IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

MISC. LAND APPLICATION NO. 09 OF 2022

(Arising from the decision of the High Court of Tanzania at Mwanza in Land Appeal No. 33 of 2021 delivered on 17/01/2022 by Hon. S.M. Rumanyika, J)

FARAJA M. MANDA..... APPLICANT

VERSUS

MICHAEL M. KUNIGWA .....1st RESPONDENT

SALOME MARCO.....2nd RESPONDENT

RULING

1st July & 5th August, 2022

ITEMBA, J.

Before me is an application for grant of leave which will allow the applicant to file an appeal to the Court of Appeal of Tanzania, to challenge the decision of the High Court in Land Appeal No. 33 of 2021, which was delivered on 17th January, 2022 by Hon. Rumanyika J. The application has been preferred under **Section** 47 (2) of The Land Disputes Courts Act, [Cap. 216 R.E. 2019]. It is supported by an affidavit sworn by Mussa Joseph Nyamwelo, the learned advocate for the applicant herein, and it sets out grounds upon which the application is based.

Facts constituting the basis for this application are gathered from the supporting affidavit and briefly are as follows:

The applicant had instituted a land dispute against the respondents through application No. 254 of 2014 in the trial District Land and Housing Tribunal (DLHT) for Mwanza at Mwanza which was decided in his favor. The respondents who were dissatisfied with the decision, preferred an appeal to this Court in Civil Appeal No. 33 of 2021. The said appeal was heard and determined in the favour of the respondents. The applicant is aggrieved and is determined to challenge the decision. He is now before this court seeking leave to appeal to the Court of Appeal of Tanzania.

On 1st February, 2022, the applicant has lodged notice of appeal, to that effect, and he has laid down complaints against the findings in the decision of the High Court.

The main grounds of contention by the applicant are that the learned trial Judge erred in law and in fact (i) by allowing documentary evidence to be superseded by a mere statement made by respondents in this Court, (ii) by applying the evidence which was neither tendered nor admitted by the trial Tribunal and (iii) by allowing the appeal in respect of the reliefs without a corresponding counterclaim preferred by the respondents in the DLHT.

Hearing of the application took the form of written submissions, preferred by the parties in adherence to the schedule. In his submission in chief, Mr. Musa Nyamwelo the learned advocated for the applicant adopted his sworn affidavit to form part of this proceedings. He avers that, the law requires an application for leave to appeal to be granted where the grounds of the intended appeal raise arguable issues for consideration by the Court of Appeal. He thinks that the grounds raised in paragraphs 7, 8 and 9 of the supporting affidavit raises serious issues to be determined by the Court of Appeal. In respect of this ground, he cited the decision in the case of ***Bulyanhulu Gold Mine Limited and two others vs Petrolube (T) Limited and Another***, CAT Civil Application No. 364/16 of 2017.

In respect of the 1st ground the applicant avers that the learned Judge erred by relying on a mere statement made by the appellant instead of documentary evidence.

On the second ground of the intended appeal, he submitted that the trial Judge erred in making reference to the minutes which was attached to the written statement of defence, because it does not form part of the DLHT proceedings as it was neither tendered nor admitted during the hearing. To cement his contentions the learned counsel

referred this Court in the decision of ***Japan International Cooperation Agency (JICA) vs Khaki Complex Limited*** [2006] T.L.R 343 (CAT). In which it was held that document which is not admitted in evidence cannot be treated as forming part of the record.

In regard to the third ground of the intended appeal, he submits that the learned Judge erred by allowing the appeal in respect of reliefs without a corresponding counterclaim preferred by the respondents in the DLHT in application No. 254 of 2014. He alleges that the respondents in their written statement of defence at the trial, did not raise any counter claim nor pleaded ownership of the disputed land, therefore, it is his understanding that the learned Judge erred by allowing the appeal and subsequently declare the respondents as the lawful owner of the suit land. He added that the law only grants reliefs which has been pleaded. He cited the decision of ***James Funke Gwagilo vs Attorney General*** [2004] T.L.R 161 and ***Hotel Travertine Limited & 2 Others vs National Bank of Commerce Limited*** [2006] T.L.R 133. At the end he prays the application be granted.

In his rebuttal submissions, Mr. Alex James the learned counsel for the respondents contended that, the entire submissions by the applicant

does not raise any sensible points to convince this Court to grant leave to appeal to the Court of Appeal of Tanzania.

In respect of the first ground of the intended appeal, he avers that oral evidence of both parties was considered and the appellate Court did not only rely on the respondents' statements on arriving on its decision where documentary evidence was superseded by oral evidence. He invited this Court to look at page 3 of impugned judgment of the DLHT. As regards the provisions of ***Section 100 (1) of the Evidence Act*** (Supra), which were cited by the applicant he is of the view that it has to be read together with ***Section 101(a),*** he added that since the applicant admitted before the trial DLHT that he paid only Tshs. 1,100,000/= and failed to prove the payment of Tshs. 15,900,000/=, the issue of consideration was questionable and this situation led the court to rely on oral evidence instead of exhibit P.1 in terms of section 101(1) of the Evidence Act.

