

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

MISC. LAND APPLICATION NO. 456 OF 2023

(Application from the Judgment and Decree in Appeal of the High Court of Tanzania (Land Division) at Dar es Salaam in Land Appeal No. 189 of 2023 delivered on 28/06/2022 before Honourable Dr. Theodora Nemboyao Mwenegoha Judge and formerly originating from Land Application No. 12 of 2018 at Kibaha District Land & Housing Tribunal)

MOHAMED ISSA MBELWA APPLICANT

VERSUS

MARTIN MOHAMED KADUMA RESPONDENT

Date of Last Order: 09/10/2023

Date of Ruling: 26/10/2023

RULING

I. ARUFANI, J

This application is for leave to appeal to the Court of Appeal of Tanzania against the decision of this court dated 23/06/2023 delivered in Land Appeal No. 189 of 2022. The matter originated from Land Application No. 12 of 2018 of Kibaha District Land and Housing Tribunal. The application is made under Section 47(2) of the Land Disputes Courts Act CAP 216 RE 2019 and is supported by the affidavit of the applicant herein and opposed by the counter affidavit of John Kambo Chandika, advocate for the respondent.

With leave of the court the application was argued by way of written submissions. Whereas submission on behalf of the applicant

was drawn and filed in the court by Mr. Faraji Mangula, learned advocate, the submissions on behalf of the respondent was drawn and filed in the court by Mr. John Kambo Chandika and Mr. Idd A. Mrema, learned advocates.

In his submission in chief, the counsel for the applicant cited cases which points out legal principles pertaining to the grant of leave to appeal to the Court of Appeal. He said according to the case of **Winford Mlagha V. Dinales Paulo Mwasile & Two Others**, Civil Application No.112/06 of 2022 (unreported) which quoted the case of **Sango Bay Estates Limited & Others V. Dresdner Bank** [1971] EA 17 it was stated that, leave to appeal will normally be granted where prima facie, it appears that there are grounds of appeal which merit serious judicial consideration.

He also cited in his submission in chief the case of **Citibank Tanzania Limited V. Tanzania Telecommunications Company Limited & 5 Others**, Misc. Commercial Cause No. 6 of 2003 cited in the case of **Winfred Mlagha** (supra) where the case of **Gaudencia Mzungu V. IDM Mzumbe**, Civil Application No. 94 of 1999 (unreported) was cited and stated leave is grantable where there is prima facie, ground meriting an appeal to the Court of Appeal. He stated paragraph 5 of the affidavit supporting the application contains

significant grounds that need to be determined by the Court of Appeal which are as follows: -

- (i) *Whether it was correct in law for the first appellate court to discredit the demeanour of the defence witness that his testimony cannot be believed and cannot be relied upon.*
- (ii) *Whether the first appellate court was correct in law dismissing and setting aside the trial Tribunal's judgment without having an intensive scrutiny on the law of Limitation Act necessities.*

The counsel for the applicant submitted that the two grounds quoted above have met the threshold mentioned in the cases cited in his submission. He stated the issue of demeanour of witness and time limit which were not properly determined are likely to have miscarriage of justice. He further cited in his submission the case of **Lazaro Mabinza V. The General Manager, Mbeya Cement Co. Ltd**, Civil Application No. 1 of 1999 (CAT-Mbeya) (unreported) where the Court of Appeal stated that leave to appeal should be granted in matters of public importance and serious issue of misdirection or non-direction likely to result in a failure of justice.

He went on citing in his submission the case of **Said Ramadhani Mnyanga V. Abdallah Salh**, [1996] TLR 74 where the

court held that, for leave to appeal to be granted the application must demonstrate that there are serious and contentious issues of law or fact fit for consideration by the Court of Appeal of Tanzania.

The counsel for the applicant also relied on Article 13 (6) (a) of the Constitution of the United Republic of Tanzania that a person is entitled to a fair hearing and has a right to appeal. He concluded his submission by praying the application be granted and the applicant be granted leave to appeal to the Court of Appeal.

In their submissions in reply, the counsel for the respondent submitted that the two grounds raised by the applicant does not meet the threshold required to invite the highest court of the land to intervene. They said the appellate court executed its duty thoroughly well and further that it being the first appellate court it had to go through the evidence on record and make a just decision by quashing and setting aside the Tribunal's judgment.

They further pointed out that for leave to be granted, one must show that there is a point of law to be discussed by the Court of Appeal but the two grounds raised by the applicant do not give that test of point of law. They submitted that the Court of Appeal is a court of record, and it cannot be turned to a court of proof of his allegations. They relied on the case **Erasto Daima Sanga V. Peter Mwonga**,

Misc. Land Application No. 66 of 2019 (HC-Mbeya) (unreported). At the end they prayed the application be dismissed with costs.

In rejoinder the counsel for the applicant emphasized that the two grounds raised in the affidavit require serious judicial consideration of the highest court of the land to ensure justice is done to parties. He relied on the cases of **Winford Mlagha** (supra) which quoted the case of **Sango Bay Estates** (supra), **British Broadcasting Corporation V. Sikujua Ng'imaryo**, Civil Application No. 138 of 2004 (CAT-DSM) (unreported), **Harban Haji Mosi & Another V. Omar Hilila Seif & Another**, Civil Reference No. 19 of 1997 (CAT) (unreported) and **Said Ramadhan Mnyanga V. Abdallah Salehe** [1996] TLR 74 to support his submission. In fine He prayed for the court to find this application has merit and grant it accordingly.

