

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

MISC LAND APPLICATION NO. 23 OF 2023

(Originating from Land Appeal No. 23 of 2023 by Hon. Mango. J dated 3
September 2021)

CLAY APIYO..... APPLICANT

VERSUS

ESHEN M. MUTARAMBILWA.....RESPONDENT

RULING

Date of last Order: 04/04/2023

Date of Ruling: 28/04/2023

K.D. MHINA, J.

This is an application brought by way of Chamber summons made under section 47 (2) of the Land Disputes Court Act, Cap 216 [R: E 2019] ("the LDCA"), Rule 47 of the Court of Appeal Rules 2019 ("the Rules") and Order XLIII Rule 2 of the Civil Procedure Code, Cap 33 [R: E 2019] ("the CPC"). The applicant, Clay Apiyo, is, *inter alia*, seeking the following orders against the respondent, Eshen M. Mutarambilwa;

- a) *That applicant be granted leave to appeal to the Court of Appeal.*

- b) Costs of and incidental to this application be costs in the cause.*
- c) Incidental orders as may be necessarily made.*

The grounds for the application were expounded in the supporting affidavit, which Mr. Clay Apiyo, the applicant, swore in support of the application.

The applicant intends to appeal against the Judgment of this Court dated 3 September 2021 in Land appeal No. 236 of 2020. The matter originated from the Land District and Housing Tribunal ("the DLHT") for Ilala at Mwalimu House.

The respondent countered the application by filing an affidavit in reply, which was duly sworn by Mr. Christian L. Rutagatina, the counsel for the respondent, who refuted all allegations contained in the affidavit.

A brief background is significant to appreciate what prompted the filing of this application.

The respondent instituted Land Application No. 236 of 2020 at the DLHT for Ilala against the applicant. The claim was that the applicant trespassed into his land measuring ten (10) acres located at Msongola Village claiming the same to be his property.

After a full hearing, the trial DLHT decided that the respondent failed to prove his case; therefore, it was dismissed.

Undaunted, the respondent appealed to this court (Land Appeal No 236 of 2020) "armed" with eight (8) grounds of appeal.

In this court's decision dated 3 September 2021, the respondent's efforts were "rewarded" after the decision of the DLHT was overturned and his appeal was allowed. Further, he was declared as a lawful owner of the suit land.

On page 8 of the Judgment, this Court reveals the reason for its decision. It held that;

".....yet evidence establishes that all land that was allocated to the late Timoth Apiyo was acquired by the Village Government and relocated to other villagers, including Joseph Manda. In such circumstances, the respondent cannot be considered to be the owner of the land which was acquired by the land allocating authority, allocated to a different person, Joseph Manda, and sold to the appellant".

This time the applicant herein was dissatisfied and intended to appeal against this Court's decision. But as the law requires, since the matter started at the District Land and Housing Tribunal, leave is mandatory, hence this application

In this application, in paragraph 6 of the affidavit, the applicant pointed out the matters to be considered by the court of appeal if leave is granted as follows;

- i. Whether or not the appellate judge was just to allow the appeal in disregard of evidence adduced by PW3, Said Abdallah Andanenga, DW1, Clay Apiyo, and DW 3, Seleman Said Beho.*
- ii. Whether the appellate judge was correct in allowing the appeal when there were contradictions in the evidence of PW2, PW3, and PW4.*
- iii. Whether the appellate judge sitting as the first appellate judge, did properly analyze the evidence and came to a fair conclusion.*

At the hearing of this application which proceeded by way of oral submissions, the applicant was represented by Mr. Joseph Manzi, learned counsel, while the respondent was by Mr. Christian Rutagatina, also a learned advocate.

In support of the application, briefly, Mr. Manzi submitted that the applicant was a winner at the DLHT; therefore, the respondent decided to appeal to this Court. This Court reversed the DLHT decision at the appeal,

thus allowing the appeal. After that, the applicant was aggrieved and intends to appeal to the Court of Appeal.

He further submitted that the reasons for seeking leave to appeal are because the appellate judge did not accord weight to the applicant's evidence and that there were contradictions in the respondent's evidence.

In a brief response, Mr. Rutagatina submitted three issues;

He submitted that if the applicant were granted leave to appeal, the respondent would challenge it at the Court of Appeal as indicated in paragraph 8 of his counter-affidavit.

Mr. Rutagatina submitted that paragraph 6 (1) of the affidavit was confusing, and he did not understand what the applicant meant.

Three, he leaves it for the Court to see if there are reasonable grounds warranting the grant of leave to appeal.

In rejoinder, Mr. Manzi submitted that paragraph 6 (1) of the affidavit was clear that the question raised was whether the appellate judge was right to allow the appeal and disregard the evidence adduced by the witness, PW3.

