

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

MISCELLANEOUS LAND APPLICATION NO. 28 OF 2022

(Arising from the District Land and Housing Tribunal of Tabora in Miscellaneous Land Application No. 231 of 2019, and Land Application No. 5 of 2019)

MSABILA MDACHI.....APPLICANT

VERSUS

MWASITI SAIDI.....1ST RESPONDENT

SALIMA HAMISI.....2ND RESPONDENT

RULING

Date of Last Order: 16/11/2022

Date of Delivery: 03/02/2023

KADILU, J.

In the District Land and Housing Tribunal for Tabora, the Applicant herein successfully sued the respondent in Land Application No. 231 of 2019 and Land Application No. 5 of 2019. The respondents dissatisfied with the decision of the District Land and Housing Tribunal for Tabora appealed to this Court through Land Appeal No. 13 of 2020. The decision of the High Court in Land Appeal No. 13 of 2020 was delivered on 5/8/2022 by Amour S. Khamis, J., who overturned the decision of the District Land and Housing Tribunal by allowing the appeal.

Being aggrieved by the decision of the High Court overturning the decision of Tabora DLHT, on 10th August 2022 the applicant lodged a notice of appeal intending to appeal to the Court of Appeal of Tanzania,

under Section 47 (1) of the Land Dispute Court Act, Cap 216 of R.E 2019. The applicant has now filed this application seeking for leave to appeal to the Court of Appeal against the decision of this Court in Land Appeal No. 13 of 2020 delivered on 5/8/2022 by Amour S. Khamis, J.

After passing through the affidavit in support of the application, the applicant intends to challenge the decision of the High Court on the following aspects:

1. Whether one can appeal against the execution order without appealing on the original judgment.
2. Whether it is proper for the High Court to entertain an appeal which is against two different decisions at once.

The respondents challenged the applicant's statement in the affidavit by stating in their counter affidavit that the matter cannot be left to proceed to the Court of Appeal as there are some orders in the impugned judgment of the High Court of Tanzania, Appeal No. 13/2020 such as revising the Probate Cause No. 1 of 2011 of Tabora District Court and No. 110/2009 of Urban Primary Court.

The application was argued by a way of oral submissions where the applicant's counsel adopted the contents of the affidavit and explained what should be done in considering an application for leave to appeal.

The counsel referred to Section 74 of the Civil Procedure Code, Cap 33 R.E 2019 which excludes execution orders from being appealed, also referred to Order XL, rule 1 of the Civil Procedure Code which lists orders which are appealable. The counsel cited the case of ***Felister Kifulugha v. Royal Mwalupembe, HC, Miscellaneous Land Appeal No.***

28/2019 (Unreported), in which it was stated that one cannot appeal against an execution order.

Also, the Counsel submitted that in this case, the respondents appeal against Miscellaneous Land Application No. 231/2019 and Land Application No. 5 of 2019, that a single appeal was against the two decisions, she cited the case of ***Novatus Mlokokozi v. Leograsia Mujwauzi, HC, PC Civil Appeal No. 64 of 2019 (Unreported)***. The applicant's counsel submitted that she has demonstrated that she has arguable points to be considered by the Court of Appeal and prayed for the Court to allow this application and grant leave to appeal.

Mr. Timothy Sichilima, Advocate for the respondents submitted that Section 76(1) (a) and (2) of the Civil Procedure Code empowers the High Court to determine appeals from decisions of lower courts. The counsel argued that it is not correct that the appeal was against the execution order rather, the proceedings of Application No. 5/2019 were improper, the High Court quashed it and its subsequent orders including the execution order.

According to the respondent's counsel, the High Court ordered the Probate case in the lower Court to be joined and the revision process initiated by the High Court for the said case that is awaiting to be commenced will give way. The respondent's counsel urged the appellant to wait for the outcome of the revision before the application is allowed to appeal to the Court of Appeal. He finally prayed for the Court not to grant the leave and dismiss the application for being premature.

I have gone through the affidavit, counter affidavit, and submissions. The issue for determination is whether there is sufficient cause to warrant leave for the applicant to appeal to the Court of Appeal.

Leave to appeal to the Court of Appeal is a mandatory step to be undertaken by any party who wants to challenge decisions from this Court. Section 47 (2) of the Land Disputes Court Act Cap. 216 imposes a condition that to appeal to the Court of Appeal of Tanzania, the aggrieved party must seek for leave from the High Court.

In considering whether to grant the leave sought or not, I will be guided by the jurisprudence found in the case of ***Jireyes Nestory Mutalemwa vs. Ngorogoro Conservation Area Authority/ CAT, Application No. 154 of 2016 (Unreported)*** where their Lordships stated:

"The duty of the Court at this stage is to confine itself to the determination of whether the proposed grounds raise an arguable issue(s) before the Court in the event leave is granted. It is, for this reason, the Court brushed away the requirement to show that the appeal stands a better chance of success a factor to be considered for the grant of leave to appeal. It is logical that holding so at this stage amounts to prejudging the merits of the appeal."

From the above principle, to establish if there is sufficient cause to grant leave to appeal, I will scrutinize the issues presented by the applicant to see whether she presents arguable issues which are worth consideration by the Court of Appeal. The gist of the applicant's application as stated above challenged on whether you can appeal against the execution order without appeal on the original judgment and the appropriateness of the

High Court's action to entertain an appeal which is against two different decisions at once. Here I should reiterate that my task is not to consider whether Hon. Amour S. Khamis, J., rightly or wrongly decided the matters in question.

My job is not to look at the evidence given in the appeal and evaluate it, that is a business of the Court above this one, which is the Court of Appeal.

Having found that there are arguable issues that calls for consideration at an appellate level, I find that there is sufficient cause established by the applicant to warrant granting leave to appeal. In this respect, the application for leave to appeal to the Court of Appeal of Tanzania is granted. Each party to bear its own costs

Order accordingly.




KADILU, M.J.

JUDGE

03/02/2023

Ruling delivered on the 3rd Day of February, 2023 in the presence of Mr. Akram Magoti Holding brief for Ms. Flavia Francis, Advocate for the Applicant and Mr. Timotheo N. Sichilima, Advocate for the Respondents.



A handwritten signature in blue ink, appearing to read 'G. Ngaje'.

GABRIEL P. NGAEJE
AG. DEPUTY REGISTRAR
03/02/2023