

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
[IN THE DISTRICT REGISTRY OF ARUSHA]
AT ARUSHA

MISC. CIVIL APPLICATION NO. 03 OF 2020

(C/F the High Court of Tanzania in Civil Appeal No. 27 of 2017)

BURA LAGWEN.....APPLICANT

Versus

NAWE LAGWEN.....RESPONDENT

RULING

28th July & 24th September, 2021

MZUNA, J.:

The application has been brought under section 47(1), (2) and (3) of the Land Disputes Courts Act No. 2 of 2002, Section 5(1)(c) of the Appellate Jurisdiction Act, [Cap. 141 R.E 2002] and Rules 45(a) and 46(1) of Court of Appeal Rules, 2009, Order XLIII Rule 2 and Section 95 and the Civil Procedure Code [Cap. 33 R.E 2002]. The Applicant seeks to be granted leave and certification on the points of law to be adjudged by the Court of Appeal of Tanzania in respect of the decision of this Court in Civil Appeal No. 27 of 2017 which was delivered on 25th April, 2018.

The application is supported by the affidavit of the Applicant. The Respondent contested the application in a counter affidavit.

Brief facts leading to this application, as can be gleaned in the affidavits and annexes are briefly as follows: The Applicant successfully filed a suit No. 22 of 2016 in the primary court of karatu at karatu claiming to the respondent a Marssey tractor No. 178.212 alleged to have been jointly purchased by them.

Dissatisfied by the decision, the respondent appealed to the District Court of Karatu vide Civil Appeal No. 4 of 2017 whereby the decision of the trial court was upheld.

Still dissatisfied by the decision of the district court, the respondent successfully filed a second appeal to this Court which is now, a basis of this application.

Leave to extend time to file this application out of time was granted in Misc. Civil Application No. 57 of 2018. The hearing of this application was through written submission. The applicant was represented by Mr. Aloyce Qamara Peter, Learned Counsel and the respondent appeared in person, unrepresented.

In his submission in chief Mr. Qamara adopted the contents of the affidavit supporting the issue of points of law to be determined by the Court of Appeal.

On the outset, Mr. Qamara referred this Court on the case of **Nurbhai N. Raittansi vs Ministry of Water Construction Energy Land and Environment and Another** (2005) TLR 220 in regard to points of law worth of being determined by the Court of Appeal.

Mr. Qamara contended that, the impugned decision of the High Court left serious legal issues as outlined under paragraph 13(a) to (f) unresolved and therefore, intervention of the Court of Appeal to make them clear is inevitable.

To such effect, the following matters were proposed to be certified as points of law;

(a) Whether the first appellate Court received the additional (sic) evidence without assigning a reason for doing so.

(b) Whether the first appellate court did give or not the appellant a chance to counter the evidence (sic).

(c) Whether there the (sic) joint ownership of the tractor in dispute can be extinguished for lack of evidence of independent (sic) evidence.

(d) Whether the change and registration of the Tractor in his name of the appellant (sic) in 2008 and in action of respondent until 2015, can discredit the evidence of the respondent/appellant herein.

(e) Whether that the appellant having registration card can give (sic) exclusive ownership of the tractor, without proving whether the card was obtained genuinely or not.

(f) Whether the decision of the this (sic) by Honorable judge (sic) is based on the judges' opinion without considering the evidence presented in court.

In the submission against, the respondent argued that the applicant has failed to meet legal requirement because all matters the applicant has identified as points of law are purely factual. The applicant prayed this court to dismiss the application with costs for lack of merit. In his rejoinder Mr. Qamara reiterated his submission in chief without much qualifications.

Before indulging into the submissions of the parties, it is desirable first to ascertain whether the application is competent before this Court. As above shown, Mr. Qamara is moving this Court to grant certificate and leave to appeal

to the Court of Appeal. He highlighted six points he considers legal under paragraph 13(a) to (f) of his affidavit.

However, I noted that the decision sought to be challenged in the Court of Appeal which is Civil Appeal No. 27 of 2017 determined by this court on 25th April, 2018 originated from Civil Suit No. 22 of 2016 in the Primary court of karatu. Therefore, moving the Court under Section 47 of the Land Disputes Courts Act, [R.E 2019] is purely misconception and probably reading the law upside down.

Mr. Qamara also as a matter of procedure, cited section 5(1)(c) of the Appellate Jurisdiction Act, [Cap. 141 R.E 2019] as among the moving provisions towards granting the prayer sought. For the purpose of clarity this provision of the law is hereby reproduced: -

5.-(1) In civil proceedings, except where any other written law for the time being in force provides otherwise, an appeal shall lie to the Court of Appeal-

(c) with the leave of the High Court or of the Court of Appeal, against every other decree, order, judgment, decision or finding of the High Court.

