

**THE UNITED REPUBLIC OF TANZANIA**

**JUDICIARY**

**IN THE HIGH COURT OF TANZANIA**

**SUMBAWANGA DISTRICT REGISTRY**

**AT SUMBAWANGA**

**MISC. CIVIL APPLICATION No. 20 OF 2022**

*(Originates from Land Appeal No. 30 of 2021, before Hon. Nkwabi, J. High Court of Tanzania at Sumbawanga and Originally from Application No. 03 of 2021 before Hon. G. K. Rugalema, Chairperson, the District Land and Housing Tribunal of Mpanda at Mpanda)*

**PHILLIP KALYELYE..... APPLICANT**

**VERSUS**

**ALFRED PETER KAPENGA..... RESPONDENT**

*Date of Last of Order: 27/10/2022*

*Date of Ruling: 24/01/2023*

**RULING**

**NDUNGURU, J.**

The applicant named above being aggrieved by the decision of this court in Land Appeal No. 30 of 2021 preferred this application for leave to appeal to the Court of Appeal. This application is made under Section 47(2) of the Land Disputes Courts Act, Cap 216 R.E. 2019, Section 5(1)(c) of the Appellate Jurisdiction Act, Cap 141 R.E. 2019 and Rule 45(a) of the Court of Appeal Rules, 2009 as amended by Rule 6 of Tanzania Court of Appeal (Amendments) Rules, 2017 GN. No. 362 of 2017. The applicant has also

filed this application by way of Chambers Summons supported by Affidavit as required by the law.

During the hearing date of this application, the applicant was represented by Mr. Laurence John, learned Advocate while the respondent had no legal representation, he appeared for himself. Both sides opted to argue out this application by way of written submissions, an option which was gladly granted by this court.

Mr. Laurence submitted first that, he prays to adopt the sworn affidavit he has made as part of his submissions. He argued that the decision of this court in Land Appeal No. 30 of 2021 is marred with illegalities to wit the respondent was granted the suitland while he had no any documentary evidence to back his assertion. He added that, in their view, a mere oral evidence of the respondent's purchase of the suitland, bearing in mind the land in dispute being a village land, the village authority was supposed to be involved in the respondent's alleged business. Mr. Laurence then referred this court to the case of Benard Galus Kingúza vs The Board of Trustees of MOFARM Group & Another, Land Case Mo. 88 of 2019 HC(T) Dar es Salaam (Unreported) at page 15 where he quoted the holding as follows;

*"Village Council being an organ in which is vested all executive power in respect of all the affairs and business of a village, my*

*view is, it was inappropriate and illegal to disregard its mandatorily approval"*

Therefore, Mr. Laurence believes that the respondent herein was supposed to involve the local authority and to have the supporting documents from it but that was not done. He also added that it is trite law in Civil suits the claimant has to prove his claims on balance of probabilities, he again referred this court to the case of *Barela Karangirangi vs Asteria Nyalambwa* [2019] 1 TLR 142

The learned counsel proceeded that in an application for leave to appeal, what is required of the court in hearing such an application is to determine whether or not the decision sought to be appealed against raises legal points worth of consideration of the Court of Appeal. In this, Mr. Laurence referred this court to the cases of *Benezeth Rweyemamu vs Cyprian Alexander Mlay & 2 Others*, Civil Application No. 247/01 of 2021 Cat, Dar es Salaam (Unreported) at page 5 and, the case of *National Bank of Commerce vs Maisha Musa Uledi (Life Business Centre)* [2020] 1 TLR 524.

In conclusion. Mr. Laurence argued that is also the trite law that in applications of this kind, the court does not need to travel beyond and look whether the appeal stand a chance of succeeding or not but only concentrate on the proposed grounds as raised to be arguable issue, he

then referred this court to the case of Bulyanhulu Gold Mine Ltd & Others vs Petrolube T. Ltd & Another [2020] 2 TLR 175 (CA). He argued further that, in this case the applicant had proved that there is a need of interference of the a Higher Court in order the matter to be resolved amicably. In that, he prayed for this court to grant leave to the applicant to appeal against the decision of this court afore mentioned.

In reply, the respondent prayed for this court to adopt to his sworn affidavit as part of his submissions to this application. He submitted further that the applicant has propounded that the decision of this court is marred with illegalities and that the only illegality seen by the applicant is the granting of ownership of the disputed land to the respondent who lacked documentary evidence and must be witnessed by the village council.

The respondent proceeded that, it is the settled principle of law that, any appeal to the Court of Appeal of Tanzania must be based on point of law, and that the sensation to this assertion is to see whether the proceedings in hearing the case were adhered to.

