

IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
MISC. LAND APPLICATION NO.635 OF 2020
(Arising from the High Court Land Division in Land Appeal No. 5 of 2018)

BINTI MLEVI RESPONDENT

V E R S U S

HALIMA MWINSHEHE APPLICANT

RULING

Last order: 06.07.2021

Ruling date: 06.07.2021

A.Z.MGEYEKWA, J

This is an omnibus application, whereas the application is brought under Sections 47 (2) and 47 (3) of the Land Disputes Courts Act, Cap. 216 [R.E 2019]. The applicant seeks to leave to appeal to the Court of Appeal of Tanzania to impugn the decision of this Court in Land Application No.38 of 2018 delivered on 24th February, 2018. The applicant also seeks this court to certify that a point of law is involved in the intended appeal to the Court of Appeal of Tanzania. The application

is supported by an affidavit deposed by Yustina Lemi, the applicant. The first and second respondents is feverishly opposed to the application. In a joint counter-affidavit sworn by Mr. Armando Swenya, learned Advocate for the first and second respondents. The third respondent did not file a counter-affidavit.

When the matter was called for hearing before this court on 8th April, 2021, the applicant had the legal service of Mr. Lockus Mshana, learned counsel whereas the respondent appeared in person unrepresented. By the court order and consent by the parties, the application was argued by way of written submissions whereas, the applicant's Advocate filed his submission in chief on 06th April, 2021 and the first and second respondents' Advocate filed his reply on 17th May, 2021 and the applicant's Advocate wave the option to file a rejoinder.

In his written submission Mr. Mshana urged this court to adopt the applicant's affidavit and form part of his submission. The learned counsel for the applicant submitted that the applicant prays for this court to grant leave to appeal to the Court of Appeal of Tanzania and certify that a point of law is involved in the intended appeal which needs certification. The learned counsel submitted that the applicant has listed points of law which attracts the attention of this court as follows; that this court and the tribunals have not decided the question of a decision made by the Ward

Tribunal while it was not properly constituted as well as the subject of *locus standi* of the respondent who initiated the proceedings while his credential as an administratrix of the estate of her deceased father was not established. He referred this court to section 99 and 100 of the Probate and Administration of Estate Act, Cap.352. Insisting he contended that the Ward Tribunal had no jurisdiction to entertain the matter and the Coram was not properly constituted. Mr. Mshana fortified his submission by citing the cases of **Mariam Madali v Hadija Kihemba**, Misc. land Case Appeal No.16 of 2019 (unreported) HC and **Joseph Valeci Nmwangumba v Mernand Nelson Mwalyambi**, Misc. Land Appeal No.06 of 2019, the Court of Appeal of Tanzania at Mbeya (unreported).

Mr. Mshana valiantly argued that the appellate tribunal failed to exercise its revisional powers as stipulated under section 36 (1) and (2) of Cap. 216. He submitted that the point of law which attracts the Court of Appeal of Tanzania to decide is whether both appellate courts were correct to uphold a decision made when the Ward Tribunal lacked jurisdiction.

The learned counsel for the applicant did not end there, that this court and the tribunals this court for treating a new issue applicant. which was not raised in the appeal. The issue of adverse possession was not properly adverted by this court and the tribunals.

The evidence on record was not well analysed and the burden of proof was shifted to the applicant. He added that both courts uphold an ambiguous decision emanating from a complaint of trespass and sale of land to another person without addressing properly the said issue. He repeatedly argued that the courts and tribunals acted illegally as they have contravened the law as they failed to exercise jurisdiction vested in them while having sufficient material before them.

On the strength of the above submission, Mr. Mshana beckoned upon this court to consider that the raised points of law are arguable before the Court of Appeal of Tanzania and grant their application with costs.

Responding, the respondent urged for this court to adopt the respondent's counter-affidavit and form part of his submission. He lamented that the applicant has introduced new points of law which were not raised before this court and the appellate tribunal. Insisting, the respondent argued that the applicant raised new allegations in every stage of the appeal. To bolster his submission he referred this court to the case of **Seleman Mvura v Ms. Mwega**, Misc. Land Case Appeal No. 172 of 2016 HC, Land Division, this court cited with approval the case of **Farida and Another v Domina Kagaruki**, Civil Appeal No. 136 of 2006.

Stressing the respondent contended that in the application for leave to the Court of Appeal of Tanzania, the applicant must demonstrate that there is a point of law involved to attract the attention of the Court of Appeal. Fortifying, he referred this court to the case of **Simon Kabaka Daniel v Mwita Marwa** (1989) TLR 64. He repeatedly claimed that the instant application is based on new grounds of appeal which are illegal. He distinguished the cited cases by the respondent, he spiritedly contended that they are irrelevant to the alleged points of law. He argued that this court and tribunal's findings were established after the Ward Tribunal visited locus in quo and the evidence on record was favouring the respondent.

