THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF MBEYA
AT MBEYA
MISC. LAND APPLICATION NO. 125 OF 2017.
(From Land Appeal No. 12 of 2013, in the High Court of Tanzania, at Mbeya, Originating in Application No. 31 of 2008, in the District Land and Housing Tribunal for Mbeya, at Mbeya).

WINFORD MLASHA.....APPLICANT

VERSUS

1. **DINALES PAUL MWASILE**
   (Administratrix of the Estate of
   the Late Paul Mwasile).....1ST RESPONDENT
2. **RUTH MLAGHA.....2ND RESPONDENT**
3. **MBEYA CITY COUNCIL.....3RD RESPONDENT**

RULING

02/09 & 26/10/2020.

UTAMWA, J:

The applicant in this application, WINFORD MLASHA applies for the following orders;

i. That, this Honourable court may be pleased to grant leave to appeal to the Court of Appeal of Tanzania (CAT) on points of law.
ii. Costs be in the course.
iii. Any other relief(s) this Honourable court may deem fit to grant.

The applicant intends to appeal against a judgement dated 18th December, 2017 (impugned judgement) of this court (Ngwala, J. as she then was) in Land Appeal No. 12 of 2013. The matter originated in Application No. 31 of 2008, in the District Land and Housing Tribunal for Mbeya, at Mbeya (the DLHT). The application is preferred under section 47 (1) of the Land

Disputes Courts Act, Cap. 216 R. E. 2002 (Now R. E. 2019). It was supported by an affidavit sworn by the applicant himself.

The respondents, DINALES PAUL MWASILE (as administratrix of the estate of the late Paul Mwasile), RUTH MLAGHA and MBEYA CITY COUNCIL (the first, second and third respondent respectively), resisted the application. They did so through the counter affidavits sworn by the first applicant, the second applicant and one Triphonia Kisiga, solicitor for the third respondent.

The application was argued by way of written submissions. The applicant was represented by Mr. Simon Mwakolo, learned counsel. The first and second respondents were advocated for by Mr. Victor Mkumbe, learned counsel. On her part, the third respondent enjoyed the services of her own solicitor, Triphonia Kisiga.

In the affidavit supporting the application, it was essentially stated that, being aggrieved by the impugned judgment, the applicant filed a notice of appeal to the CAT. He also applied for the certified copies of the proceedings, judgment and decree of this court. The affidavit further stated that, the grounds for appealing are based on points of law related to the following issues to be considered by the CAT:

a) Whether the Honourable Judge (appellate Judge) misconstrued the principle of double allocation of plot number 826, Block "R" Nzovwe area and plot No. 980 Block "R" Nzovwe area in Mbeya City.

b) Whether the sale of the disputed house by the 2nd respondent to the 3rd respondent was null and void.

c) Whether title number CT No. 8844 MBYLR, plot No. 980 Block "R" Nzovwe area in Mbeya City was illegally registered by the 3rd respondent and illegally allocated to the 2nd respondent.

d) Who was the lawful owner of the disputed house between the parties.

In his written submissions, the learned counsel for the applicant adopted the contents of the affidavit supporting the application. He further argued that, the suit land was previously allocated to the applicant, but later it was allocated to the second respondent in a different name of the plot. However, the in deciding the appeal, the appellate Judge did not properly address herself to the issue of double allocation. He further contended that, the second respondent illegally sold the suit land to the first respondent though he had no title on it since it had been allocated to the applicant. There is thus, an issue of illegality of the sale. He added that, there was also an illegality in issuing the title deed (No. CT. 884-MBYLR, plot No. 980, Block R Nzovwe area) to the second respondent while there was a pending offer in the name of plot No 926 Block R- Nzovwe area regarding the same land. There was thus, an issue of ownership regarding the suit land for the double allocation and illegality of the sale from the second respondent to the first respondent.

The learned counsel for the applicant also contended that, the appellate Judge decided the appeal without considering the issue of double allocation and illegalities mentioned above.

In her counter affidavit, the first respondent opposed the application on the grounds that, there is a difference between the notice of intention to appeal issued by the applicant and the application at hand. In the notice of appeal, the applicant showed that, he intends to appeal against the whole of the impugned judgment. However, in the application under consideration he shows that, he wants to appeal on points of law. She also stated that, since the matter at hand did not originate in a ward tribunal, the applicant had only to apply for leave to appeal under section 41 (2) of Cap. 216. He could not apply for appealing on point of law as he has done in the application at hand. Besides, the points raised by the applicant are not real points of law, but are mere points of facts. The counter affidavit for the second respondent basically joined hands with the first respondent and stated that, the applicant did not mention (in the affidavit supporting the application) any point of law to be decided by CAT in the intended appeal.