This provision is very clear that it takes care of the issue of leave against every decree, order, Judgment, decision and findings of the High Court. However, the applicant has gone further not only citing irrelevant provisions to this application like Order XLIII Rule 2 of the Civil Procedure Code and 46(1) of

the Court of Appeal Rules, but also citing the non-existing one which is rule 45(1)(c) of the said Court of Appeal Rules.

Whatsoever the application may be, the proper provision to move this court was section 5(2)(c) of the Appellate Jurisdiction Act, [Cap. 141 R.E 2019] which the applicant did not consider. This provision for ease of reference reads;

(2) Notwithstanding the provisions of subsection (1)-

(c) no appeal shall lie against any decision or order of the High Court in any proceedings under Head (c) of Part III of the Magistrates' Courts Act unless the High Court certifies that a point of law is involved in the decision or order;

However, despite such misconception, I am quite aware of the plethora decisions of the Court of Appeal on wrong citation of law basing on oxygen principles. The Court of Appeal being confronted with the same fact in the case of **Joseph Shumbusho vs Mary Grace Tigerwa and 2 Others**, Civil Appeal No. 183 of 2016 CAT- DSM (unreported) said;

Given the fact that the respondents had cited section 49 of the Probate and Administration Act which deals with revocation and removal of the administrator the citation of the inapplicable provision of the law did not make the respondents' application incompetent. Admittedly, the respondents did not go further to mention the specific subsection that was applicable. But, as rightly submitted by the learned counsel for the respondents, the failure to cite specific subsection of the law did not make the application incompetent.

The same position was given in the case of **MIC Tanzania Limited and 3 Others v. Golden Globe International Services Limited**, Civil Application No. 1/16 of 2017 (unreported) which was cited with approval in the above case.

I now turn to the circumstance of this case. Despite the fact that the applicant did not cite a proper subsection in moving the Court which is section 5(2)(c) of the Appellate Jurisdiction Act (*supra*) and mixed-up with irrelevant provisions, his negligence is fortunately saved by the above cited cases by at least managing to mention and or refer to section 5(1)(c) of the proper Act. Guided by the principles indicated in the above cited cases, the court rules out that this application has been incompetently filed.

Now the question is whether there are points of law to be certified for consideration and determination by the Court of Appeal.

Having considered the application together with the submissions presented by both parties, it is indeed the requirement of the law that, no appeal shall lie against the decision of the High Court originating from Primary Courts unless leave and Certificate that there are points of law worthy to be determined by the Court of Appeal are granted by the High Court.

Leave is grantable where the grounds of appeal raise issues of general importance or novel points of law or a *prima facie* or arguable appeal. Such leave is not granted where the grounds of appeal are frivolous, vexatious, useless or hypothetical. This position has been reiterated in a number of

decisions including the case of **Simon Kabaka Daniel Vs. Mwita Marwa Nyang'anyi & 11 others** (1989) TLR 64 where it was stated:

"In application for leave to the Court of Appeal the application must demonstrate that there is a point of law involved for the attention of the Court of Appeal..."

The same applies to applications to certify that there are points of law to be considered by the Court of Appeal in the intended appeal. In the case of **Ali Vuai Ali Vs. Suwedi Mzee Suwedi** [2004] TLR 110, the Court of Appeal held:

According to section 5(2) (c) of the Appellate Jurisdiction Act 1979, a certificate on a point of law is required in matters originating in Primary Courts; it is provided therein that an appeal against the decision or order of the High Court in matters originating in Primary Courts would not lie unless the High Court certifies that a point of law is involved in the decision or order.

The first ground of appeal is premised on the issue as to whether the first appellate Court received additional evidence without assigning reasons for doing so. The question of taking additional evidence by the 1st appellate court, though the record may prove otherwise on the face of it, had been proposed by Mr. Qamara. He has insisted that it involves a point of law to be considered and determined by the Court of Appeal.


Other remaining five proposed matters by Mr. Qamara in my view, all are factual based which their determination could not be without sufficiently

proving them through evidence. With such reason, they cannot therefore fit to grant this application.

The point of law is whether the first appellate Court received additional evidence without assigning reasons for so doing and whether the same affected the decision on appeal. I hereby certify this as a point of law to be considered and determined by the Court of Appeal. Leave to appeal to the Court of Appeal is hereby granted within 21 days from the date this ruling is pronounced. No order for costs.

Order accordingly.




M. G. MZUNA,
JUDGE.
24/9/2021