

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC.LAND CASE APPLICATION NO. 743 OF 2022

(Arising from the Judgment and Decree of the High Court, Hon. V.
Makani, J in Land Appeal No. 165 of 2021, Originating from Land
Application No. 258 of 2017)

FIDELIS M. MWASELELA APPLICANT

VERSUS

SHAIBU HATIBU HAMADI RESPONDENT

RULING

Date of last Order 03.3.2023

Date of Ruling: 03.03.2023

A.Z.MGEYEKWA, J

In this application, the Court is moved to exercise its discretion and grant leave to the applicant to go to the Court of Appeal of Tanzania by way of appeal. The application has been preferred under the provisions of Section 47 (2) of the Land Disputes Courts Act, Cap. 216 [R.E 2019] and

Rule 45 (a) of the Tanzania Court of Appeal Rules, 2019. The Application is premised on the grounds appearing on the Chamber Summons together with the supporting affidavit of Fidelis M. Mwaselela, the applicant sworn on 21st November, 2022 setting out grounds on which the prayer for leave is based.

The Application is contested. The respondent filed the counter affidavit of Shaibu Hatibu Hamadi, the respondent sworn on 3rd march, 2023 in which he averred that the applicant's application has no merit.

When the matter was called for hearing on 9th March, 2023, the applicant enlisted the legal service of Mr. Silvester Shayo, learned counsel assisted by Ms. Bernadeta Shayo, learned counsel and the respondent was present in person, unrepresented.

Getting us underway was Mr. Shayo, learned counsel for the applicant. Reiterating what was deposed in the supporting affidavit, Mr. Shayo urged this court to adopt the applicant's application and form part of his submission. Mr. Shayo stated that the applicant is applying for leave against the decision of this Court in Land Appeal No. 165 of 2021. The appeal originated from the decision of the District Land Housing Tribunal for Kinondoni in Application No. 258 of 2017. The applicant is claiming that this Court's Judgment is tainted with illegality and the applicant in

paragraph 5 of his affidavit has raised legal issues which need to be determined by the Court of Appeal of Tanzania as follows:-

1. Whether the evaluation of the evidence was proper; one party has a Letter of Offer and the other party has a Certificate of Title. This Court ruled out that the appellant failed to adduce evidence on how he obtained the Certificate of Title.
2. Whether in the absence of any Counter Claim, the respondent was entitled to any decree under the Land Disputes Courts Act.

Regarding the first issue, Mr. Shayo submitted that under section 40 of the Land Act, Cap.113 a person who possesses a Certificate of Title does not need to prove his ownership. He went on to submit that the applicant is the one who filed the Application at the District Land and Housing Tribunal and the respondent did not file a Counter Claim, therefore they are asking if it was correct for a person who did not file a Counter Claim to be declared the lawful owner of the suit land. Mr. Shayo believed that the raised points of law are arguable and attracts the attention of the Court of Appeal of Tanzania. He stated that the applicant has filed a Notice of Appeal and requested copies of proceedings to prove that he has the intention to file an appeal against the impugned decision of this Court.

Responding, the respondent in his sworn deposition, was resolute in defence of the trial court's decision. He submitted that the applicant has failed to tender documentary evidence before the tribunal and hence has failed to move this Court to grant leave to file an appeal. He stated that he did not file a Counter Claim because he certainly knew that he is the lawful owner of the suit plot. He valiantly argued that he developed the suit land in 1979, and in 1999 the applicant claimed that he is the owner. The respondent contended that it does not make sense for an invader to claim that he is the lawful owner of the suit land while the owner acquired the suit land in 1979. He claimed that the applicant has not served him with a Notice of Appeal.

In conclusion, the respondent urged this Court to dismiss the same with costs.

In his rejoinder, the learned counsel for the applicant reiterated his submission in chief. He stated that the issue of a copy of a Notice of Appeal and contentious issues will be determined by the Court of Appeal. Ending, he urged this Court to grant leave based on the legal points that they have raised.

Having heard the submissions of the learned counsel for the applicant and the respondent for and against the application. A review of the rival depositions is centered on one grand question for settlement by the Court, this is *whether the application demonstrates sufficient ground or a disturbing feature that requires the attention of the Court of Appeal of Tanzania.*

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 which need to be revisited by the Court of Appeal before rights of the contending parties are conclusively determined. The alleged points of law are gathered from the affidavit that supports the application. This means that grant of leave to appeal is not automatic. Relatively, is discretionary and the Court can only exercise such discretion if the party has been able to present a *prima facie* case. This position was accentuated in the case **Gaudensia Mzungu v IDM Mzumbe**, Civil Application No. 94 of 1994 (unreported), the Court of Appeal of Tanzania held that:-

“Leave will be granted if, prima facie there are grounds meriting the attention and decision of the Court of Appeal.”

I am aware that in determining whether this court can grant leave or not, this court will do the same without assuming the power of the appellate

Court as this court is bound to assume such power which is vested in the Court of Appeal of Tanzania. In the case of **Grupp v Jangwani Sea Breeze Lodge Ltd**, Commercial case No.93 of 2002 (unreported) my brother Massati, J (as he then was) expressed the matter this way:-

"... I have no jurisdiction to go into merits or deficiencies of the judgment or orders of my sister judge in this application. All that I am required to determine is whether there are arguable issues fit for the consideration of the Court of Appeal..."

The applicant's argument is based on the grounds deposed in paragraph 5 of his affidavit. These are the grounds that the applicant believes that they are guaranteed a ticket to the Court of Appeal. The respondent opposed the application, he contended that there is no arguable case.

I hold a divergent view from what the respondent stated. I take the view that there is a pertinent question that constitutes an arguable case, which attracts the Justices of the Court of Appeal. Issues such as whether in absence of any Counter Claim the respondent was entitled to any decree. In my considered view, this point of law is fit in respect of which the guidance of the Court of Appeal is required.

In consequence, this application succeeds. The applicant is granted leave to appeal to the Court of Appeal of Tanzania. Costs to be in the cause.

Dated at Dar es Salaam this date 9th March, 2023.



A.Z. MGEYEKWA

JUDGE

09.03.2023

Ruling delivered on 9th March, 2023 in the presence of M. Silvester Shayo, Ms. Benedeta Shayo, learned counsels for the applicant, and the respondent.



A.Z. MGEYEKWA

JUDGE

09.03.2023