

THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 707 OF 2022

(Originated from Land Appeal No. 97 of 2021)

BETWEEN

SHOSE K. NGOWO (Administrator of the Estate of the Late COSTANSA S. NGOWO).....APPLICANT

VERSUS

1. EDWIN PAUL MHEDE
2. MUSTAFA HARUNA
KIGUFA.....RESPONDENT'S

RULING

Date of last Order:17/08/2023

Date of Ruling:03/09/2023

K. D. MHINA, J.

The applicant, Shose Ngowo (Administrator of the late Costansa S. Ngowo), was also the applicant in the District and Housing Tribunal ("the DLHT") for Temeke. She sued the respondents, Edwin Paul Mhede and Mustafa Haruna Kigufa, in Land Application No. 264 of 2016, whereas she claimed for *inter alia*, a declaration that she was the lawful owner of five acres of unregistered land located at Kisarawe II Ward within Kigamboni District and that the respondents were trespassers. The respondents disputed the claims.

Having heard the application, the DLHT decided the matter in favour of the applicant and declared the respondents as trespassers.

Aggrieved, the respondents appealed to this Court vide Land Appeal No. 97 of 2021. Having heard the parties on appeal, this Court allowed that appeal by reversing the DLHT decision and declaring the first respondent as the lawful owner of the disputed land.

After that decision, the applicant was dissatisfied; hence this application, which was brought by way of a Chamber summons made under section 47 (2) of the Land Disputes Court Act, Cap 216 (R: E 2019)

The applicant is seeking the following orders against the respondents:

(a) That the Honourable Court be pleased to grant Leave for the Applicant to appeal to the Court of Appeal against the Judgment and Decree of this Court delivered by Hon Arufani, J. In Land Appeal No. 97 of 2020 on 1 September 2022.

(b) Any other order(s) /reliefs(s) as the Court may deem just to grant and

(c) Costs for the application.

The grounds for the application were expounded in the supporting affidavit, which Mr. Raymond Wawa, the counsel for the applicant, swore in support of the application. Relevant to this application are paragraphs 5, 6,7,8,9, 10 and 11 of the affidavit.

The application proceeded by way of written submissions. Mr. Raymond Wawa, learned advocate, represented the applicant, while Mr. Raphael David, also a learned advocate, represented the respondents.

In supporting the application, Mr. Wawa cited the decision of the Court of Appeal in **British Broadcasting Corporation vs. Eric Sikujua Ng'maryo**, Civil Application No. 138 of 2004 (unreported), where it was held that;

"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 case or arguable appeal.

From above, he submitted that based on paragraph 5,6,7,8,9,10,11 affidavit, the grounds for which the application will seek the attention of the Court of Appeal are;

- 1. Whether it was correct for the High Court to find that the joint written statement of defense filed by the 1st, 2nd, 3^d and 5th Respondents were properly before the trial tribunal when they ignored filing the amended written statement of defense as ordered by the Trial Tribunal.*
- 2. Whether it was correct for the High Court to condone the pleadings filed by representative purporting to hold power of attorney in the absence of tendered evidence of such power of attorney.*

3. *Whether it was correct for the High Court when held that the 2nd respondent to be lawful owner of the suit plot in the absence of any prayer in the pleadings at the trial tribunal and in the High Court.*
4. *Whether the High Court was correct to find that the 2nd respondent land was revoked while there was no testimony from any of the parties.*

Based on the above, Mr. Wawa contended that the applicant had demonstrated sufficient grounds to grant the application.

In response, Mr. David vehemently disputed the application by arguing that the affidavit does not disclose any point worth being determined by the Court of Appeal.

He narrated that what was complained in paragraph 5 of the affidavit was fully addressed at page 20 of the impugned judgment. Therefore, nothing was disclosed as a point of law to be considered by the Court of Appeal. The same as what was complained of in paragraph 6.

He further stated that paragraph 7 was the repetition of paragraph 5.

Regarding paragraph 9, he stated that before the DLHT, the issue to be determined was the dispute of two different villages allocated the same land. That was resolved by the High Court as per page 24 of the

Judgment. Therefore, nothing was disclosed as a point of law to be considered by the Court of Appeal.

Concerning paragraph 10, Mr. David stated that the first respondent was represented by a person with power of attorney, and there was no harm regarding that representation.

Faulting paragraph 11, he argued that the complaint was misleading because the local leader testified at the Trial as DW7.

Therefore, Mr. David insisted that there would be no arguable issues before the Court of Appeal if the application were granted.

Mr. Wawa filed the rejoinder, which mostly reiterated what was submitted earlier in the submission in chief.

