

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 150 OF 2022

PIDAS GILBERT NDALIBANYEAPPLICANT

VERSUS

KASSIM HASSAN KISAMILE (Administrator of

the estate of the late ABDALLAH NDEMBO) **RESPONDENT**

RULING

Date of last Order: 18/09/2023

Date of Ruling: 15/12/2023

K.D. MHINA, J.

This application originates from this court's Land Appeal No. 11 of 2022.

The records reveal that the applicant had instituted a suit against the respondent at the Wazo Ward Tribunal in Madai No. 181/2019, where it was decided in favour of the respondent.

Dissatisfied, the applicant applied at the District Land and Housing Tribunal ("the DLJT") for Kinondoni in Misc. Land Application No. 816 of 2021 for an extension of time to challenge the Ward Tribunal decision out of time. The DLHT dismissed the application for the applicant's failure to provide sufficient good cause for the delay.

Aggrieved, the applicant appealed to this court vide Land Appeal No. 11 of 2022. The appeal was dismissed on 31 March 2022 for want of merit.

Undaunted, the applicant approached this Court this Court again by way of a Chamber summons made under. ***Rule 45(a) of the Tanzania Court of Appeal rules [R.E. 2019] and section 47 (2) of the Land Disputes Courts Act [CAP.216 R.E. 2019].***

The applicant is seeking the following orders against the respondent;

- 1. This Honourable Court may be pleased to grant leave to enable the applicant appeal to the Court of Appeal of Tanzania against the whole decision of this Court in Land Appeal No. 11 of 2022 by Hon J. Mgeyekwa dated 31st of March 2022.*
- 2. Costs of this application be provided for.*
- 3. Any other or further reliefs) this Honourable Court may deem fit and just be granted.*

The grounds for the application were expounded in the supporting affidavit; the applicant swore to support the application. Paragraphs 5 and 6 of the affidavit are relevant to this application.

The application proceeded by way of written submissions, and the applicant as well as the respondent were both unrepresented.

In supporting the application, the applicant submitted that the High Court of Tanzania (Land Division) failed to analyze and properly address the grounds raised in Land Appeal No. 11 of 2022, especially on the point of illegality as to the jurisdiction of the Ward Tribunal.

He narrated that the Ward Tribunal had no jurisdiction to entertain the matter before it, as proved in the valuation report dated March 2022, which indicated that the value of TZS 6,000,000, which was beyond TZS 3,000,000=, the pecuniary jurisdiction of the Ward Tribunal.

He further submitted that illegality goes to the root of the subject matter, and the issue of jurisdiction is the point of law that can be raised at any time, even at the Court of Appeal stage.

Further, another point of illegality based on whether it was the correct position of the law for this Court and DLHT for Kinondoni to fail to consider and disregard the principle of the 1st buyer who acquires the good title that could be the sufficient reason to grant an extension of time

He explained that the record shows that the applicant bought the disputed property on 10 March 2015, where the respondent was given the same on 14 June 2015, a few months later.

He argued that that is another point which deserves the attention of the Court of Appeal of Tanzania.

In supporting the application, the respondent referred this court to the decision of the Court of Appeal in ***Hashimu Juma Napepa vs. Bakari Ahmed Ng'itu*** (*Administrator of the Estate of Galus Polipoli*) ***and Another***, Civil Application No 7 of 2022 (Tanzlii) at page 6 where it was held that;

"It is a trite law that in an application for leave to appeal, the applicant must demonstrate that there are some arguable points of law or matters of general importance emanating from the impugned decision to convince the Court to exercise its judicious discretion to grant it. As we stated in Kadiri Zahoro and Another v Mwanahawa Selemani [Supra] in an application for leave to appeal; - "questions such as the nature or significance of the intended point of law or fact to warrant the decision of the Court of law or fact to warrant the decision of the Court of Appeal should prima facie be stated in the applicant's application".

In response, the respondent submitted that at Ward Tribunal, when testified, the respondent alleged that the subject matter's value was around TZS 700,000/= and TZS 900,000/=.

Further, he submitted that the Applicant intended to mislead this Court while submitting in Land Appeal number 11 of 2022 when annexed manipulative valuation report conducted a few days before such submission alleging that the value of the land was TZS 6,000,000/= including the value of the hut constructed by the Applicant himself which was not there when the Tribunal visited a locus in quo.

On the issue of illegality, the respondent cited the case of ***Salim Mbwana and Three Others vs. Caroline John Mchechu*** (As Administrator of the estate of the late John Mchechuu) Misc Land Application No. 81 of 2019 and ***Leocadia Rugambwa vs Asia Mzee Mkwanga and Another***, Misc Land Application Number 504 of 2019 at page 9 where it was held that;

"Illegality must be apparent on the face of records such as the question of jurisdiction, not one that would be discovered by long drawn argument or process".

He further submitted that the late Abdallah Ndembo was the first to buy the land in dispute early in 2011

Therefore, he argued that the claimed Illegality is not apparent on the face of the record other than the result of the Applicant's reluctance and hoodlum acts.

He concluded by submitting that, since the Pecuniary jurisdiction of the Ward Tribunal was well established at the Ward Tribunal, and the Applicant was the loser at the Ward Tribunal, it was not expected to see

him constructing a hut on the disputed land that was initially declared not his land.

In a brief rejoinder, the applicant reiterates what he submitted earlier in his submission in chief.

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

The issue for determination in this matter 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 leave, as pointed out in numerous decisions by the Court of Appeal and this Court.

One, the Court must ascertain if there is a legal point worth being considered by the Court of Appeal.

Two, the Applicant must demonstrate that the intended appeal raises issues of general importance or novel point of law.

Three, there must be prime facie grounds meriting an appeal.

