

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 401 OF 2023

(Arising from the Ruling and Drawn Order in Misc. Land Application No. 367 of 2021 dated 17th November 2021)

ADRIANO CHANJA.....APPLICANT

VERSUS

RENATHA TIGIYA.....1ST RESPONDENT

HAMU KOTEKI MWAKASOLA.....2ND RESPONDENT

10/10/2023 & 25/10/2023

RULING

A. MSAFIRI, J.

The above named applicant have lodged the present Application, by chamber summons under Section 5(1) (c) of the Appellate Jurisdiction Act [CAP 141 R.E 2019] read together with the provisions of the Land Disputes Courts Act Cap 216, R.E 2019, seeking for the following reliefs namely;

- 1. That this Honourable Court be pleased to grant leave to the applicant to appeal to the Court of Appeal against the decision of Honourable V.L. Makani,J delivered on 24th day of October, 2022.*
- 2. Costs be in the cause.*
- 3. Any other reliefs this Honourable Court deem fit to grant.*

The Application is supported by an affidavit sworn by Adriano Chanja, applicant himself and is contested by the 2nd respondent who filed

a counter affidavit which was sworn by Moses Ambindwile, the learned advocate acting under instructions of the 2nd respondent. By the consent of the parties and order of the Court, the Application was disposed of by way of written submission, the order which was accordingly complied with by both parties hence this ruling. The Application was heard ex-parte against the 1st respondent as she failed to appear in Court and defend his case when she was summoned to appear.

Before canvassing the submissions in support and rival to the Application, a brief background giving rise to the present Application is apposite.

The origin of the dispute is that the now applicant instituted the Application No. 90 of 2010 against the respondents Renatha Tigiya and Hamu Koteki Mwakasola. The Application was filed at The District and Land Housing Tribunal of Ilala(DLHT) where the applicant claimed that he purchased a piece of land at Kisukuru, Dar es Salaam and the 1st respondent was a witness. That when he was transferred to another work station he left the said piece of land under care of the 1st respondent. That sometimes later when he returned back he was surprised to find the 2nd respondent occupying his piece of land and when he asked the 2nd *Allo.*

respondent, he replied that he has purchased the land from the 1st respondent.

At the DLHT the applicant was seeking for declaration that he was a lawful owner of the piece of land hence entitled to possession of the same and that the sale of his piece of land by the 1st respondent to the 2nd respondent was void and the 1st respondent had no any title to pass to the 2nd respondent.

The DLHT after hearing the parties, partly granted the Application and ordered that the applicant should claim his proceeds of sale back from the 1st respondent and that the 2nd respondent is the lawful owner of the suit land. The DLHT made further order that the 2nd respondent is entitled to enjoy the land in dispute or to vacate upon being compensated all the development he has done on the disputed land.

The applicant was aggrieved by the decision and lodged an appeal No.196 of 2019 in this Court before Hon. Makani,J. After hearing, the appeal was dismissed with costs and this Court upheld the decision of DLHT that the 2nd respondent is the lawful owner of the suit land. The applicant was not happy either with the said decision and intends to appeal further to the Court of Appeal, hence he is seeking for leave to file the appeal to the Court of Appeal.

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During the hearing which was by written submissions, the submissions by the applicant was drawn and filed by Mr. Barnaba Luguwa, learned advocate. He submitted that the grounds of intended appeal are as stated in paragraphs 5 i-vi of the applicant's affidavit. The counsel went on to submit at length on each of the grounds for determination by the Court of Appeal. Also he has cited several decisions to fortify his stance. The Court has taken into consideration the said grounds as submitted by the counsel for the applicant.

The reply submissions by the 2nd respondent was drawn and filed by Mr. Moses Ambwindile, and Mr. Felix Mutaki, learned advocates. They submitted also briefly first on the legality of the affidavit supporting the Application. That the affidavit is defective contrary to Order XIX, Rule 3(1) of the Civil Procedure Code, Cap 33 R.E 2019. They argued that the contents of paragraph 5(i-vi) of the affidavit are not confined on facts but they are basically arguments hence they lacks the qualification to be in affidavit. That the said paragraph ought to be expunged from the affidavit and since the remaining contents cannot stand, the Application is rendered incompetent. They prayed that the Application be struck out with costs.

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The counsels submitted on the merit of the Application that the same is devoid of merit to the extent that the applicant have failed to meet the prerequisite requirement to move this Court to grant leave to appeal from the impugned decision of this Court. The counsels pointed that the issues raised at paragraph 5 of the affidavit are issues of facts and not issues of law that constitute good cause for grant of leave to appeal. They prayed that the Application be dismissed with costs.

In rejoinder, Mr. Luguwa responded that, the affidavit of the applicant shows points of law of legal importance which are to be determined by the Court of Appeal and hence cannot be expunged. He added that the counsels for the 2nd respondent have failed to see the grounds of appeal stated in the affidavit of the applicant. He reiterated his prayers.

I have closely examined the affidavit in support of the Application, counter affidavit of the 2nd respondent as well as submission in support and rival to the Application. The point for my determination is whether the application has merits.

In an Application for leave like the present one there are conditions to be considered upon which leave to appeal is grantable. Such conditions were expounded in the decision of the Court of Appeal in **British** *Alls.*

Broadcasting Corporation vs. Erick Sikujua Ng'maryo, Civil Application No. 138 of 2004 (unreported). In that case the Court 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 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 (see: **Buckle vs. Holmes (1926)** ALL E. R. 90 at page 91). However, where the grounds of appeal are frivolous, vexatious or useless or hypothetical no leave will be granted."*

From the foregoing quoted decision, it is imperative to note that the grant of leave is not automatic but conditional in that it can only be granted where the grounds of the intended appeal raise arguable issues in the appeal before the Court. Furthermore, my duty in this Application is not to determine the merits or demerits of the grounds of appeal raised when seeking leave to appeal. Instead I have only to consider whether the proposed issues are embraced in conditions set out in **British Broadcasting Corporation vs. Eric Sikujua Ng'maryo [supra]**.

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Unlike the submissions of the counsel of the applicant in which he has at length submitted on each of the grounds intended to be determined by the Court of Appeal, it is not my duty to make decision on the substantive issues before the appeal itself is heard but to look on whether there are vital points of law which has to be placed before the Court of Appeal.

Hence the applicant was only required to show in his affidavit the arguable grounds for determination by the Court of Appeal. Looking at paragraph 5 i-vi of the affidavit at what are purportedly to be the vital issues of law on which the Court of Appeal has to intervene, this Court finds that they are narrations of the proceedings or the evidence which was adduced during trial and allegedly was not considered by the High Court Judge. This Court has failed to grasp on what exactly are the novel issues which are worthy of the consideration of the Court of Appeal as the said contents of paragraph 5 of the affidavit are not coherent.

As said earlier, even in the written submission by the counsel for the applicant, the counsel has at length submitted on the evidence which was adduced during the trial and that the Hon. Judge has failed to consider the said evidence by the applicant. The counsel has failed to point out on

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direct substantive issues which are of the utmost importance and which could have moved this Court to grant the sought order for leave to appeal.

Consequently I find that the grounds set out in paragraph 5 of the affidavit does not meet the requirements set in the case of **British Broadcasting Corporation vs. Eric Sikujua Ng'maryo [supra]**.

The Application has no merit and is hereby dismissed with costs.



THE HIGH COURT OF TANZANIA
LAND DIVISION
A. MSAFIRI,
JUDGE
25/10/2023