In his replying submissions, the learned counsel for the first and second respondents adopted the contents of counter affidavits of his two clients. He added that, what the applicant claims to be points of law are pure points of facts. The points were well addressed by both the DLHT and the appellate Judge of this court on appeal. The law is also clear that, the concurrent findings of facts by two lower courts cannot be disturbed by a superior court.

The counter affidavit of the said Triphonia Kisiga on behalf of the third respondent essentially disputed almost all the facts deponed in the affidavit supporting the application. It did not contest only the grievances

of the applicant and the fact that he filed the notice of appeal and had applied for copies of necessary documents.

In her submissions, the said Triphonia, as Solicitor of the third respondent, argued thus; since this matter originated from a DLHT, and not from a Ward Tribunal, the applicant ought to have applied for leave to appeal under section 47 (2) of Cap. 216. However, it is not certain in the submissions by the learned counsel for the applicant as to whether he is seeking for leave or for a certificate of point of law (the certificate). In her view, pure points of law require the certificate as per section 47 (3) of Cap. 216 as amended by Act No. 3 of 2018. She added that, a leave to appeal does not include the certificate. She supported this contention by the decision of the CAT in the case of **Ndwaty Philimon Olesaibull v. Solomon Olesaibull [2000] TLR. 209.** She thus, argued that, the alleged points of law raised by the applicant cannot be determined by the CAT without any certificate. It was also her view that, the applicant intends to confuse the court and put it into a dilemma. His prayers are contradictory and should not be heard.

It was also the contention by the representative of the third respondent that, the applicant did not raise any point of law. What he rose were mere points of facts. There is also no issue of double allocation to be decided by the CAT.

I have considered the affidavit and counter affidavits, the arguments by the parties and the law. Before I consider the merits of the application, I find myself obliged to firstly make a finding on one important issue. It is apparent in this application that, the respondents are questioning the

competence of the application at the stage of hearing. They do so on the ground that the applicant erroneously moved this court under wrong provisions, i. e. section 47 (1) of Cap. 216. They are also of the view that, the application shows that the applicant is applying for a certificate of point of law though he ought to have applied for the leave to appeal to the CAT.

In my view, though I agree with the respondents that the applicant ought to have cited section 47 (2) of Cap. 216 [instead of section 47 (1)] as the enabling provisions of law for this application, I consider the slip as not fatal. This is because, the contemporary law guides that, wrong or non-citation of enabling provisions of law does not make an application incompetent as long as the court has the requisite jurisdiction to entertain the application. This is the stance underlined by this court in **Aliance One Tobacco Tanzania Ltd and another v. Mwajuma Hamisi and another, Misc. Civil Application No. 803 of 2018, High Court of Tanzania, at Dar es Salaam** (unreported). This stance is based on the principle of overriding objective.

The principle of overriding objective just mentioned above essentially requires courts to deal with cases justly and timely, to have regard to substantive justice and avoid overreliance on procedural technicalities; see the decision by the CAT in the case of **Yakobo Magoiga Giche re v. Peninah Yusuph, Civil Appeal No. 55 of 2017, Court of Appeal of Tanzania (CAT), at Mwanza** (unreported). In the case at hand, it is undisputed that, this court has jurisdiction to entertain an application for leave to appeal to the CAT in matters of the nature like the one under consideration. The wrong citation cannot thus, vitiate the application.

Moreover, the respondents' view that the application shows that it is for a certificate of point of law, is unfounded. This is because, by reading the prayers lodged by the applicant in the chamber summons, it is clear that he is seeking for leave to appeal to the CAT. However, his grounds are based on points of law. In fact, according to section 47 (2) of Cap. 216 as amended by the Written Laws (Miscellaneous Amendments) (No. 3) Act 2018 (Act No. 8 of 2018), an aggrieved party may appeal to the CAT against a decision of this court with leave in a matter originating in a DLHT. The grounds for appealing in my settled view, may be on points of facts or points of law. Nonetheless, where the matter originates from a ward tribunal, such aggrieved party must apply for and obtain from this court a certificate that a point of law exists (see section 47 (3) of Cap. 216). It cannot thus, be taken that the applicant in the matter at hand was applying for certificate of point of law since the matter did not originate in a ward tribunal. The applicant did not also cite any provision of law related to a certificate of point of law. Besides, in his prayers he did not mention anywhere about a certificate of point of law. I thus, also discard this ground of challenging the competence of the application. Due to the above reasons, I distinguish the **Ndwaty case** (supra) cited by the solicitor for the third respondent.