In addition to that, the respondent submitted that the point of illegality is a good cause warranting an extension of time, but also leave to appeal to the Court of Appeal, but that the law is also clear that who wishes to establish this principle of illegality must point out on the face of records the illegalities so as to establish the same, the respondent cited the

case of Robert Maziba Sengerema vs Erasto Maziba, (PC) Civil Appeal No. 17 of 2019 (Unreported) at page 14 paragraph 1, he quoted;

*"The question of illegality in the conduct of the trial proceedings does not arise, the same cannot, as a matter of law, be the ground for applying for extension of time, this means that the decision of the District Court to dismiss the application owing to the fact that illegality had not been established was sound and vindicated."*

The respondent continued to submit that, the Affidavit of the counsel for the applicant states that this court granted the respondent the ownership of the disputed land who failed to prove ownership of the same via documentary evidence and was not overseen by the village council. Nevertheless, he added, at Section 61 of the Evidence Act Cap. 6 R.E. 2019 it has been clearly stated that;

*"All facts, except the contents of documents, may be proved by oral evidence."*

He illustrated that, the above cited Section reminds the litigants that evidence can be proved by oral evidence or documentary evidence and that all these forms of evidence have the same status under the eyes of the law that all deserve to be considered.

He proceeded further that, Section 110 (1) of the Evidence Act, states and he quoted;

*"Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he/she assert must prove the fact exists."*

Again, the respondent illustrated more on the cited provision above that, the assertion of the applicant that documentary evidence is mandatory to prove the case if baseless and is the matter of facts and not law, the illegality cannot rely on lack of documentary evidence, this is the matter of facts and not law.

In winding up, the respondent has urged this court reconsider the point that Courts of law are not markets where a person can just decide whatever they pleases them to come and shop whatever they desire, that there must be an end to litigation. In that, the respondent referred this court to the case of Karim Kiara vs Republic, Criminal Application No. 04 of 2004 (Unreported) where it was held inter alia and he quoted as hereunder;

*"In a properly functioning legal system; litigation must have finality, thus the Latin maxim of 'debet esse finis itium'".*

He added that, the applicant has surely failed to establish the illegalities committed by this court which suffices to grant leave of

appealing to the Court of Appeal of Tanzania, so that it would intervene the decision, and also, he added, there is no any arguable issue to be determined by the Court of Appeal of Tanzania. In that, the respondent rests his case by inclining that this application has no merit and deserves to be dismissed with costs.

As there was no any rejoinder from the counsel for the applicant, and as I have gone through the entire submissions from both sides, the only determinant issue to be dealt with by this court is ***whether this application has merits.***

However, as the applicant raised the issue of illegality, it is safe to alert both camps that this application would not consume bulky of my precious time for it is clear as a day broad light that, the applicant had not pointed out any illegality in the proceedings of Land Appeal No. 30 of 2021, but rather to him, the fact that he had lost the case to the respondent and that the latter had not supported his submissions with documentary evidence, to him it was an illegal decision.

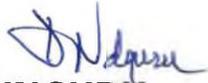
In my consideration, in applications of this nature where there is a claim off illegality or otherwise, the applicant should reveal to the court the particular illegality that made the decision he/she intends to challenge. See ***Veronica Fubile vs. National Insurance Corporation & Two Others, Civil Application No. 168 of 2008*** (unreported)

It is trite law that under section 110 (1) of the Evidence Act, Cap. 6 R.E. 2019, whoever alleges existence of certain fact must prove the of that such fact is really existing or existed. It is quite clear that, the ball was dropped to be won between the parties herein, if the applicant believes that the decision made in favour of the respondent was a result of insufficient evidence (lack of documentary evidence), it is his decision to appeal against that and prove the contrary to what was decided, but in this, it is a settled law under the Evidence Act and various decided cases that in proving existence of any fact not only documentary evidence suffices but even oral evidence is as well admissible. See for example the Court of appeal decision in the case of **Loitare Medukenya v. Anna Navaya, Civil Appeal No. 7 of 1998.**

From the determination above, I find no illegality in the decision of this Court in Land Appeal No. 30 of 2021 and consequently, I find this application to be lacking merits and deserves to be dismissed. I therefore proceed to do so with costs.

It is so ordered.



  
**D.B. NDUNGURU**

**JUDGE**

**24/01/2023**

Date - 24/01/2023

Coram - Hon M.S. Kasonde - DR

Applicant - Absent

Respondent - Present in Person

B/C - Mr. A. Chitimbwa

**Respondent:** This matter is for Ruling and I am ready.

**Court:** Ruling delivered this 24<sup>th</sup> day of January, 2023 in the presence of the Respondent in person but in absence of the Applicant.



  
**M.S. KASONDE**

**DEPUTY REGISTRAR**

**24/01/2023**