

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
(IRINGA DISTRICT REGISTRY)
AT IRINGA

MISC.LAND APPLICATION NO. 04 OF 2022
(Originating from Land Appeal No. 22 of 2020)

FAUSTINA MKUVASA ----- APPLICANT

VERSUS

PIUS MYINGA-----RESPONDENT

30/6 & 04/8/2022

RULING.

MATOGOLO, J.

This ruling is in respect of an application for leave to appeal to the Court of Appeal which was filed by the applicant one Faustina Mkuvasa who lost in Land Appeal No. 22 of 2020.

In this application the applicant through her advocate Mr. Leonard Lazaro Sweke is praying for leave of this court so that she can appeal to the Court of Appeal of Tanzania.

The applicant wants to move the Court of Appeal to determine the following point of law and facts:-

- a. That, the Honourable Judge erred both in law and fact by deciding that the Applicant did not prove her case on balance of probability before the District Land and Housing Tribunal for Iringa at Iringa failing to take into account that the Applicant's evidence before the Tribunal was heavier than that of the respondent.

In this application, the parties were represented, while Mr. Leonard Lazaro Sweke learned advocate represented the applicant, the respondent was represented by Mr. Jonas Kajiba learned advocate from Lawmax Attorneys.

The application was argued through written submissions and the parties complied with the filing schedule set by this court.

Mr. Sweke first of all prayed for this court to adopt the affidavit sworn by the applicant in order to form part and parcel of the written submission in question together with the prayers fronted in the chamber summons.

In support of the application Mr. Sweke submitted that, the applicant is intending to lodge an appeal to the Court of Appeal of Tanzania and on 14th day of January, 2022 the applicant lodged in this court a Notice of Appeal, hence this application for leave to appeal to CAT against the whole of the said decision, so as for the Court of Appeal of Tanzania to consider and determine the point in law and facts as reproduced above.

He went on submitting that, the deceased before the trial District Land and Housing Tribunal with her three witnesses proved on balance of probabilities that she is the owner of the disputed land. He submitted that, the deceased (PW1) at the trial tribunal testified that, she lent the suit land to the respondent for a period of 10 years, five years on each term and after expiry of the said period the Respondent refused to leave the suit land to her.

He went on submitting that, it was decided by the Court in the case of ***Georges Jayo versus Mohamed Hamisi***, [1970] HCD 266 inter alia that;

"The fact that a person has buried his ancestors in that piece of shamba does not necessarily mean that the shamba belonged to him..."

He submitted further that, the appeal before this court was based upon facts presented and evaluated by the District Land and Housing Tribunal for Iringa at Iringa. He argued that, the law is very clear and settled that where a case is essentially one of fact, in the absence of any indication that the trial court failed to take some material point or circumstance into account, it is improper for the appellate court to say that the trial court has come to an erroneous conclusion. To support his argument, he cited the case of ***Ali Abdallah Rajab versus Saada Abdallah Rajab & Others (1994) TLR 132.***

He said the rationale behind this legal position is that the trial court or tribunal was better placed to assess the demeanor and credibility of witnesses who came before it and testified during the trial of the dispute or case hence arrived at the conclusion it reached.

He concluded by praying before this court to grant leave to the applicant to appeal to the Court of Appeal of Tanzania against the whole of the decision and order of the High Court in Land Appeal No. 22 of 2020 costs of this application be provided for and any other and further relief(s) the court may deem fit and just to grant

In reply Mr. Kajiba submitted that, it is well settled that an appeal to the Court of Appeal of Tanzania from a decision of the High Court in exercise its appellate jurisdiction is not an automatic, a party aggrieved must first sought a leave of this Court pursuant to section 47(2) of the Land Dispute Courts Act Cap 216 R.E 2019.

He submitted that, this Court is vested with discretional power to grant leave, however as it was held in by the Court of Appeal of Tanzania in the case of ***British Broadcasting Corporation versus Eric Sikujua Ng'maryo***, Civil Application No.138 of 2004 (unreported), such discretion must be exercised judiciously and this Court must be satisfied that the following conditions are established which are; " the case must involve substantial question of law worth the consideration by the Court of Appeal and the ground(s) raised must be issue of general importance, or novel point of law, or show a prima facie or arguable appeal, and must not be frivolous, vexations or useless or hypothetical.

Mr. Kajiba was of the considered view that, the ground raised by the Applicant seeking leave to appeal to the Court of Appeal of Tanzania does not whatsoever meets the condition stipulated herein above and from the applicant's submission there is nothing this Court can be persuaded to grant leave to appeal to the applicant.

He went on submitting that, the ground raised by the Applicant is not purely point of law worth the consideration of the Court of Appeal, rather it raises a point of fact as the same based on evaluation of evidence, he said the Court of Appeal of Tanzania being second Appellate Court will not readily interfere with the concurrent findings of facts by two courts below unless there are compelling circumstances for such an interference, to bolster his stance he cited the case of ***Helmina Nyoni versus Yerima Magoti***, Civil Appeal No. 61 of 2020 (unreported).

Regarding the argument by the counsel for the Applicant that, it was improper for this Court to reach into a conclusion that the trial Tribunal has come to an erroneous conclusion and the trial court was in a better place to assess the credibility of witnesses, Mr. Kajiba responded that, the Court as a first appellate court is in a better place to evaluate the evidence and interfere with the decision of the trial court in the event the material circumstances of the case call for negative answer.

He submitted that, this court correctly reached to a conclusion that the trial tribunal has come to an erroneous conclusion after conscientiously satisfy itself that the trial tribunal failed to take point or circumstance into account.

With regard to the cases of ***Georges Jayo versus Mohamed Hamisi [1970] HCD 266*** and ***Ali Abdallah Rajab versus Saada Abdallah Rajab and Others*** (supra), Mr. Kajiba said they are aware the decision of the Court of Appeal of Tanzania, that an application of this nature court(s) should avoid making decisions on the substantive issues before the appeal itself is heard at the stage of applying for leave and confine itself to the determination whether the proposed grounds raise an arguable issue(s) before the Court of Appeal.

Mr. Kajiba went on submitting that, the Applicant in his submission failed to persuade this Court as to why the sought leave should be granted, he prayed for this court to disregard his submission in chief which the Applicant argued as if this an appeal in line with the requirement emphasized in the case of ***Bulyanhulu Gold Mine Limited and Others versus Petrolube Limited and Isa Limited*** (supra).

Mr. Kajiba concluded by submitting that, since the applicant in his submission failed to demonstrate as to whether his raised grounds of appeal meet the conditions for leave to be granted, he prayed for this court to follow the authority and precedents cited and dismiss the application with costs for it is devoid of merit.

Having gone through the rival submissions by the parties and having carefully perused the court records, the issue to be determined here is whether this application has merit. In the application for leave to appeal to the Court of Appeal, the law is settled. Leave may be granted where there is a point of law, or the intended appeal stands a good chance of success

or there is a point of public importance to be determined by the Court of Appeal.

In the case of ***Kadili Zahoro (Adminsrator of the Estate of the late Bahati Ramadhani Mponda and Another versus Mwanahawa Selemani*** Civil Application No. 137/ 01 of 2019 (unreported) at page 6 when the Court of Appeal referred its previous decision in the case ***Harban Haji Mosi and Another versus Omar Hilal Seif and Another***, Civil Reference No. 19 of 1997 (unreported) the Court stated that:

“Leave is granted where the proposed appeal stands reasonable chances of success or where, but not necessarily, the proceedings as a whole reveal such disturbing features as to require the guidance of the Court of Appeal. The purpose of the provision is therefore to spare the Court the specter of unmerited matters and to enable it to give adequate attention to cases of true public importance”.

The same principle was reiterated in the case of ***British Broadcasting Corporation versus Eric Sikujua Ng’maryo***, Civil Application No. 133 of 2004 (unreported) where it was stated that;

*"Needless to say, leave to appeal is not automatic. It is within the discretion of the court to grant or refuse leave. The discretion must, however, be judiciously exercised on the materials before the Court. As a matter of general principle, leave to appeal will be granted where the grounds of appeal raises issues of general importance or a novel point of law or where the grounds show a prima facie or arguable appeal (see **Buckle versus Holmes (1992)** ALL E.R Rep 90 at page 91). However, where the grounds of appeal are frivolous, vexatious or hypothetical, no leave will be granted".*

Having seen the legal position regarding application for leave to appeal to the Court of Appeal, I am bound now to determine whether the applicant has advanced good cause for this court to grant the sought leave.

The applicant on her side adduced one reason/ground as found at paragraph 12 of her affidavit to the effect that:

- a. "That, the Honourable Judge erred both in law and fact by deciding that the Applicant did not prove her case on balance of probability before the District Land and Housing for Iringa at Iringa failing to take into account that the Applicant's evidence

before the Trial Tribunal was heavier than that of the Respondent”.

Mr.Sweke was of the view that, the deceased before the Trial Tribunal with her three witnesses proved on balance of probabilities that she is the owner of the disputed land.

Mr. Kajiba on his side was of the view that, the applicant has failed to persuade this court as to why the sought leave should be granted, as the ground raised by the applicant is not a point of law which need determination by the Court of Appeal rather than it is based on fact.

Having carefully considered the facts deposed in the affidavit in support of this application, specifically paragraph 12 (a), the raised ground by the applicant is not on point of law nor does it raise issues of general importance for consideration on appeal. It is neither a novel point of law or that there are matters of public importance and serious issues of misdirection or non-direction likely to result in a failure of justice as it was held in the cases of ***Harban Haji Mosi and Another vs. Omar Hilai Seif and Another*** (supra) and ***Lazaro Mabinza vs. The General Manager Mbeya Cement Co. Ltd***, Civil Application No. 1 of 1999 CAT at Mbeya (unreported). The ground of appeal raised is based on evaluation of evidence that, at the trial tribunal her evidence was heavier than that of the Respondent. The Court of Appeal of Tanzania in the case of ***Gaudencia Mzungu vs. IDM Mzumbe***, Civil Application No. 94 of 1999 (unreported), held that:-

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

The only point raised in the applicant affidavit, and what was submitted by the learned counsel for the applicant is that the 1st appellate judge erred in law and fact by deciding that the applicant did not prove her case on balance of probability before the District Land and Housing Tribunal because her evidence is heavier than that of the respondent. With such submission by the applicant's counsel, it is my considered opinion that, the applicant has failed to demonstrate that, the raised ground of appeal meets the conditions for leave to appeal as it was decided in the cases cited above. