

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

MISC. LAND APPLICATION NO. 675 OF 2022

BUIBUI INVESTMENT LTD.....1ST APPLICANT

KESSY JUMANNE MWAIPOPO.....2ND APPLICANT

VERSUS

MAENDELEO BANK PLC.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

THE PERMANENT SECRETARY

MINISTRY OF NATURAL RESOURCES AND TOURISM....3RD RESPONDENT

R U L I N G

Date of last Order:21/12/2022

Date of Ruling: 03/02/2023

K. D. MHINA, J.

By a chamber summons taken under section 5 (1) (c) (1) of the Appellate Jurisdiction Act, Cap 141 R: E 2019 ("AJA") and Rule 45 (a) of the Tanzania Court of Appeal Rules, the applicants, Buibui Investment Ltd and Kessy Jumanne Mwaipopo instituted this application against the respondent, Maendeleo Bank PLC, the Hon Attorney General and the Permanent Secretary Ministry of Natural Resources and Tourism.

The applicants, *inter-alia*, are seeking the following orders: -

- i. That applicants be granted leave to appeal to the Court of Appeal against the ruling and drawn order of the High Court*

*of Tanzania (Land Division) in Land Case No 134 of 2022,
delivered on 26 October 2022;*

- ii. Costs of this application in the course.*
- iii. Any other order or incidental relief as it deems fit and just.*

In response to the application, the 2nd and 3rd respondents countered it through a preliminary objection predicated on the following grounds.

- i. That the application is incompetent and untenable in law for being frivolous and vexation hence abusing the court process, as it emanated from the High Court Order while exercising original jurisdiction and conclusively determined the rights of the parties; hence there is no requirement for leave.*
- ii. That the application is incompetent and untenable for failure to attach the order sought to be challenged.*

At the hearing of the application, the applicant was represented by Mr. Theodory Primus, a learned advocate. The 1st respondent by Ms. Kalolo, also a learned advocate, while the 2nd and 3rd were represented

respondents by Mr. Ayoub Sanga and Mr. Mathew Fuko, learned state attorneys.

Mr. Sanga's argument on the first limb of preliminary objection was that the gist of the preliminary objection originated from Land Case No. 134 of 2022 between the same parties, which was struck out.

He submitted that according to section 47 (1) of the Land Disputes' Courts Act No. 2, Cap 216 R: E 2019 ("the LDCA"), as amended by Act No. 8 of 2018, provides for the direct appeal to the court of appeal where the matter originated from the High Court. To substantiate his submission, he cited **Winford Mlagha vs. Dinales Paulo Mwasile (Administratrix of the late Paulo Mwasile) and two others**, Civil Application No. 112/06 of 2022 (Tanzlii), and **Ali Chamani vs. Karagwe District Council and another**, Civil Application No. 411/04 of 2017. In **Ali Chamani (Supra)**, the Court of Appeal held that;

"In view of the above-cited authorities, I am of the view that, the applicant was wrong to predict his application among other provisions, section 47 (1) of the LDCA, because the said provision does not vest the court

with the jurisdiction to entertain an application for leave to appeal against the decision of the High Court on land matters.”

He concluded by submitting that since the matter originated from Land Case No. 134 of 2022, then there is no requirement for leave as per section 47(1) of the LDCA and section 5 (1) (a) of AJA.

On the second limb of the objection, Mr. Sanga submitted that being an application for leave, the applicants were required to attach the decision they sought a leave to appeal.

He further submitted that the requirement was pronounced in the case of **Ali Chamani (Supra)**, where the Court of Appeal held that;

“Rule 49 (3) of the Rules requires every application for leave to appeal to be accompanied with the decision to be appealed against.”

In reply, Mr. Primus strongly opposed the preliminary objection and the submission in chief by arguing that the application is proper as per section 47 (1) of the LDCA. His reason was; in the amendment of section 47 (1), there was an addition of the words “ to appeal in accordance with the appellate jurisdiction act”; therefore, he said

section 47 (1) of LDCA provides for the right to appeal but how to appeal is provided under the AJA.

Further, he submitted that the applicants are seeking to appeal against the struck out of an appeal; therefore, it falls under section 5(1) (c) of AJA. That decision did not conclusively determine the rights of the parties because of the struck-out order.

He further submitted that there are decisions that prohibit appeal against the struck-out order, but the circumstances differ because, in the application, at hand, the applicants were not satisfied with that order, and that is the reason they intend to appeal.

In conclusion, he submitted that neither of the cited decisions stated that a party could appeal directly to the court of appeal.

On the second limb of the objection, he submitted that the cited decision of **Ali Chamani (Supra)** is applicable when the application for leave is preferred at the Court of Appeal.

Further, the Court of Appeal in **Alex Maganga vs. The Director of Msimbazi Centre** (2004) TLR, 212, held that there was no need to attach any document when applying for leave to appeal.