Having considered the chamber summons, its supporting affidavit, the counter affidavit, and the oral submissions made by the learned counsel for the parties, the issue that has to be resolved is;

"Whether or not there is the existence or otherwise of points of law worth to be considered by the Court of Appeal."

Before traversing to the merits or demerits of the application, it is essential to highlight the factors to consider before granting or refusing an application for leave to appeal to the Court of Appeal, as pointed out in numerous decisions by the Court of Appeal and of this Court. The factors are as follows;

One, the Court must ascertain if there is a legal point worth being considered by the Court of Appeal. See **Marcus Kindole Vs. Burton Mdinde**, Civil Application No. 137/13 of 2020[COA] (Tanzlii).

Two, the Applicant must demonstrate that the intended appeal raises issues of general importance or novel point of law. See **HTT In Franco Limited V Juliano Charles Mkongomi**,_Misc. Civil Application, No 24 of 2020 [HC] (Tanzlii)

Three, there must be prime facie grounds meriting an appeal. **Erasto Daima Sanga Vs. Peter Mwonga**, Misc. Land Application No. 66 of 2019 [HC] (Tanzlii)

Four, if the matters are of public importance and raise serious issues of misdirection or non-direction results in a failure of justice. See **Erasto Daima Sanga (Supra)**

Five, there must be serious and contentious issues of law or fact fit for consideration by the Court of Appeal.

In addition to the above factors, in applications of this nature, it is a well-established principle that this Court should refrain from determining the merits or otherwise of the substantive issue(s). See **Regional Manager TANROADS Lindi Vs. DB Shapriya and Co. Ltd**, Civil Application No. 29 of 2012(CAT unreported). At this stage, this Court should confine itself to whether the proposed grounds pass the test of the factors to be considered before granting leave.

Flowing from above, in the determination of the application;

First, having gone through the applicant's affidavit in paragraph 6, the applicant just mentioned that there were contradictions in the evidence of PW2, PW3, and PW4 when testified at the Tribunal. Further, the appellate court disregarded the evidence of PW3, DW1, and DW3 and failed to analyze the evidence properly.

Unfortunately, the details of the contradictions in the evidence of mentioned witnesses or the evidence alleged to be disregarded by the appellate court were not revealed and analyzed to support and prove the allegations. Even in the oral submission to support the application, the counsel for the applicant did not substantiate those allegations; he did not submit anything on the details of alleged contradictions or the evidence that he alleged the appellate court disregarded it.

In principle, the law under section 110 of the **Tanzania Evidence Act**, Cap 6 R: E 2019, has placed a burden of proof on the person alleging the existence of any fact. In this matter, even the affidavit being a substitute for the oral evidence also does not contain any evidence to support the application rather than raising the allegations. Essentially, the affidavit as the basis of the application should have evidence to support the application.

Therefore, from the above discussion, I find that the affidavit and the submission to support the application contain general allegations without being substantiated.

Second, in my analysis on reading the impugned decision, I find that

One, the appellate Court evaluated the evidence of the trial tribunal available on records, including the evidence of PW3, the Chairman of

Msongola Village Council. This is revealed at page 6 of the judgment, where the appellate judge quoted a piece of PW3 evidence that;

"I allowed Joseph Manda to sale the area of Timothy Apiyo because Joseph Manda has the right to sale that area. Timothy Apiyo failed to develop 10 acres and the 10 acres were taken by the village and handled by Joseph Manda who was the caretaker of the area. The time Joseph Manda sold that area it was lawful as at that time that area belonged to Joseph Manda as he was given that area by the village".

Two, also on records, the appellate court noted that there were contradictions by the respondent's witnesses, but it held that the contradictions were minor and could not affect the merits of the appeal. On page 6 of the impugned judgment, the Appellate Judge held that;

"I find the appeal to have merits as though there are minor contradictions in the evidence adduced by the appellant witnesses...".

From the above reasoning, I hold that the appellate Court considered the available evidence on record, analyzed it, and reached that decision.

Therefore, I do not find if there are prima facie grounds meriting an appeal. This is because the grounds to seek leave are not only raised generally and without being substantiated but also don't raise any point worth being considered by the Court of Appeal for the reason that the evidence of the witnesses was considered in the determination of the appeal

and the contradictions that were found were declared to be minor and could not affect the merits of the matter.

In the upshot, the grounds raised in the application are not worthy of being considered in granting the application for leave to appeal to the court of appeal.

Consequently, the application lacks merit, and I dismiss it with costs.

It is so ordered.




K.D. MHINA
JUDGE
28/04/2023.