

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY
AT MOSHI**

MISC LAND APPLICATION NO. 80 OF 2020

*(Arising from Land Appeal No. 17 of 2016 High Court of Tanzania
at Moshi, Originating from Application No. 20 of 2016 Moshi District
Land and Housing Tribunal)*

CHARLES .J.K TEMBA 1ST APPLICANT
PAULIN .P. MASSAWE 2ND APPLICANT
STEVEN .A. CHAMI 3RD APPLICANT

VERSUS

CALISTA .J. MSAKI..... RESPONDENT

RULING

MUTUNGI .J.

The applicants are praying they be granted leave to appeal to the Court of Appeal of Tanzania against the decision of this Court (Mwenempazi .J.) dated 17th November 2020 in **Land Appeal No. 17 of 2016** (1st appellate court). The application is made under **Rule 6(a) of Tanzania Court of Appeal (Amendments) Rules, 2017 G.N No. 362** Published on 22/09/2017, section 5(1) (c) of the **Appellate Jurisdiction Act, Cap 141 of 1979** and supported

by the second applicant's sworn affidavit. The respondent in reply thereof filed a counter affidavit.

Briefly, the Applicants instituted a land case at the District Land and Housing Tribunal at Moshi which was decided in favour of the Respondent. Dissatisfied they knocked this court's door through Land Appeal No. 17 of 2019 before Mwenempazi .J. on the grounds that: -

- 1) The District Land and Housing Tribunal conducted its proceedings and judgement in absence of tribunal members,
- 2) The trial tribunal erred in law and fact in admitting the sale document of the suit land which was not legally written and
- 3) The trial tribunal erred in law and fact to analyse evidence of the applicant which was heavier than that of the respondent.

Once again the case was decided in favour of the Respondent. The Applicants are now seeking for leave to appeal to the Court of Appeal on the grounds (under para 6(a) to (c) of second applicant's affidavit) as hereunder: -

6. That the applicants after obtaining High Court leave to appeal to the Court of appeal intends to move Court of appeal on the following points of law;

a) Whether the high court erred in law by not considering illegalities in the proceedings in land application No. 20 of 2016 District Land and Housing Tribunal for Moshi at Moshi, of which the proceedings were conducted in the absence of Tribunal assessor's contrary to the requirements of the law.

b) Whether the High Court erred in law by not considering the sales of the Suitland which has no blessings from the Village land Council as provided by the law.

c) Whether the High Court erred in law by not considering that the Suitland is a matrimonial property of which spousal consent was not obtained prior to the sale of Suitland.

Hearing of the application was ordered to proceed by way of written submissions. The applicants were represented by Mr. G.M. Shayo, learned advocate while the respondent's submission was prepared by Mr. M. Kilasara learned advocate. I commend both parties for filing their submissions timely.

Mr. Shayo on the 1st ground stated, the trial tribunal's proceedings were conducted without assessors contrary to the law. He cited the case of **Sikuzani Said Magambo and Another Vs Mohamed Roble, Civil Appeal No. 197 of 2018** where the Court of Appeal held that: -

"In view of the settled position of the law, where the trial has been conducted with the aid of assessors ... they must actively and effectively participate in the proceedings so as to make meaningful of their role in giving their opinion before the judgment is composed."

The learned counsel argued, since the predecessor chairman was transferred to another working station, the successor chairman declared that he will proceed in absence of Teddy Temu and Julia Mmasi, even though they had partly heard the matter by virtue of **section 23 (3) of the Land Disputes Courts Act**. Mr. Shayo contended, since the said assessors were the ones who heard the matter from the beginning, their absence throughout the rest of the trial, is a point of law worth the Court of Appeal's consideration.

It was Mr. Shayo's further assertion that, the suit land in issue was sold without the Village Land Council's approval and

blessings. During trial the respondent tendered a purported sale agreement signed by a Kitongoji Chairman and Village Executive Officer who are not members of the Village Land Council in terms of **section 60 of the Village Land Act Cap 114 of 1999**. To support his contention, the applicants' advocate cited the case of **Bakari Mhando Swanga Vs Mzee Mohamed Bakari Shelukindo and Three Others Civil Appeal No. 389 of 2019**. On the same footing, since the sale agreement was not presented to the Kisanga Village Council, the same suffices to be considered by the Court of Appeal as a point of law.