On careful reading and scrutiny of the application, affidavit, affidavit in reply and submissions from both counsel, the issue that has to be resolved is whether the application of leave can be granted in the circumstances of this matter.

In deliberation and determination of the issue, first, it should be noted that granting leave to appeal is a discretion but not automatic. The Court must ascertain and satisfy itself before granting or refusing leave on points worth being considered by the Court of Appeal.

While scrutinizing the grounds for leave, the Court of Appeal has already cautioned this Court when dealing with applications of this nature.

In **Dorina N. Mkumwa vs. Edwin David Hamis**, Civil Appeal No.53 of 2017 (Tanzlii), it held that it is not expected for this Court to act as an uncritical conduit to allow whatsoever the intending appellant proposes to be perfunctorily forwarded to the Court of Appeal.

Therefore, there are criteria for granting or refusing leave, but this must be done cautiously to avoid falling into the “trap” of determining the merits or demerits of the grounds of intended appeal. See **Jireys Nestory Mutalemwa vs. Ngorongoro Conservation Area Authority**, Civil Application No. 154 of 2016 (Tanzlii), where the Court of Appeal held 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..."

Flowing from above, while balancing the holdings of the Court of Appeal in **Dorina Mkumwa** and **Jireys Nestory Mutalemwa (Both Supra)**, the essential criteria to be considered in granting or refusing leave to appeal 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 vs. Juliano Charles Mkongomi**, Misc. Civil Application, No 24 of 2020 [HC] (Tanzlii)

Third, 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)**

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

Therefore, at this stage, this Court will confine itself to whether the proposed grounds pass the test of the factors to be considered before granting leave.

On this, by looking at the impugned decision, i.e. Land Appeal No. 97 of 2021, in my view, the grounds of complaints by the applicant raise the points of law worth to be considered by the Court of Appeal.

The complaints raised are worth being investigated and given judicial consideration by the Court of Appeal.

Therefore, by a mere look at the impugned decision and without going further to the merits or demerits of the application, the issues raised are contentious.

In the cited case of **Erasto Daima Sanga (Supra)**, it was held that;

"I think it is now settled that, for an application for leave to appeal to succeed, the applicant must demonstrate that the proposed appeal raises contentious issues worth taking to the Court of Appeal or are of such public importance, or contain serious issues of misdirection or non-direction likely to result in a failure of justice and worth consideration by the Court of Appeal....In an application of this nature, all that the Court needs to be addressed on, is whether or not the issues raised are contentious....the Court cannot look at nor decide either way on the merits or otherwise of the proposed grounds of appeal."

Before concluding, I wish to add one issue, quite briefly, regarding the submissions filed by the counsel for the parties engaging themselves in unnecessary arguments. For better understanding, I quote what the parties submitted in chief and reply.

In the submission in chief, the counsel for the applicant wrote that;

*Briefly, at the trial tribunal the Applicant (**a poor widow**) was suing for ownership of piece of land as the administratrix of the estate of the late Konstansa S. Ngowo (her husband) unlawfully occupied by the 1st Respondent one EDWIN PAUL MHEDE (**by then he was the Commissioner General of Tanzania Revenue Authority, now the Chief Executive Officer at Dar es Salaam Rapid Transport (DART)**) who encroached a piece of land and snatched about 5 acres uprooted various crops,*

demolished the house and foundation which was erected by the applicant.

In reply, the counsel for the respondents wrote;

Before going into the details of this application, we strongly comment on the mode or conduct of the applicant's counsel in particular paragraph three of the written submission in chief. The applicant is attacking and lowering the integrity and image of the first respondent in the society. The first respondent being a Government Officer that alone does not prohibit him from defending his constitutional rights to own property/properties lawfully he has acquired. The applicant is using an umbrella of being a widow to take away the first applicants right we are mindful and respect this court as a court of law and not court of equity. This behaviour should be discouraged.

Flatly, I think it was unnecessary to raise, engage and argue on such an unnecessary issue, which in any way could not assist the Court in determining the matter at hand.

Therefore, counsel and parties should "stick" to their pleadings and/or other necessary and important points of law arising from their pleadings rather than engaging themselves in unnecessary arguments such as parties' social statuses. It is abhorrent and absurd, and for that reason, I should end here on that issue.

From the above discussion and the cited decision, I hold that there are legal points worth being considered by the Court of Appeal.

Consequently, this application has merit and is hereby granted, and I order no costs.

I order accordingly.



A handwritten signature in blue ink, appearing to read "K. D. Mhina".

K. D. MHINA
JUDGE
03/09/2023