I have gone through the chamber summons, affidavit, counter affidavit and the submission filed in the matter by the counsel for the parties and find the main issue for consideration in this matter is whether the applicant deserve to be granted leave to appeal to the Court Appeal. The guiding principle in grant of application for leave to appeal to the Court of Appeal is found in the cases of **Harban Haji**

Mosi & Another (supra) and **British Broadcasting Cooperation**

(supra). In the latter case 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 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 (see: **Buckle v Holmes** (1926) ALL E.R. Rep. 90 at page 91). However, where the grounds of appeal are frivolous, vexatious or useless or hypothetical, no leave will be granted".*

The foundation of an application for leave to appeal is to spare the Court of Appeal of inflow of matters, which have no merit, and or which have already been dealt with by the lower courts. The law provides that the court has the discretion to grant or refuse the application for leave. However, that discretion must be judiciously exercised and the court in so doing must act on the materials presented by the applicant both in his affidavit and the submissions in support of the application.

The applicant must also show clearly the deficiencies moving him to appeal as seen in the proceedings and decision sought to be impugned. The duty of the applicant, is therefore, to demonstrate

serious points of law or mixed law or prima facie arguable ground that need to be considered by the Court of Appeal (see **Simon Kabaka Daniel vs. Mwita Marwa Nyanga'nyi & 11 Others [1989] TLR 64**).

In view of the above stated position of the law, the main task of the court is to decide whether the applicant in the present application has managed to meet the conditions elaborated in the above cited authorities. Looking at the affidavit in support of the application, the court has found the grounds intended to be considered by the Court of Appeal are enumerated in paragraphs 5 (i) and (ii) of the affidavit supporting the application which has been quoted earlier in this ruling. After considering what is stated in the grounds contained in the cited paragraph of the affidavit supporting the application and after going through the impugned judgment of the court the court has found the stated grounds are extracted from what was deliberated by the court at page 4 and 5 of the impugned judgment of the court.

The court consolidated the three grounds of appeal which had been raised in the appeal and after considering them conjunctively it came to the finding that the evidence of the respondent was heavier than the evidence of the appellant. The court allowed the appeal of

the respondent and quashed and set aside the order of the tribunal and declared the respondent is the lawful owner of the suit land and the respondent is a trespasser and ordered to vacate from the land immediately.

After considering the grounds intended to be considered by the Court of Appeal raised in the affidavit of the applicant the court has been satisfied the applicant has sufficiently set out the grounds contesting correctness of the decision of the court. The court has found the ground of contesting correctness of the first appellate court to discredit demeanor of the defense witness and failure to consider and determine the issue of limitation of time are arguable grounds which deserve to be considered by the Court of Appeal.

The court has considered the argument by the counsel for the respondent that the two grounds raised by the applicant are not point of law worth to be considered by the Court of Appeal but find as stated in the cases cited hereinabove it is not true that the leave to appeal is supposed to be granted on point of law only. To the contrary and as held in various cases cited in the submissions of the counsel for the parties and particularly the case of **British Broadcasting Cooperation** (supra) the court is required to be satisfied the grounds of appeal intended to be considered by the Court of Appeal raises

issues of general importance or a novel point of law or where the grounds show a prima facie or arguable appeal.

The court is agreement with the counsel for the respondent that the first appellate court can review the evidence of the trial court and come out with its own decision. That position is well stated in the case of **Demmay Daati & 2 Others vs. Republic, Criminal Appeal No. 80 of 1994**) where the Court of Appeal stated: -

"Where there is misdirection and non-direction on the evidence, or the lower courts have misapprehended the substance, nature and quality of the evidence, the appellate court is entitled to look at the evidence and make its own findings of fact."

However, the court has found as the applicant is contesting correctness of the decision of the court in quashing the decision of the tribunal, the grounds raised in paragraph 5 of the affidavit supporting the application are arguable grounds which deserve to be considered by the Court of Appeal. It is because of the above stated reasons the court has found the applicant has managed to satisfy the court he deserves to be granted leave to appeal to the Court of Appeal. Consequently, the applicant is granted leave to appeal to the Court of Appeal against the decision of the court in Land Appeal No. 189 of 2023 delivered on 28th June, 2023. No order as to costs.

Dated at Dar es Salaam this 26th day of October, 2023



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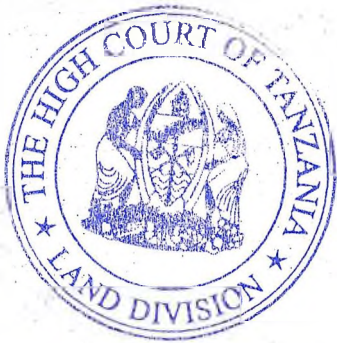
I. Arufani.

JUDGE

26/10/2023

Court:

Ruling delivered today 26th day of October, 2023 in the presence of Mr. Faraji Mangula, learned advocate for the applicant and in the presence of Mr. Idd Mrema, learned advocate for the respondent. Right of appeal to the Court of Appeal is fully explained to the parties.



A handwritten signature in blue ink, appearing to read "I. Arufani".

I. Arufani.

JUDGE

26/10/2023