Four, if the matters are of public importance and raise serious issues of misdirection or non-direction results in a failure of justice.

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

In determining the only issue which arises in this matter, whether or not the application has merit, what is to be ascertained is the existence or otherwise of a point of law worth consideration by the Court.

An application for leave to appeal to the Court of Appeal of Tanzania is granted at the discretion of the court. Much as the law is silent on how this discretion should be exercised, the conditions for granting leave have been given in a number of Court of Appeal decisions, including that of ***Jireys Nestory Mutalemwa vs. Ngorongoro Conservation Area Authority***, Civil Application No. 154 of 2016, (Tanzlii). In this case, the Court Appeal, while affirming the position elucidated in its previous decisions, held that:

*"We acknowledge that the law does not expressly state the factors to be considered for the grant of leave to appeal to the Court. However, it is now accepted that the conditions were lucidly expounded by the Court in the case of **British Broadcasting Corporation vs Eric Sikujua Ng'maryo**, Civil Application No. 138 of 2004 (unreported). In that case, as cited in the case of **Rutagatina C. L. vs The Advocates Committee and Another**, Civil Application No. 98 of 2010 (unreported), 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 v 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."*

Subscribing fully to the case laws above, therefore, leave to appeal to the Court of Appeal of Tanzania cannot automatically be granted until and unless the court is satisfied that the conditions expounded above exist.

In the instant application, the central issue for our determination is whether the applicant has raised grounds for passing the test set out in the above decisions of the Court for the grant of leave to appeal.

Applying the conditions in the above precedent and this present application for leave, the court has to be satisfied with the anticipated grounds of appeal under Para. 5 and 6 of the applicant's affidavit raised issues arguable by the Court of Appeal.

The duty of the Court at this stage is to confine itself to the determination of whether the proposed grounds raise an arguable issue(s) before the Court in the event leave is granted.

In elaborating, the applicant concentrated on only two issues, which he said were the basis of his prayer for leave to appeal to the Court of Appeal. For clarification, I will produce the two paragraphs hereunder for easier understanding;

5. Further that the applicant is going to contend in the Court of Appeal of Tanzania that there are serious points of illegalities in the decision to be challenged which were disregarded by the High Court of Tanzania (Land Division) and District Land and Housing Tribunal

prompting refusal to grant extension of time one of them being as to whether it was right for the Ward Tribunal to deal with land matter that it had no jurisdiction to deal with despite the tendered documentary evidence.

6. Further that the applicant is going to contend in the Court of Appeal of Tanzania as to whether it was correct position of the law for the High Court of Tanzania (Land Division) and the District Land and Housing Tribunal to fail to consider the illegality tainted in the decision to be challenged of the Ward Tribunal for disregarding the principal of the 1st buyer who acquires the good title that could be sufficient reason to grant extension of time since the record shows that the applicant bought the disputed property on 10.3.2015 where the respondent was given the same on 14.6.2015 a few months later.

From the above, the grounds for this application are

One that the ward tribunal had no jurisdiction to entertain the matter before it

Two illegality by ignoring the first buyer principle

Briefly, in the determination of the first ground, I have considered the fact that the applicant was the one who applied to Wazo Ward Tribunal as Shauri Na 181/2019 and, being unsuccessful, filed Mic Land Application No. 816 Of 2021 to the DLHT of Kinondoni.

It is evident from the records that the applicant did not raise the point of illegality at the DLHT, but he raised it at this court during the appellate stage.

On this, the general position of law is that the appellate court cannot entertain a ground not raised in the first appellate Court. This is the position

in ***Melita Naikiminjal and another vs Sailevo Loibanguti*** (1998) T.L.R 120, where the Court of Appeal held that;

"An issue not raised before the first appellate court cannot for the first time be raised and entertained by the second appellate court".

I understand that the question of jurisdiction can be raised at any stage. But ***in Tanzania - China Friendship Textile Co. Ltd vs. Our Lady of the Usambara Sister (2006) TLR 70***, it was held that in order to raise a point of law, there must be material evidence placed before the Court. The evidence against and for that question of jurisdiction.

The Court of Appeal cemented this position in ***Yusuf Khamis Hamza vs. Juma Ali Abdalla***, Civil Appeal No. 25 of 2020 (Tanzlii) when it held that: -

"We are alive with the settled position of the law that time limitation goes to the Jurisdiction issue of the Court, and it can be raised at any time, even at the Appellate stage by the Court, but in order for it to be noted and raised, it would require material evidence to be placed before the Court."

Therefore, though the applicant raised the question of jurisdiction at this stage, the same was not backed up by any material evidence adduced at the DLHT. Thus, this Court cannot endorse an issue to the determination of the Court of Appeal, which was not raised before, because it cannot know where the 1st appellate court goes wrong or right.

In addition, as can be seen under paragraph 5 of the applicant's affidavit, the applicant's application intending to challenge the decision of the DLHT when refusing to grant an extension of time and not to challenge the decision of the Wazo Ward Tribunal in Shauri Na. 181/2019.

Therefore, this ground is not merited, and as a result, I hold that it is misplaced.

Regarding the second ground, having gone through the impugned ruling, in my view, the complaints raised by the applicants in the instant application do not raise any point of law worth being considered by the Court of Appeal. Thus, I am not persuaded by the applicant's submissions that the second ground raises issues of general importance or novel point of law. What happened as per the ground is the dissatisfaction of the applicant on the determination of who was the first buyer.

On this, the law that leave to appeal should not be based on the dissatisfaction of a party who intends to appeal; it should be based on the existence of points of law worth being considered by the Court of Appeal. There must be serious issues of misdirection or non-direction, resulting in miscarriage of justice and legal points worth being considered by the Court of Appeal.

In the upshot, the grounds raised in the application are not worth considering 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

15/12/2023