

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

MISCELLANEOUS LAND CASE APPLICATION NO. 51 OF 2020

(C/F Misc. Land Appeal No.3/2019; Originating from Misc. Application No. 14/2018 Moshi, District Land and Housing Tribunal)

DANIEL SEBASTIAN.....APPLICANT

Versus

SEBASTIAN DANIEL OLDETARIKI..... RESPONDENT

RULING

Last Order: 4TH June, 2021

Date of Ruling: 28th July, 2021

MWENEMPAZI, J.

This is an application for leave to appeal to the Court of Appeal of Tanzania against the judgment of this Court in Land Appeal No. 03 of 2018, which dismissed the appeal.

The application has been made under section 47(2) & (3) of the Land Disputes Courts Act, [CAP 216 R.R. 2019] (the Land Act) and Section 5(1) (c) of the Appellate Jurisdiction Act, [Cap 141 R. E 2019] (the AJA) and Rule 45(a) of the Tanzania Court of Appeal Rules, 2009. The application is

supported by the affidavit of Mr. Elia Johnson Kiwia learned counsel. The respondent's whereabouts was unknown thus the summons was published in the local newspaper.

The brief background that led to this application is that, the appellant was sued by the respondent for trespass at the Massama Kusini Ward Tribunal in Application No. 15/2018. The dispute was heard ex-parte by the tribunal after failure by the appellant to appear. The ex-parte judgment was in favour of the respondent. Two years later on 22nd January 2018 the appellant filed an application in the District Land and Housing Tribunal for Moshi seeking an extension of time to file an appeal out of time against the decision of Massama Kusini Ward Tribunal. The District Land and Housing Tribunal did not grant the application for the reason that the applicant did not advance good and sufficient grounds. Aggrieved by that decision the applicant filed an appeal to this court which was Appeal No. 3 of 2019. This court also dismissed his appeal hence the appellant preferred the present application seeking leave to appeal to the Court of Appeal of Tanzania and a certificate on point of law.

The application was heard ex-parte after the respondent failed to appear. The applicant was ordered to file his written submission in support of his application which he did through his advocate Mr. Elia Kiwia. In his submission in support of the application Mr. Kiwia prayed to adopt his affidavit as a part of his submission. It was his submission that the law requires for leave to be sought by the appellant who wishes to appeal to the Court of Appeal and also since the matter originated at the Ward tribunal the law requires for a certificate from this court certifying point of law involved hence the present application for leave and certificate.

Mr. Kiwia started his submission by stating the principle of law as provided in the case of **British Broadcasting Corporation vs. Eri Sikujua Ng'maryo, Civil Application No. 138 of 2004 Court of Appeal of Tanzania at Dar es Salaam (unreported) at pg. 6&7**. Referring to this case, Mr. Kiwia submitted that for this court to grant leave to the court of appeal, an intended appeal must raise issues of general importance or point of law or where grounds show prima facie or arguable appeal and the proposed appeal should stand reasonable chance of success.

The learned counsel submitted further that the major raised ground by the applicant in application for extension of time in the District Land and Housing

Tribunal and in the first appeal before this court was the illegality found in the Ward Tribunal Judgment. He contended that the law is very clear that whenever the decision of the court contains illegality, the applicant ought to be granted leave to file his appeal out of time even if he failed to account for each day of delay. He argued that the purpose behind that is for the court to be able to rectify the illegality found.

Mr. Kiwia went on submitting on the illegalities contained in the judgment of the Ward Tribunal. I have read the entire submission by the learned counsel and I do not wish to reproduce the same here but in the course of determining this application I will definitely consider the same.

This being an application for leave to appeal to the court of appeal, the issue for determination is whether the applicant has shown sufficient cause to be granted the leave to appeal to the Court of Appeal. Before I proceed with determination of this issue, based on the background of this matter I find it pertinent to first determine whether the present application is tenable given the fact that the applicant was not a party to the judgment sought to be appealed against.

The main ground under which the applicant is seeking leave to appeal is that there is illegality in the judgment of the Ward tribunal. As the record shows

the said judgment was decided ex-parte against the applicant. On becoming aware of the ex-parte judgement against him, the applicant sought from the District Land and Housing Tribunal an extension of time to appeal as two years had already passed since the judgment was delivered. This issue was well dealt with by this court in the Misc. Land Appeal No. 3 of 2019 at page 6 and 7. The honourable judge was of the view that as a matter of practice a party who did not enter appearance during ex-parte decision if aggrieved his remedy is to first apply to the court to set aside the ex-parte decision and not to appeal.

The learned counsel for the applicant was of the view that this court misdirected itself when it gave its decision for the reason that the law governing proceeding in the ward tribunal is silent as there is no provision which permits the ward tribunal to set aside its own decision heard ex-parte. He submitted further that since the procedure of hearing complaints filed in the ward tribunal is not governed by the Civil Procedure Code (Cap.33 R.E.2019), then it is wrong to refer to it. He contended that if the law is silent then the only remedy provided in the law is to appeal to the District Land and Housing Tribunal as provided under section 19 of the Land Disputes Courts Act, CAP 216 R.E. 2019 which provides that any person

aggrieved by an order or decision of the ward tribunal may appeal to the District Land and Housing Tribunal.

In determining this issue, considering the fact that the applicant was not present during trial at the Ward tribunal even though the law governing the procedure at the ward tribunal is silent on the procedure to be followed by the aggrieved party to the dispute, I find it absurd on how the applicant would be able to challenge the decision and proceedings which he was not a party. Ideally, in an appeal, the appellate court usually evaluates whether the lower court has appreciated the evidence properly or not and whether the law has been interpreted correctly. It is due to this reason that the practice has been that the appropriate remedy though not expressly provided by the law is to apply to the court that issued the ex-parte judgment to set it aside by convincing the trial court that there were valid reasons for non-appearance so that the matter would be heard interparty.

The applicant's counsel in this case has submitted that he could not apply to set aside an ex-parte Judgement because the law is silent on the said procedure where the ex-parte judgment has been entered in the Ward Tribunal; though, he is admitting on that procedure had it been the same had happened in the District Land and Housing Tribunal where he would

take refuge to the Civil Procedure Code, Cap. 33 R.E.2019. Since the applicant feels he has not seen justice to be done and would like to pursue the superior court, I cannot do further than decide on the application for leave which is before me. On that application thus, I am of the opinion, the proceedings as a whole reveal such a disturbing feature as to require guidance of the Court of Appeal.

Based on the above stated reasons, I hereby grant the application with no orders as to cost. It is so ordered.



T.M. Mwenempazi
T.M. MWENEMPAZI
JUDGE
28th JULY, 2021