The learned advocate submitted further, this Court did not consider the fact, the suit land was a matrimonial land thus spouse consent was mandatory. Elaborating further, the suit land was initially owned by one Kalama Kabanga, whereas his wife one Marietha Kalama Kibanga's was not summoned to prove her consent during trial. The same was to be secured before the suit land was allegedly sold to the respondent. This was yet another point of law worth the Court of Appeal's attention. Mr. Shayo finally prayed this Court grants the applicants' leave so that they can further fight for their rights.

In reply, Mr. Kilasara first submitted, when the matter was heard for the 1st time, the tribunal was dully constituted and when the trial chairman sat in absence of the assessors, he gave his reasons in terms of **section 23 (3) of the Land Disputes Courts Act**. He contended the cited case Sikuzani Magambo (supra) is distinguishable and inapplicable to the current application. In that case there was a requirement, the assessors present throughout the trial to write their opinions. However, in the current application, the assessors in issue were excused since 21/05/2018 hence were not present in the conclusion of the trial.

It was Mr. Kilasara's further argument in respect of the 2nd ground that, there is no provision of law that requires a sale agreement of an un-surveyed piece of land to be blessed by the Village Land Council. Even though, in this matter the Local Government Authority was involved and dully endorsed Exhibit "P1".

Regarding the 3rd ground, Mr. Kilasara argued, the issue of consent was never raised during the trial and 1st appeal, hence does not qualify to be brought as a point of law in the 2nd appeal. More so, the said Marietha Kalama Kabanga was dully involved in the sale transaction. Be as it may, the applicants are the ones who allege she did not

consent to the sale, they were duty bound to prove the same as per **section 110 (1) and 113 of the Evidence Act, Cap 6**. The application should in the event be dismissed with cost.

In their brief rejoinder, the applicants reiterated their earlier submission in chief and insisted there are points of law worth the Court of Appeal's intervention.

Having considered the applicant's affidavit and submissions, the main issue for determination is whether the applicants have pointed out the novel points of law to be considered by the Court of Appeal.

Before scrutinizing the above issue, I wish to start with the obvious. Leave is usually granted if there is good reason, normally on a point of law or on point of public importance as held in **British Broadcasting Corporation Vs Eric Sikujua Ng'maryo, Civil Application No. 133 of 2004 (Unreported)** 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 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. However, where the grounds of appeal are frivolous, vexatious or useless or hypothetical, no leave will be granted."


I took time to peruse through the applicants' corresponding affidavit and both court records, and as pointed out herein above when the applicants lodged their appeal in this Court sitting as the 1st Appellate Court, one among the grounds of appeal is that the trial tribunal did not comply with **section 23(3) of the Courts (Land Disputes Settlements) Act No. 2** in the sense that the same conducted the case in absence of assessors. It is my considered opinion that the point of law deserves the Court of Appeal intervention.

Moreover, the second issue that there was non-compliance of the law in the sale also needs the attention of the Court of Appeal. I say so because the record shows initially the owner of the suit land was the late John Kalama Kibanga and together with his wife and son as witnesses sold the suit land to the respondent. However, the applicants still challenge such sale on the ground that the


same did not adhere to section 142 (1) of the Local Government District Authorities Act, Cap 287 R.E. 2002.

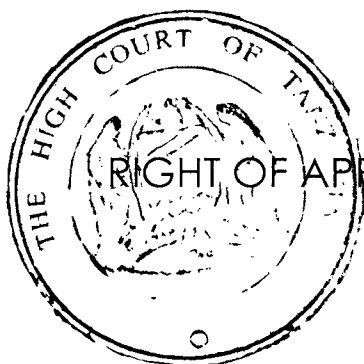
In such respect therefore, I find on the face of it there are novel points of law worth the determination of the Court of Appeal. I thus allow the application and do hereby grant leave for the applicants to appeal to the Court of Appeal with no order for costs.

It is so ordered.

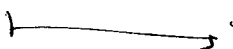

B. R. MUTUNGI
JUDGE
20/08/2021

Ruling read this day of 20/8/2021 in presence of the Respondent and Mr. Shayo for the Applicants.


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RIGHT OF APPEAL EXPLAINED.


B. R. MUTUNGI
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