Having discarded the challenges against the competence of the application, I find the application competent irrespective of the weaknesses complained of by the respondents. I therefore, proceed to consider the merits of the application. The major issue between the parties is *whether or not this application is meritorious*. Before I tackle this issue, I find it

proper to outline, some relevant principles related to the law on leave to appeal to the CAT as shown hereunder.

Our written laws do not give guidelines regarding factors to be considered in applications for leave to appeal to the CAT; see **COWI Consult (T) and 2 others v. Pius Kuhangaika and others, High Court Civil Revision No. 8 of 2004, at Dar es salaam** (unreported, by Kalegeya, J. as he then was). However, case law has plugged the gap and developed some factors thereof. They are these; in the first place, it must be known that, the right of appeal to the CAT is not granted by Cap. 141 alone, there are other laws providing for such right, see **The Attorney General v. Philemon Ndesamburo [2003] TLR. 194** (the Ndesamburo case). Cap. 216 (supra), which is relevant in the application at hand, is among such other laws. Furthermore, an appeal to the CAT is not automatic in all cases. This means that, in some cases appeals are automatic and need no prior leave. This is where the law does not provide for a prior requirement of leave to appeal. In some cases however, where the law provides for prior leave, it is necessary to obtain the leave as a pre-requisite for the appeal, see the wording of the laws under which this application was pegged.

Moreover, though statutory provisions requiring prior leave to appeal to the CAT do not expressly require the applicant to adduce grounds for seeking the leave, the trite practice has been that, the applicant must adduce grounds for the leave; see the envisaging of the CAT in **Zanzibar Shipping Corporation v. Mkunazini General Traders, CAT ZNZ, Civil Appl. No. 6 of 2005, at Zanzibar** following its previous decision in

Giafar Mohamed Bedar and General Construction Co. Ltd. v. Ital African Transporters Ltd, Civil Application No. 4 of 1994. It is also a practical principle of law that, an applicant for the leave is not only obliged to adduce grounds for the leave, but such grounds must also be coated with merits; see the reasoned opinion of this court (Masanche J. as he then was) in **Razac Somji and 29 others v. National Housing Corporation, High Court, Misc. Civil Application No. 100 of 2004, at Mwaza** following the firm view of **Spry VP**, in **Sango Bay Ltd v. Dresdner Bank [1971] E. A. C. A. 17** and that of **Lord Parker CJ**, in **R. v. Stevens and Briston [1968] Crim. L. R. 670.**

I am therefore, settled in mind that, one of the objectives for enacting the provisions of law requiring leave for appealing to the CAT, was to minimise unnecessary appeals to the CAT. That is why the right to appeal to the CAT is not automatic in every case as I observed previously.

Conditions for granting an application for leave were summarised by my brother, Massati, J. (as he then was) in the case of **Citibank Tanzania Limited v. Tanzania Telecommunications Company Ltd and 5 others, High Court of Tanzania (Commercial Division), Misc. Commercial Cause No. 6 of 2003, at Dar es Salaam** (unreported) herein called the **Citibank case,** where he remarked, and I quote him for a readymade reference;

> "I think it is now settled that, for an application for leave to appeal to succeed, the applicant must demonstrate that the proposed appeal raises contentious issues worth taking to the Court of Appeal or are of such public importance, or contain serious issues of misdirection or non-direction likely to result in a failure of justice and worth consideration by the Court of Appeal....In an application of this nature, all that the Court needs to be

> addressed on, is whether or not the issues raised are contentious....the Court cannot look at nor decide either way on the merits or otherwise of the proposed grounds of appeal."

In arriving into the decision in the **Citibank case** (supra), the learned Judge keenly considered and followed various precedents including the following: **Gaudencia Mzungu v. IDM Mzumbe, CAT Civil Application No. 94 of 1999** (unreported), which held that;

> "...leave is not granted because there is an arguable appeal. There is always arguable appeals. What is important is whether there are prima facie, grounds meriting an appeal to this Court. The echo stands as guidance for the High Court and Court of Appeal."

This court (in the **Citibank case** cited above) also followed the East African Court of Appeal decision in **Sango Bay Estates Ltd & others v. Dresdner Bank [1971] EA 17 (2).** In this case it was stated that:-

> 'Leave to appeal from an order in civil proceedings will normally be granted where *prima facie*, it appears that there are grounds of appeal which merit serious judicial consideration."

Again, this court in the **Citibank case** (supra) considered the CAT decision in the case of **Lazaro Mabinza v. The General Manager, Mbeya Cement Co. Ltd, Civil Application to 1 of 1999** (at Mbeya Registry, unreported) that held thus:

> "Leave to appeal should be granted in matters of public importance and serious issues of misdirection or non-direction likely to result in a failure of justice."

