

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

MISC. LAND APPLICATION NO.555 OF 2022

(Originating from Land Appeal No.175 of 2019)

ELIAS EDWARD MAYUNGA..... APPLICANT

VERSUS

ERNEST MASSAE.....1ST RESPONDENT

MWANTUMU ALLY.....2ND RESPONDENT

Date of Last Order: 22.12.2022

Date of Ruling: 24.02.2023

RULING

V.L. MAKANI, J

The applicant ELIAS EDWARD MAYUNGA is seeking for leave to appeal to the Court of Appeal of Tanzania against the decision of this court in Land Appeal No. 175 of 2019. He has moved this court vide section 47(2) of The Land Disputes Courts Act, CAP 216 RE 2019. The application is supported by affidavit sworn Mr. Daniel Welwel, Advocate for the applicant. The respondents swore a joint counter affidavit in opposition. Mr. Erick Mhimba appeared for the applicant while Mr. F. Mghare represented both the 1st and 2nd respondents. The application was argued orally.

Submitting for the application Mr. Mhimba prayed to adopt the contents of the supporting affidavit and the reply to the counter affidavit. He said that the application herein is against the judgment in Land Appeal No.175 of 2019. He mentioned some of the reasons for appeal; that an appeal is a matter of right and that the applicant stands a chance for success in the intended appeal. He said an application for leave is discretionary and as a matter of procedure there is no automatic right of appeal unless leave is granted as per section 47(2) of the Land Disputes Court Act CAP 216 RE 2019. He also relied on the case of **British Broadcasting Corporation vs. Eric Sikujua Ng'maryo, Civil Application No. 133 of 2004 (CAT-DSM)** (unreported).

The discretionary powers of the court and chances of success are in paragraph 12 of the affidavit of which a copy of the proposed Memorandum of Appeal is annexed and it reflects the intended grounds of appeal. He said paragraph 3 of the proposed Memorandum of Appeal is to the effect that the learned Judge stated that the land was abandoned for one year while the appellant's witness stated that the land was abandoned since 1991. That the 2nd respondent was not cultivating anything from the suit land. That once

the village land has been abandoned for 5 years the village has a right to relocate it to another person. That is the same to the appellant who was allocated the land after it had been abandoned. He said this point of law need to be resolved by the Court of Appeal. He prayed for the Court to grant this application.

In reply Mr. Mghare said that for an application of this nature to be granted, there must be a point of law and also mixed points of law and facts to be resolved by the Court of Appeal. He relied on the case of **Said Ramadhani Mnyoga vs. Abdallah Salehe [1996] TLR 74**. He said in the cited case two factors were advanced; that it is a legal right and secondly there are high chances of success. He said an application for leave ought to be granted if backed by reason and the law. He observed that the submissions by Counsel for the applicant relied on paragraph 12 of the affidavit referring to the proposed Memorandum of Appeal where on paragraph 3 abandonment is reflected. He said the decision of this court stated that there was no proof of abandonment and further in ground 3 the applicant is talking of the former owner which is a new issue. He said it was clearly stated that in case of abandonment there are specific procedures to be followed. That there was no proof that the

abandonment was only for one year and was still within the law (Village Land Act) and the village could not have given land to another person while the 2nd respondent was still in possession of the same. He said these are points of evidence and not of law. That the high chance of success in appeal can be meaningfully assessed on appeal and not at this stage. He supported this position with the case of **Tanzania Posts & Telecommunications Corporation vs M/S B. S. Henritta Supplies (1997) TLR 141**. He said he is not in quarrel with the principle in the case of **British Broadcasting Corporation vs. Eric Ng'imaryo** (supra) but the intended appeal reflects points of facts, and not general points of law. He also pointed out that the grounds are vexatious and hypothetical as such they do not comply with the principles laid down in the said case. He prayed for the application to be dismissed.

In rejoinder, Mr. Mhimba reiterated his main submissions and added that leave can be granted if there are mixed points of law and facts. That the application at hand has mixed points of law and facts specifically paragraph 12 of the supporting affidavit. That grounds for leave are not confined only to ground 3 of the proposed Memorandum of Appeal. That even chances of success are not the only reason for

grant of leave, but it can be used together with other reasons to grant leave to appeal to the Court of Appeal. He reiterated his prayers for grant of the application.

Leave to appeal to the Court of Appeal is granted where the proposed appeal stands reasonable chances of success or where, but not necessarily, the proceedings as a whole reveal such disturbing features as to require the guidance of the Court of Appeal. The rationale behind is to spare the Court of Appeal of stream of matters, which have no merit, and or which have already been dealt with the lower courts.

In the case of **British Broadcasting Corporation vs. Eric Sikujua**

Ng'maryo, (supra) it was stated as follows: -

*"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".*

It is, therefore, the duty of the applicant to demonstrate serious points of law that need to be considered by the Court of Appeal (see **Simon Kabaka Daniel vs. Mwita Marwa Nyanga'nyi & 11 Others [1989] TLR 64**).

I have considered the arguments by Counsel for the parties, and I have gone through the affidavit and counter affidavit, together with the available records on case file. The point for determination is whether the applicant has advanced points of law which needs the intervention of the Court of Appeal. However, before I proceed, I would like to put it clear and per the above cited authorities that, the aim of the application for leave to appeal is not to analyse the intended grounds of appeal but it is for the court to only look as to whether there are disturbing features which attracts the intervention of the Court of Appeal.

In this present application the concern by the applicant revolves around the abandonment issue as reflected in the grounds of appeal in the proposed Memorandum of Appeal annexed to the affidavit. This issue was well addressed by the Hon. Judge at page 3 and 4 of the judgment. Her Ladyship observed that the 2nd respondent got the

land by purchase from an individual, therefore ownership by the 2nd respondent was not a conditional government grant.

In that respect, I am of the considered view that, there is nothing on the part of the law that needs the attention of the Court of Appeal. There is no controversy whatsoever on the finding, reasoning, and application of the law in the judgment in Land Case No. 175 f 2019 and there is therefore, no issue of importance and/or disturbing to warrant the guidance of the Court of Appeal as set out in the case of **Simon Kabaka Daniel** and **British Broadcasting Corporation** (supra).

For the above reasons, the application for leave to appeal to the Court of Appeal has no merit and it is hereby dismissed with costs.

It is so ordered.




V.L. MAKANI
JUDGE
24/02/2022