In a brief rejoinder, Mr. Sanga reiterated what he had submitted earlier. In addition, he submitted that if the order of striking out did not conclusively determine the rights of the parties, then the application relied on the matter, which is not appealable as it is trite that if the case is struck out, the remedy is to file afresh as there is no right to appeal.

During the submissions, Ms. Kalolo advocated for the 1st respondent did have anything to say.

Having dispassionately heard the arguments from the learned counsel for both parties, the issues for determination are

- i. whether the applicants require leave to appeal to the court of appeal
- ii. Whether to attach the order sought to be challenged is a requisite in the application for leave to appeal

In deliberation and determination of the first issue, which covers the first limb of the objection, the entry point is section 47 (1) of the LDCA. The section reads;

"47 (1) A person who is aggrieved by the decision of the High Court in exercise of its original jurisdiction may

appeal to the Court of appeal in accordance with the Appellate Jurisdiction Act.”

In his submission, Mr. Sanga submitted that after the amendment of Section 47 (1) of LDCA in 2018, leave is no longer a requirement where a matter originated at the High Court when exercising its original jurisdiction, therefore; section 5 (1) (a) of AJA is applicable. Section 5 (1) (a) of AJA leave is not a requisite for a decision of the High Court when exercising its original jurisdiction.

On the other hand, Mr. Primus stated that Section 47 (1) of LDCA provides for the right to appeal, but how to appeal is provided under AJA. He further submitted that the relevant provision under AJA, as far as this application is concerned, is section 5 (1) (c). This is the provision where by leave is required when a party seeks to appeal against the decision of the High Court.

From above, a brief background of section 47 (1) of the LDCA may be instructive to appreciate the nature of the preliminary objection.

Before 2018 when the Written Laws (Miscellaneous Amendments) Act No 8 of 2018, section 47 (1) of the LDCA was read as follows;

47 (1) Any person who is aggrieved by the decision of the High Court (Land Division) in exercising its original, revisional or appellate jurisdiction, may with the leave from the High Court (Land Division), appeal to the Court of appeal in accordance with the Appellate Jurisdiction Act."

The court of Appeal in **Dero Investment vs. Heykel Berete**, Civil Appeal No. 92 of 2004 (unreported), explained the applicability of the old section 47 (1) of the LDCA. On page 5, it was held that;

"It is apparent from this provision that all appeals to the Court of Appeal from decisions of the Land Division of the High Court are by leave of the Land Division of the High Court. As submitted by both counsel, this is a marked departure from what is provided in section 5 (1) (a) of AJA as regards to civil proceedings.

Therefore, that was the old position that made the requirement for leave to appeal even when the High Court exercised its original jurisdiction.

After the introduction of section 9 of the Written Laws (Miscellaneous Amendments) Act No 8 of 2018; section 47 (1) of the LDCA was amended, and the new section reads as follows;

"47 (1) A person who is aggrieved by the decision of the High Court in exercise of its original jurisdiction may appeal to the Court of appeal in accordance with the Appellate Jurisdiction Act."

Again, the Court of Appeal in **Hassan Kibasa vs. Angelesia Chang'a**, Civil Application No. 405/13 of 2018 (Tanzlii), explained the applicability of the new section 47 (1) of the LDCA; it held that;

"...leave is longer a pre-requisite for land matters arising from the High Court's exercise of its original jurisdiction following the amendment Of section 47 (1) of the LDCA by section 9 of the Written Laws (Miscellaneous Amendments) Act No 8 of 2018."

Therefore, from both the old and current section 47 (1), it is quite clear that the Land Disputes' Courts Act No.2, Cap 216 R: E 2019 is instructive; it dictates and is the one which regulates the issue of leave to appeal on the land matters when the High Court exercising its original jurisdiction. On the other hand, section 5 of the appellate jurisdiction Act accommodates both scenarios when an appeal may lie with leave or without leave. But that must be read with the provisions of other written laws to determine whether leave to appeal is a requisite, and in

case of land matters, it must be read together with section 47 of the Land Dispute Courts Act.

Flowing from above, there is no doubt that the application for leave before this Court is improper. The applicants may go straight to appeal to the Court of Appeal in accordance with Section 47 (1) of the Land Disputes' Courts Act No.2, Cap 216 R: E 2019, since the decision/order they sought to appeal originated from the High Court when exercising its original jurisdiction.

On the issue of whether the order sought to be appealed is appealable or not, I will not discuss the same because it is outside the parameters of the first limb of the preliminary objection.

Therefore, I sustain the first limb of preliminary objection that the application is incompetent and untenable in law as the order sought to be appealed emanated from the High Court Order while exercising original jurisdiction; hence there is no requirement for leave as per section 47 (1) of the LDCA.

Further, since the first limb of the objection alone disposes of the application, I see no reason to deliberate and determine the second limb of the objection.

Consequently, the application for leave is hereby dismissed with costs.

It is so ordered.

DATED at DAR ES SALAAM this 03/02/2023.





K. D. MHINA
JUDGE