This court further, in the **Citibank case** (supra), considered the case of **Saidi Ramadhani Mnyanga v. Abdallah Salehe [1996] TLR 74** where it was held that, for leave to appeal to be granted the

application must demonstrate that there are serious and contentious issues of law or fact fit for consideration by the CAT.

Likewise, in the case of **Masumbuko Serikali Jinola v. Furaha Mwambiji, High Court Misc. Land Case Application No. 52 of 2016, at Tabora** (unreported) another brother of mine (Mallaba, J. as he then was) had an opportunity for highlighting factors that can be considered in deciding whether or not to grant leave to appeal to the CAT. His factors indeed rhyme well with those highlighted in the **Citibank case** (supra).

The CAT has further guided that, the leave is granted where the appeal has chances of success; see **Harban Haji Mosi and another v. Omari Hilal Seif and another, CAT Civil Reference No. 19 of 1997** (unreported). In the case of **British Broadcasting Corporation v. Eric Sikujua Ngmaryo, CAT Civil Application No. 133 of 2004** (unreported) it was highlighted that, leave to appeal to the CAT is granted by discretion of the court that must be exercised judicially. It is also granted where the grounds of appeal raise issues of general importance or novel point of law or *prema-facie* arguable appeal. In **Rutagatina C. I v. The Advocates Committee and Clavery Mtindo Ngalapa, Civil Application No. 98 of 2010** (unreported) it was emphasised that, leave is grated if there is good reason normally on point of law or public importance.

The sub-issue now is, whether or not the application at hand meets the conditions highlighted above (or any of them), for granting the leave. I will answer the sub-issue by considering the eligibility of the proposed

grounds of appeal (to the CAT), the arguments by the parties, the record and the law.

Indeed, it is clear from the arguments by the parties that, the major ground of appeal proposed by the applicant is that, the appellate judge of this court did not consider the issue of double allocation. Other grounds on illegality of the sale of the suit land, the transfer of the title and the issue of ownership of the same revolved around the said issue of double allocation. However, it is clear from the impugned judgment that, the appellate judge of this court addressed herself to the issue of double allocation when she considered the issue of ownership of the suit land. She did so from page 4 of the typed version of the impugned judgment. She considered the evidence on record and reached a decision that, there was no question of double allocation (see at page 8). She then agreed with the decision of the DLHT and dismissed the appeal by the applicant because, he had no good title over the suit land. The applicant cannot thus, argue at this stage, that the appellate judge did not consider the issue of double allocation.

Again, though the applicant claims that the grounds of appeal to the CAT are on point of law, I do see any point of law in such grounds as rightly contended by the respondents. In fact, even the learned counsel for the applicant himself did not cite any law offended by the appellate judge in the impugned judgment. All the grounds are on points of facts based on the evidence which was effectively considered by the appellate Judge who also made findings. I thus, agree with the argument by the learned counsel for the first and second respondents that, it is a principle of our law that, a

third appellate court rarely interferes with the concurrent finding of two lower courts. This stance of the law is supported by a heap of precedents in our jurisdiction; see for example in **Asha Mohamed v. Zainab Mohamed [1983] TLR 59** (by the CAT). In the matter at hand, the third appellate court is the CAT to which the applicant intends to appeal. The CAT cannot thus, under this principle of law, easily interfere with the concurrent facts finding of this court and the trial DLHT in relation to the complained of double allocation. This views thus, negates the arguments by the applicant's counsel that, there are issues to be considered by the CAT in the intended appeal.

Having observed as above, I answer the sub-issue posed above negatively that, the application at had does not meet any of the conditions listed above for granting the prayed leave to appeal to the CAT. I subsequently, find the major issue also posed herein above negatively to the effect that, the application is not meritorious. Leave to appeal to the CAT against the impugned judgment of this court, is thus, denied. The application is consequently dismissed with costs since the general rule is that, costs follow the event. It is so ordered.

THE HIGH COURT OF TANZANIA

J.H.K. Utamwa

Judge

26/10/2020.

26/10/2020.

CORAM; Hon. JHK. Utamwa, J.

Applicant: present and Mr. Amani Mwakolo, advocate.

Respondents: present No. 1 and 2, and Mr. Aman Mwakolo, advocate, holding briefs for Mr. Mkumbe, advocate for the respondents No. 1 and 2 and Mr. Jibu Mbua, Solicitor for the respondent No.3.

BC; Mr. Patrick, RMA.

Court: Ruling delivered in the presence of the applicant, the respondents No. 1 and 2, Mr. Aman Mwakolo, advocate for the applicant who also holds briefs for Mr. Mkumbe, advocate for the respondents No. 1 and 2 and Mr. Jibu Mbua, Solicitor for the respondent No. 3, in court, this 26th October, 2020.

JHK. UTAMWA.
JUDGE

26/10/2020.