of the LDCA stated in the submission of the counsel for the applicant or section 5 (1) (c) of the AJA indicated in the chamber summons. That shows the

application before the court is made under wrong law which its consequences as stated in number cases including the case of **Hon. Zito Zuberi Kabwe (MP) V. The Board of Trustees, Chama cha Demokrasia na Maendeleo & Another**, [2014] TLR 290 is to render the application incompetent.

As the parties were not invited to address the court on the above stated defect which was brought to the attention of the court by the submission filed in the court by the counsel for the applicant, the court has found it is proper to go to the merit of the application and see whether if the application would have been brought under the correct provision of the law, the application would have been granted.

It is well settled law that, the court to which an application for leave to appeal to the Court of Appeal has been filed has discretionary power to grant or refuse the sought leave. However, the stated discretion must be exercised judiciously and in doing so the court is required to act on the materials brought before it by the parties. Those facts must be shown by the applicant both in his affidavit and in the submissions in support of the application and the ground moving the applicant to appeal must clearly be seeing 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 jurisdiction 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 vs. 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 the affidavit and counter affidavit filed in the court by the parties together with the written submission filed in the court by the parties shows the applicant wants to appeal to the Court of Appeal against the decision of this court made in Land Revision No. 07 of 2020. The court has found that, in the impugned ruling, the court upheld the points of preliminary objection raised by the respondent that; the application filed in the court by the applicant for revision of the decision made by the trial tribunal in Land Application No. 96 of 2016 was time barred and was made under wrong citation of the law. After hearing the parties, the court upheld the said points of preliminary objection and dismissed the application with costs.

The court has found the applicant deposed at paragraphs 6 to 10 of her affidavit supporting the application that, she has a point of law worth to be determined by the Court of Appeal in the intended appeal because the judge erred in the impugned decision in the circumstances of the matter by refusing to exercise her revisional jurisdiction on ground of preliminary objection. She deposed that, the judge erred in not taking into account the computation of time spent in procuring

documents for appeal from trial tribunal and stated the intended appeal has overwhelming chances of success.

Although it is well known as stated in the case of **Bulyahulu Gold Mine Limited & Two Others V. Petrolube (T) Limited**, Civil Application No. 364/16 of 2017, CAT at DSM (unreported) that the application before this court is for leave to appeal to the Court of Appeal and not for determination of whether the proposed grounds of appeal have merit or not. However, as stated in the cases cited earlier in this ruling, the court is required to be satisfied the grounds proposed for being taken to the Court of Appeal for determination are not frivolous or vexatious and they worth to be taken to the Court of Appeal.

The court has considered the deposition by the applicant at paragraph 6 of her affidavit that the judge erred in failing to take into account the time taken in procuring the documents for appeal from the tribunal but found there is nowhere the stated issue was raised and considered in the impugned decision so as to say it can be taken to the Court of Appeal for determination.

The position of the law is well settled as stated in number of cases which one of them is the case of **Ismail Seleman Nole V. R**, [2014] TLR where it was stated that, as a general principle an appellate court

cannot allow matters not taken or pleaded and decided in the court below to be raised on appeal. As the said point of time spent in procuring the documents from the tribunal is not featuring to have been raised and determined anywhere in the impugned ruling of the court, the court has found it cannot be said is a point worth to be taken to the Court of Appeal for determination.

The counsel for the applicant stated in his submission that, the judge erred in dismissing the application for revision instead of determining the same on merit by using the principle of overriding objective which amounts to disturbing feature required to be determined by the Court of Appeal. The court has failed to see any disturbing feature in the decision of the court which dismissed the application for revision filed in the court after the elapse of 821 days without leave of the court worth to be taken to the Court of Appeal for determination.

The argument by the counsel for the applicant that the application was decided on technicalities instead of relaying on the principle of overriding objectives has been found by the court has not managed to establish is a point worth to be taken to the Court of Appeal for determination. The court has arrived to the above finding after seeing

the position of the law as stated in the case of **Shahida Abdul Hassanali Kasam** (supra) is very clear that, the aim of a preliminary objection is to serve time of the court and parties by not going into the merits of an application because there is a point of law that will dispose of the matter summarily. Since the point of limitation of time is a point of law which once established can dispose of the matter summarily the court has failed to see how it can be said that is a technicality and the judge erred in determining the application basing on the said point of law.

The court has also arrived to the above finding after seeing the principle of overriding objective which the counsel for the applicant argued would have been used to move the court to determine the application on merit has been considered in number of cases and found it cannot be applied in a situation where there is a clear provision of the law concerning procedures required to be followed which is couched in mandatory terms.

The stated position of the law can be seeing in the cases of **Mandorosi Village Council and Two Others V. Tanzania Breweries Limited and Four Others,** Civil Appeal No. 66 of 2017 (unreported) and **SGS Societe Generale De Surveillance SA and**

Another V. VIP Engineering and Marketing Limited & Another, Civil Appeal No. 124 of 2017 (unreported). Therefore, as the applicant's application was caught in the web of limitation of time it cannot be said the matter was determined on technicalities which deserve to be reconsidered by the Court of Appeal.

In the premises the court has failed to see any point of law, or fact or mixed facts and law raised in the affidavit or argued in the submission of the counsel for the applicant to support the application worth to be taken to the Court of Appeal against the impugned decision of this court for determination. The court has found this is a frivolous application for leave to appeal to the Court of Appeal which does not deserve to be granted. Consequently, the application is hereby dismissed in its entirety for being devoid of merit and with no order as to costs. It is so ordered.

Dated at Dar es Salaam this 24th day of June, 2022.

I. Arufani

JUDGE

24/06/2022

Court:

Ruling delivered today 24th day of June, 2022 in the presence of Mr. Hassan Chande, advocate holding brief of Mr. Alex Mashamba Balomi, Senior Advocate for the applicant and in the presence of the respondent in person. Right of Appeal is fully explained.

I. Arufani

JUDGE

24/06/2022.