

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 84 OF 2022

(Arising from Land Appeal No. 103 of 2021 before the High Court of Tanzania (Land Division) Mwenegoha. J)

BETWEEN

DONATILA BERNARD..... APPLICANT

VERSUS

REMJI THEODORY..... 1ST RESPONDENT

JACKLINE MMARY (Suing as a next friend of her son Agape T. Massawe
And her daughter Glory T. Massawe **2ND RESPONDENT**

RULING

Date of last Order: 09/8/2022

Date of Judgment: 25/08/2022

A. MSAFIRI, J.

The applicant Donatila Bernard has filed this application under the provisions of Section 47(1) of the Land Disputes Courts Act, Cap. 216 and Section 5(1) (c) of the Appellate Jurisdiction act, Cap. 141. She seeking for the following orders namely: -

- a) That this Honorable Court may be pleased to grant an applicant a leave to appeal to the Court of Appeal of Tanzania against the decision of this Court in Land Appeal No. 103 of 2021 dated 29th November 2021 but extracted on 2nd February 2022 before Honorable Mwenegoha, J.

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- b) Any other order that this Honourable Court shall deem fit and just to grant.
- c) Costs be provided for.

The application is supported by the affidavit of the applicant and is contested by the respondent who has filed a counter affidavit. The hearing of the application was conducted by way of written submissions, and the applicant was represented by George Sang'udi, learned advocate, the 1st & 2nd respondents written submissions were drawn and filed by themselves.

Mr. Sang'udi, submitted in support of application that, the applicant is of the firm view that the intended appeal has arguable points of law that need attention and determination of the Court of Appeal.

He said that, these arguable points of law are stated at paragraphs 6(a) (b) and 7 of the applicant's affidavit. That the applicant intends to move the Court of Appeal to determine whether the High Court was justifiable to declare that the disposition of the matrimonial property was lawful despite the fact that the consent from another part was not obtained.

To cement his point, he cited the case of **Restituta Frank Msongole vs. Michael Ngaya Shoo**, Misc. Land Application No. 555 of 2020 (unreported).

He prayed that the application be granted with costs.

On reply, the 1st respondent submitted that, he joins issues with the applicant and prays for the application to be allowed. He stated that the current application raises arguable points of law that need intervention of the Court of Appeal. He pointed that, the trial Judge was not justifiable to

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declare that the transfer of ownership to the son and daughter of the 2nd respondent was lawful without the consent of the applicant.

The 2nd respondent prayed to adopt the contents of her counter affidavit to form part of her submissions. She contended that the application should be dismissed because the applicant has not provided arguable issues that need the attention of the Court of Appeal.

She said that the condition justifying the granting of leave to appeal to the Court of Appeal is pinpointed under Section 47(1) of the Land Disputes Act, which mandates the applicant to establish that the intended appeal involves serious points which require attention of the Court of Appeal. She cited the case of **British Broadcasting Corporation vs. Erick Sikujua Ng'maryo**, Civil Application No. 135 of 2004, CAT, DSM (Unreported). She submitted further that, this application has no merit, is filed without cause and is a total abuse of justice with intention of the applicant to remain in occupation of the 2nd respondent's property.

The 2nd respondent stated that, no element of point of law has been shown at paragraph 6 (a), (b), and 7 of the applicant's affidavit. That, since the hearing of the Land Application No. 118 of 2016, before the District Land and Housing Tribunal of Ilala, the applicant failed to establish that the property in issue was a matrimonial property. She averred that the application has no merit and it must fail with costs to the applicant.

There was no rejoinder. *Adle*

Having gone through the submissions of the parties in support and opposition of the application along with the affidavit and counter affidavits, the pertinent issue is whether the application has merits.

As correctly submitted by the 2nd respondent, there are conditions to be considered upon which leave to appeal is grantable. The decision of the Court of Appeal in the case of **British Broadcasting Corporation vs. Erick Sikujua Ng'maryo (supra)**, cited by the 2nd respondent, it 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 be 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 issues of general importance or a novel point of law or where the grounds show a prima facie or arguable appeal..."

From the above principle set by the Court of Appeal, grant of leave to appeal is not automatic but conditional. It can only be granted where the grounds of intended appeal raise arguable issues in the appeal before the Court.

The parties have submitted at length, on the prompted arguable issues at paragraphs 6 (a), (b) and 7 of the affidavits of the applicant. The 2nd respondent is arguing that the issue of matrimonial property has already

been determined and decided by the previous Courts before, while the applicant is maintaining that the issues of matrimonial property and consent of the spouse on a matrimonial property are arguable issues which have to be brought to the attention of the Court of Appeal.

However, my duty in this application is not to determine the merits or demerits of the points raised when seeking leave to appeal. If I do that, I will be determining the appeal itself and I will assume the role of the appellate Court while determining application. In the case of **The Regional Manager-TANROADS Lindi vs. DB Shapriya and Company Ltd**, Civil Application No. 29 of 2012 CAT (Unreported), it was held that;

"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."

I have gone through the applicant's affidavit in support of the application. At paragraph 6 of the said affidavit, the applicant has listed what she claims as arguable points of law that need attention and determination of the Court of Appeal of Tanzania. The points are as follows;

a) *Whether the trial Judge was justifiable to declare a son and daughter of the 2nd respondent the lawful owners of the disputed property while the same property was a matrimonial property acquired during the subsistence of lawful marriage between the applicant and 1st respondent.* *Acute.*

- b) Whether the trial Judge was justifiable to declare that the transfer of ownership to the son and daughter of the 2nd respondent was lawful without the consent of the applicant.*
- c) Whether the trial Judge was justifiable to hold that the 1st respondent was bound by the principle of estoppel.*

While I am mindful to the fact that I am not in the position as to investigate into correctness or otherwise of the decision of my fellow Honourable Judge, I hold the view that the above raised points are sufficient enough to raise an arguable appeal, hence the need for the Court of Appeal to adjudicate upon the rival contentions between the parties.

I therefore grant leave to the applicant to appeal to the Court of Appeal as sought in the chamber summons. Costs shall be in the cause.

It is so ordered.

Dated at Dar es Salaam this 25th day of August 2022.



A. MSAFIRI

JUDGE

25/8/2022