

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC CIVIL APPLICATION NO. 395 OF 2020

(Arising from Land Appeal No.137 of 2019, of 26/02/2021 Before Hon.Maghimbi, J)

MARIAM JUMA MTEMVU..... 1ST APPLICANT

ASHA SULEIMAN MKANGARA..... 2ND APPLICANT

**MARIAM JUMA MTEMVU (Suing through
power of Attorney of RICHY ABDALLAH RICHY.....3RD APPLICANT**

VERSUS

BALTAZAR S. MATONYA..... 1ST RESPONDENT

SOSTENES KEWE..... 2ND RESPONDENT

JULIUS RUBEN MBINDUKA3RD RESPONDENT

RULING

I. MAIGE, J

27/04/2021 & 30/04/2021

The applicants have initiated this matter under sections 47(2) of the Land Disputes Courts Act, Cap. 216, R.E. 2019 and Rule 45(a) of the Tanzania Court of Appeal Rules, 2009 for leave to appeal to the Court of Appeal of Tanzania ("CAT") against the decision of this Court in Land Appeal No. 137 of 2019 as per Madame Judge Maghimbi.

In the affidavit in support of the application which has been amplified in the written submissions filed on their behalf by advocate Dennis Michael MSAFIRI, the applicants having made reference to the judgment under discussions, urged the Court to hold that, the following points raise novel issues which deserve attention of the Court of Appeal:-

- I. Whether the provision of Sections 19(2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2002 G.N.No.174 Of 2003 in requiring every assessor to give his opinion mean such assessor should give opinion individually and separately?*
- II. Whether in view of the provisions of section 24 of the Land Disputes Court Act opinion of assessors include opinion unanimously and jointly given by them?*
- III. Whether as a matter of law the entire record of proceedings of the trial tribunal can be vitiated by opinions wrongly given by assessors?*
- IV. Whether under the circumstances of the matter before the High Court the Decision of the trial tribunal could not be saved under the provision of section 45 of the Land Disputes Court Act there being no proven failure of justice?*

In his submissions in rebuttal, Mr. Mabula who represented the respondent while in agreement with his learned friend on the position of law, is of the opinion that, the application does not demonstrate any *bonafide* arguable issues in the intended appeal.

Having exposed the nature of the contention, it may be appropriate to consider the application. As the counsel have correctly submitted, for the Court to grant leave to appeal to the Court of Appeal, the applicant has to establish by affidavit or otherwise that, the intended appeal involves serious points which require attention of the Court of Appeal. This position was stated in among other authorities, the case of **British Broadcasting Corporation vs Eric Sikujua Ng'amaryo, Civil Application No. 138 of 2004 (unreported)** where it was stated that;

*"As a matter of general principle, leave to appeal will be granted where the grounds of appeal raise issues of general importance or novel point of law or where the grounds show a prima facie or arguable appeal (see **Buckle v Holmes (1926) ALL E.E. 90 at page 91**). However, where the grounds of appeal are frivolous, vexatious, or useless or hypothetical, no leave will be granted"*

I have closely followed the rival submissions in line with the affidavit and counter affidavit. Much as I am not the right person to comment on the validity of the allegations therein raised, I have no doubt that the intended appeal is neither frivolous nor vexatious. It raises arguable *bonifide* issues which may deserve attention of the Court of Appeal as herein appointed pinpointed.

Before I wind up my ruling, I am bound to provide reasons for my decision dated 26th February 2021 overruling the first point of preliminary objection

and sustaining the second point. In the first point, paragraph 8 of the affidavit was attacked for being argumentative. While it is the law under XIX rule 3(1) of the Civil Procedure Code, Cap. 33, R.E., 2019 (‘the CPC’) that, an affidavit should not be arguments, I, in my careful reading of the respective paragraph, am in agreement with Mr. Denis Msafiri, learned advocate for the applicant that, the depositions therein give a summary, based on records, as to what transpired at the trial tribunal. It is not argumentative as alleged. It is on that reason, that I overruled it.

The second point of preliminary objection was directed to paragraph 10 of the affidavit. My careful reading of the same revealed that, not only was it argumentative but it contained points of law by way of legal conclusions as well. Under the provision of the **CPC** just referred, an affidavit being a substitute of oral evidence is not expected so to be. It is on that ground that, I sustained the objection and consequently expunged the relevant paragraph from the affidavit.

In the final result and for the foregoing reasons therefore, the application succeeds. Accordingly therefore, leave to appeal to the Court of Appeal against the judgment of this Court in **Land Appeal No. 137 of 2019** is hereby granted with costs.

It is so ordered.

A handwritten signature in black ink, appearing to read 'I. Maige', with a large, stylized initial 'I' and a long, sweeping underline.

I. Maige

JUDGE

30/04/2021

Date 30/04/2021

Coram: Hon. A.S. Chugulu - DR.


For the 1st Applicant }
For the 2nd Applicant } Mr. Paschal Mshanga, advocate holding brief for
Denis Msafiri, advocate

For the 1st Respondent }
For the 2nd Respondent } Mr. Josephat Mabula, advocate
For the 3rd Respondent }

RMA: Bukuku

COURT:

Ruling delivered this 30th day of April, 2021 in the presence of Mr. Paschal Mshanga learned advocate holding the brief for Mr. Denis Msafiri, learned advocate for applicants and Mr. Josephat Mabula, learned advocate for respondent.


A.S. Chugulu

DEPUTY REGISTRAR

30/04/2021