On the strength of the above argumentation, the respondent urged this court to find that there is no point of law that attracts the attention of the Court of Appeal of Tanzania, thus, the instant application should not be granted with costs.

Having heard the submissions of the learned counsel for the applicant and the respondent for and against the application, I will determine *whether the application is meritorious*. The issue for determination takes into account the settled position of the law to the effect that grant of leave to appeal to the Court of Appeal is not a matter of a mere formality. A party intending to be allowed to appeal must demonstrate, with material

sufficiency, that the intended appeal carries an arguable case that merits the attention of the Court of Appeal. Thus, a grant of leave is granted if prima facie grounds are meriting the attention of the Court of Appeal. In other words, there must be based on solid grounds which are weighty enough to engage the minds of the Court of Appeal. It is trite law that leaves to appeal to the Court of Appeal is granted if prima facie grounds are meriting the attention of the Court of Appeal as it was held in the case of **Sango Bay v Dresdner Bank A.G** [1971] EA 17, it was held that:-

*“ Leave to appeal will be granted where **prima facie** it appears that there are grounds which merit serious judicial attention and determination by a superior Court.”*

Equally, in the case of **Gaudensia Mzungu v IDM Mzumbe**, Civil Application No. 94 of 1994 (unreported), the Court of Appeal of Tanzania held that:-

“ Leave will be granted if, prima facie there are grounds meriting the attention and decision of the Court of Appeal.”

These decisions are in consonance with the decision cited by the counsel for the applicant; **Bulyanhulu Gold Mine** (supra); and the cited case by the learned counsel for the respondent; **Nubhain Rattansa** (supra). The Court of Appeal in **Nubhain Rattansa** held that:-

“ An application for leave will be granted if it is a fit case for further consideration by the Court of Appeal...”

Applying the above holding, the Court of Appeal of Tanzania emphasized that the disturbing features must be in the form of serious points of law that warrant the attention of the Court of Appeal. Gathering from these decisions, it is clear that it is within this Court's discretion to refuse to grant leave where the Court is of the view that the application for leave falls short of meeting the requisite threshold for its grant. The same was held in the cited case of **Ministry of Water Construction Energy Land and Environment and Another**, Civil Application No. 3 of 2004 TLR [2005] 220 and in the case of **Saidi Ramadwani Mnyanga v Abdallah Salehe** [1996] TLR 74.

Guided by the above authorities, I have to say that, the case referred to this court must be looked at its context rather than authority against the success of the intended appeal. The applicant's learned counsel has raised several points of law which he thinks are meriting the attention of the Court of Appeal of Tanzania to determine their appeal. One of them is that the issue of jurisdiction was not discussed by this court and the tribunals. He claimed that the Coram of the Ward tribunal was constituted contrary to the law. The learned counsel for the applicant also blamed the appellate tribunal for entertaining a new issue that was not raised as a

ground of appeal. The respondent has strongly opposed the application for the main reason that the grounds of appeal raised by the applicant are all new which were not raised before this court or appellate tribunal. However, I cannot determine the respondents' concern at this juncture, doing so I will go to the merit of judgment. All I have to do is to find out whether the applicant has raised arguable grounds to merit the attention of the Court of Appeal of Tanzania. In the case of **Grupp v Jangwani Sea Breeze Lodge Ltd**, Commercial Case No.93 of 2002 (unreported) my brother Massati, J (as he then was) expressed the matter this way:-

“... I have no jurisdiction to go into merits or deficiencies of the judgment or orders of my sister judge in this application. All that I am required to determine is whether there are arguable issues fit for the consideration of the Court of Appeal....”

Based on the above authority, I have noted that issues raised by the learned counsel for the applicant are arguable issues that he thinks are good grounds to attract the attention of the Court of Appeal of Tanzania to determine their appeal. I do not think the grounds raised in the applicants' affidavit and Mr. Mshana's submission are not serious enough to be determined by the Court of Appeal of Tanzania.

In the upshot, I will, in the circumstances, exercise my discretion under Sections 47 (2) and 47 (3) of the Land Disputes Court Act, Cap.216 [R.E

2019], I certify that there are points of law which attracts the attention of the Court of Appeal of Tanzania, thus, I proceed to grant leave to appeal to the Court of Appeal of Tanzania.

Order accordingly.

DATED at Dar es Salaam this 6th July, 2021.


A.Z MGEYEKWA
JUDGE
06.07.2021

Ruling delivered on 6th July, 2021 in the presence of Mr. Mshana, learned counsel for the applicant and the respondent.


A.Z MGEYEKWA
JUDGE
06.07.2021