IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 289 OF 2022

(Arising from Misc. Land Application No. 132 of 2019, originating from the judgment of the Kibaha District Land and Housing Tribunal in Land Application No. 98 of 2012)

ESTER BARUTI ..... APPLICANT

VERSUS

SETH SENYAEL AYO ..... 1ST RESPONDENT

MRISHO RAMADHANI ..... 2ND RESPONDENT

RULING

Date of last Order: 11.07.2022

Date of Ruling: 12.07.2022

A.Z.MGEYEKWA, J

This Court is called upon to grant an extension of time within which to file an application for leave to appeal to the Court of Appeal of Tanzania. At the centre of the impending appeal is the decision of the Court by Hon.

Maghimbi, J in Land Application No. 132 of 2019, in which the District Land and Housing Tribunal allowed the respondent's appeal. Dissatisfied, the applicant lodged the instant application and complains that the impugned decision of this court is tainted with illegality. The application is supported by the affidavit of Ms. Ester Baruti, setting out the ground for extension of time. The application is strongly opposed by the respondents. Through counter-affidavit; the 1st respondent counter affidavit is deponed by Seth Senyael Ayo, the 1st respondent, and the 2nd respondent counter affidavit is deponed by Mrisho Ramadhani, the 2nd respondent.

The application was disposed through written submissions, preferred in conformity with the schedule drawn by the Court, and fully adhered to by counsel for the parties. I thank the applicant and 1st respondent's counsel for their concise and focused written submissions. However, nothing has been filed by the 2nd respondent, to-date, and no word has been heard from him on the reason for the inability to conform to the court schedule. This being the position, the question that follows is: what is the next course of action? The settled position is that failure to file written submissions, when ordered to do so, constitutes a waiver of the party's right to be heard and prosecute his matter.

This position is consistent with the Court of Appeal of Tanzania holding in the case of **National Insurance Corporation of (T) Ltd & Another v Shengena Ltd**, Civil Application No. 20 of 2007 at DSM (unreported), it was held that:

> *"The applicant did not file submission on the due date as ordered. Naturally, the Court could not be made impotent by the party's inaction. It had to act ... it is trite law that failure to file submission n(s) is tantamount to failure to prosecute one's case."*

In consequence of the foregoing, it is ordered that the matters be determined *ex-parte* against the 2nd respondent by considering the application based on the submission filed by the applicant and 1st respondent.

In this matter, Mr. Mgaya, learned counsel represented the applicant, while the respondents appeared in person, unrepresented.

In his written submission, Mr. Mgaya began by praying for this court to adopt the applicant's affidavit to form part of his submission. The learned counsel in his submission referred this court to the applicant's affidavit especially paragraphs 4, 5, and 6. He submitted that the applicant has demonstrated that the ruling of this court denied her an extension of time to

appeal out of time without considering the ground of illegality while the same is on the face of the record. He went on to submit that in case this court could have thoroughly gone through the record of the District Land and Housing Tribunal could have seen that the trial Chairman decided the matter with one assessor and the decision was made without properly procuring the attendance of assessors contrary to section 23 (1), (2) of the Land Courts Act, Cap. 216 [R.E 2019] and Regulation 19 (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations of 2003. The learned counsel for the applicant raised the following three grounds which require the attention of the Court of Appeal of Tanzania:-

(a) *That the learned trial Judge erred in law in deciding the matter without considering the existence of the material irregularity on the face of the records of the trial tribunal.*

(b) *That the trial Judge erred in law I rejecting the ground of jurisdiction as a reason for granting extension without considering the records of the trial tribunal which shows that the tribunal decided the matter while improperly constituted.*

(c) *That the trial Judge erred in law in requiring the applicant to prove the raised ground of jurisdiction as the reason to grant an extension without assessing its existence on the face of records.*

It was his submission that the above-mentioned grounds sufficiently raise contentious issues worth taking to the Court of Appeal. To buttress his contention he cited the case of **Elibariki Jacob v Babu Libilibi & Another**, Misc. Land Application No. 88 of 2020 (unreported).

In conclusion, the learned counsel for the applicant, beckoned upon this court to grant the applicant's application with costs.

In reply, the first respondent's confutation was strenuous. The respondent came out forcefully and object to the applicant's application. He claimed that the applicant did not intend to lodge an appeal against the judgment of the District Land and Housing Tribunal for Kibaha. The respondent contended that the applicant has not filed a Notice of Appeal. He insisted that the applicant's intention to appeal is an afterthought because she wrote a letter to obtain the proceedings and judgment of this court on 1st February, 2018, after a lapse of one year and three months.

The 1st respondent valiantly contended that issue that the tribunal records show that the trial Chairman decided the matter with one assessor is without merit. He added that the Chairman satisfied herself before proceeding with the case. To support his submission he referred this court to page 5 of the

District Land and Housing Tribunal and section 23 (1), (2) of the Land Courts Act, Cap. 216 [R.E 2019].

He spiritedly argued that the issue of recording the assessors' opinion is a new matter that was not an issue in Misc. Application No. 132 of 2019. The respondent claimed that a piece of new evidence or discovery in the course of litigation is not allowed. Supporting his submission he cited the case of **Q-Bar Limited v Commissioner General & Another**, Civil Appeal No. 163 of 2021. The 1st respondent distinguished the cited cases of Elibariki Jacob (supra) that the applicant in the present case has not raised contentious issues worth taking to the Court of Appeal. Stressing on contentious issues, the 1st respondent forcefully submitted that there are no contentious issues at all in the applicant's proposed appeal and the cited authority is irrelevant. He insisted that illegality is not a good ground for the extension of time.

On the strength of the above submission, he urged this court to strike out the application with costs for lack of merit

So much for the submissions of the learned counsel for both parties. The ball is now in my Court. The parties' rival submissions raise one key question. This is as to *whether or not the application has passed the threshold for its grant.*

It is trite law that grant of leave to appeal to the Court of Appeal is premised on the applicant's ability to demonstrate that there are points of law or fact that have been decided by the High Court but need to be revisited by the Court of Appeal before rights of the contending parties are conclusively determined. To bolster the same, there are several precedents supporting this position. In the cases of **Jireys Nestory Mutalemwa v Ngorongoro Conservation Area Authority**, Civil Application No. 154 of 2016 (unreported), **OTTU on Behalf of Milanzi and Others v Blanket Manufactures Ltd** (Unreported), and **Gaudencia Mzungu v IDM Mzumbe,** Civil Application No. 94 of 1999 CAT (Unreported) in the case of **OTTU** (supra) it was held that:-

> *"What is important is whether there are prima facie grounds meriting an appeal to this Court. The echo stands as guidance for the High court and Court of Appeal."*

The emphasis drawn in the fore mentioned authority, is that leave to appeal to the Court of Appeal will only be granted if there are arguable grounds, premised on serious points of law or law and fact. The grounds of appeal must raise issues of general importance or a novel point of law, or where there is a prima facie or arguable appeal.

Moreover, the grant of leave to appeal is not automatic rather, it is discretional of the Court and the Court can only exercise such discretion if the party has been able to present an arguable case. This position was accentuated in the case of **Bulyanhulu Gold Mine Ltd v Petroiube (T) Ltd & Another**, Civil Application No. 364/16 of 2017 CAT (unreported), it was held 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, be judiciously exercised and on the materials before the court. As a matter of genera! principle, leave to appeal will be granted where the grounds of appeal raise issues of general importance or novel point of law or where the grounds show prima facie or arguable appeal (see: Buckle v Holmes (1926) All E.R. 90 page 91). However, where the grounds of appeal are frivolous, vexatious or useless or hypothetical, no leave will be granted."*

The same was decided by the Court of Appeal of Tanzania in the cases of **British Broadcasting Corporation v. Eric Sikujua Ng'maryo**,-Civil Application No. 138 of 2004 (unreported) and **National Bank of Commerce**

v Maisha Musa Uiedi (Life Business Centre), CAT-Civil Application No. 410/07 of 2019.

After taking into consideration what has been stated in the affidavit and the applicant's Advocate submission, I would like to observe that in his written submission the learned counsel submitted that the tribunal was improperly constituted. He claimed that the Chairman delivered the judgment with one assessor contrary to section 23 (1) (2) of Cap. 216. The learned counsel for the applicant insisted that the trial tribunal Chairman omitted to receive the assessors' opinion in the presence of the parties and sat with one assessor.

Additionally, the applicant's argument is based on the grounds deponed in paragraph 5, the three grounds that the applicant believes are sold grounds, and argues that they are attracting the attention of the Court of Appeal of Tanzania. The ground which is considered to be worthy of consideration by the Court of Appeal of Tanzania is reproduced hereunder:

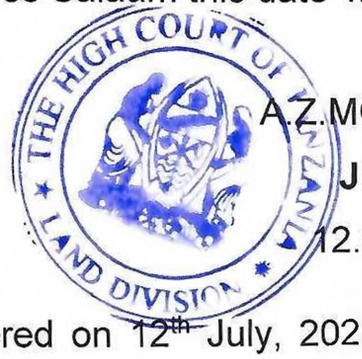
(1) Whether t*he trial Judge rejected the ground of jurisdiction as a reason for granting extension time.*

I take the view that there are important questions that constitute an arguable case, serious enough to engage the minds of the Justices of Appeal who will determine the appeal. In my view the above ground raises *a prima facie* case, thus, it is a fit point of law for appeal.

In the upshot, I proceed to grant the applicant leave to appeal to the Court of Appeal of Tanzania. No order as to costs.

Order accordingly.

Dated at Dar es Salaam this date 12th July, 2022.



A.Z.MGEYEKWA

JUDGE

12.07.2022

Ruling delivered on 12th July, 2022 vide video conferencing whereas Mr. Mgaya, counsel for the applicant and respondents were remotely present.

A.Z.MGEYEKWA

JUDGE

12.07.2022