In regard to the second ground of the intended appeal, he contends that, exhibit D.1 is the evidence which were tendered and admitted in the trial DLHT therefore, this Court was right because the central issue is not whether there was a sale arrangement between the parties but rather whether the respondent furnished the consideration.

On the last ground, he is of the view that, the defendants are not compelled to file a counterclaim as per ***Order VIII Rule 9 (1) of the Civil Procedure Code*** (CAP. 33 R.E 2019). Based on the above arguments he urged this Court to dismiss the application.

In his rejoinder, the learned counsel for the applicant in respect of the first ground stated that, the point of contention, is that the learned judge while hearing the appeal arrived at the conclusion that the applicant only paid a sum of Tshs. 1,100,000/= as the purchase price to the respondents and the remaining balance of Tshs. 15,900,000/= was to be done by an exchange of fishing equipments, the conclusion which according to him was contrary to the documentary evidence tendered and admitted in the trial tribunal. He added that, the learned judge erroneously applied the oral statements from the respondents without considering the documentary evidence.

On the second ground of the intended appeal, he held the view that, the statutory duty of this Court in hearing of the application for leave, is to see whether the raised grounds, qualifies to be an arguable issue worth of determination by the Court of Appeal and not to determine which among the two, deserve to be the *ratio decidendi* of the decision of the first appellate Court.

As to the third ground of the intended appeal, he stated that, if the respondents had any interests over the suit land, he would have raised a counter claim in the same written statement of defence and the trial tribunal would have determined them all together as envisaged under ***Order VIII Rule 9 (2) of the CPC*** (Supra). In supporting his arguments, he cited the decision in the case of ***Melchiades John Mwenda vs Gizelle Mbaga (Administratrix of the Estate of the late John Japhet Mbaga – deceased and two others,*** Civil Appeal No. 57 of 2018. In the end he reiterated the prayers.

Having heard the rival submissions made by both counsels, the Court's duty, at this stage of the proceedings, is to determine whether the applicant has raised any sufficient ground capable of engaging the Court of Appeal in the intended appeal. This question arises from a realization of the fact that the Court has a duty, in an application for leave, to avoid a wasteful use of judicial time. Prof. Shivji, in **Developments in Judicial Review in Mainland Tanzania;** (https:// www. Scribd.co). Had this to say:

> *"Weeding out frivolous or vexatious and perhaps those, on the face of it,* ***that do not exhibit good faith or ex facie are an abuse of the legal process"*** (Emphasis supplied)

It is an established position of law that a party that is craving for leave to appeal must demonstrate, with material sufficiency, that the intended appeal carries an arguable case which dictates the attention of the Court of Appeal. This means that leave to appeal to the Court of Appeal must be based on solid grounds that are weighty enough to engage the Court of Appeal. Such grounds must be premised on serious points of law or law and fact. This position has been underlined in several Court's decisions including ***Abubakari Ally Himid v. Edward Nyalusye***, CAT-Civil Application No. 51 of 2007; ***British Broadcasting Corporation (BBC) v. Eric Sikujua Ng'maryo***, CAT-Civil Application No. 138 of 2004, and ***Rutagatina C.L. v. The Advocates Committee & Another***, CAT-Civil Application No. 98 of 2010.

In all these decisions the emphasis given is to the effect that grant of leave to appeal must be on satisfaction that the intended appeal raises a novel point of law or there is a prima facie or arguable appeal which warrant the attention of the Court of Appeal.

However, the court enjoys the discretionary powers to refuse to grant leave where it is of the view that the application for leave falls short of meeting the obligatory verge for its grant. See: ***Nurbhain Rattansi***

v. Ministry of Water Construction Energy Land and Environment and Another Civil Application No. 3 of 2004 TLR [2005] 220.

In connection to the above position of law, the Court in determination of the application of this nature should not confine itself on the merits of the case but rather it should only determine whether there is a novel point of law. See the decision in ***Bulyanhulu*** case which was cited by the applicant.

Having gone through the affidavit that supports the application and the applicant's submission, I am convinced that the concern raised by the applicant constitutes a serious point, sufficient to draw the attention of the Court of Appeal's engagement and make a finding thereon. These points are, as stated earlier on, extractable from paragraph 7, 8 and 9 of the supporting affidavit and they are:

1. *Whether documentary evidence can be superseded by a mere statement made by the respondents in this court.*
2. *Whether the High Court could make a decision in favour of the respondents by applying the evidence which was neither tendered nor admitted by the trial tribunal.*
3. *Whether the High Court was justified in allowing the appeal and award reliefs without a corresponding counterclaim preferred by the respondents in the District Land and Housing Tribunal for Mwanza in Application No. 254 of 2014.*

From the foregoing arguments, I am of the firm view that the application meets the legal threshold for its grant. Consequently, I grant it as prayed. Costs to be in the cause.

It is so ordered.

DATED at **MWANZA** this 05th day of August, 2022.

L. J. ITEMBA

JUDGE