

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 807 OF 2022

(From the decision of the High Court of Tanzania at Dar Es Salaam in Land Appeal No. 197 of 2020 before Hon. V. I. Makani J. dated on 13th October 2021)

MATILDA MATIGANAAPPLICANT

VERSUS

PETER KIULA.....1ST RESPONDENT

BROWN MWAKALEBELA.....2ND RESPONDENT

PAULO KUBE MASANJA.....3RD RESPONDENT

GABRIEL BENARD.....4TH RESPONDENT

RULING

Date of last Order:07/09/2023

Date of Ruling:09/11/2023

K. D. MHINA, J.

The applicant, Matilda Matigana, was also the applicant in the District and Housing Tribunal ("the DLHT") for Kinondoni. He sued the respondents in Land Application No. 418 of 2018, whereas he claimed against the respondent's part of surveyed one acre of land located at Goba and the application was dismissed for want of merit. He was dissatisfied by that decision and therefore knocked on the door of this court vide land Appeal No. 197 of 2020. Again, the matter was decided in favour of the respondents.

Being aggrieved by this court decision, the applicant prefers 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:

- 1. The trial Judge did not evaluate and ascertain the irregularities constitute point of law by failure to adhere the rules govern land tribunal in admission of evidence and let the impugned judgment tainted with a lot of technicalities.*
- 2. That, the trial Judge did not ascertain the irregularities which constitute on point of law by fail to scrutiny the authentic of evidence on the record by the purported first owner of land in declaring the respondents are legally posses the suit land*
- 3. Cost*
- 4. Any other order as this honourable Court may deem fit and just to grant*

The grounds for the application were expounded in the supporting affidavit, which Matilda Matigana, the applicant, swore in support of the application.

The points of law for which the applicant will seek the attention of the Court of Appeal if leave is granted by this Court are;

- 1. Whether the trial Judge did not evaluate and ascertain the irregularities constitute point of law by failure to adhere the rules govern land tribunal in admission of evedence and let*

the impugned judgment of Land and Housing Tribunal tainted with technicalities

- 2. Whether the trial Judge did not ascertain the irregularities constituted on point of law by failure to scrutinise the authentication of evidence on the record by the purported first owner of land in dispute and declaring the respondents legally possess the suit land.*

The application proceeded by way of written submissions. The applicant was unrepresented, while Mr. Kelvin Kidifu, a learned advocate, represented the 1st and 3rd respondents. The application proceeded ex parte against 2nd and 4th respondents.

The applicant submitted that they went through the records of the District Land and Housing Tribunal of Kinondoni at Mwananyamala in Land Application No. 418 of 2018 clearly shows that the applicant's evidence was not admitted during all processes of hearing regardless she was appeared in person, as the trial chairperson has a duty to lead both parties in dispute in order to reach a fair and undoubtedly decision, the act of denied her evidence as the matter of secondary evidence is not fatal because he had a duty to refer the rules governs land tribunal in particular circumstances in order to reach a fair and just decision to both parties.

The applicant submitted that the one who transfer the land in dispute to 3rd respondent, did not appear to prove the said purported

agreement. The trial Judge when determined the Land Appeal No. 197 of 2020 in this Court, failed to scrutinize authentication of sale agreement. She further submitted that the land has never been owned by the purported seller (2nd respondent) regardless all necessary procedure to summon him was followed hence found that, this issue has to be determined before the Court of Appeal for the purpose of justice.

The 1st and 3rd respondents opposed the application and urged that the first ground adduced by the Applicant was never raised in her appeal and the second ground was dealt with by this Court in her appeal

Mr Kidifu further urged that the second ground did not constitute sufficient ground for determination by the Court of Appeal of Tanzania. The decision of this Court in Land Appeal No. 197 of 2020 on pages 14 and 15 this Court find out that the whole decision of the trial Tribunal was based on documentary evidence, whereas the Applicant never had sufficient evidence to prove her ownership of the demise premises.

He referred this court to the Court of Appeal decision in **Innocent Bisusa vs. Rajabu Rashi Mgozi**, Civil Application No. 680 of 2021 (**Tanzlii**) wherein the determination of the application of this nature whereas the Applicant has failed to adduce sufficient grounds worth this Court to grant leave to appeal to the Court of Appeal of Tanzania.

On careful reading and scrutiny of the application, affidavit, affidavit in reply and submissions from both counsels, 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.

There is plethora of authorities that has insisted on the sufficient cause for leave to appeal to the Court of Appeal. In the case of **Harban Haji Mosi and Another v. Omar Hulal Seif and another**, Civil Reference No. 19 of 1997 (unreported) which was quoted with approval in **Rutagatina C.L vs The Advocates Committee and Clavery Mtindo Ngalapa**, Civil Application No. 98 of 2010 (Tanzlii) the Court of Appeal held that:

"Leave is grantable where the proposed appeal stands reasonable chances of success or where but not necessarily the proceedings as whole reveal such disturbing features as to require the guidance of the Court of Appeal. The purpose of the provision is therefore to spare the Court the spectre of

unmeriting matters and to enable it to give adequate attention to cases of true public importance.”

While it is clear that it is within the discretion of the Court to grant or refuse to grant leave, such discretion must be judiciously exercised in considering the facts before the Court. As a matter of general principle, leave to appeal will be granted where the grounds of appeal raise issue of general importance or a novel point of law or where the grounds show a prima facie or arguable appeal.

In the present application, the Applicant deponed in his affidavit at paragraph 7 is based on two points,

One, that the hon Judge failed to adhere to the rules which govern Land tribunal in the admission of evidence and

Two that the hon judge failed to consider the fact that the vendor did not appear to adduce evidence at DLHT.

Flowing from above by looking at the impugned decision, 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. While the issues of the vendor of the land absence was raised in the 3rd ground of appeal but it was not determined.

I hold as above in order 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..."

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

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

I order accordingly.




K. D. MHINA
JUDGE
09/11/2023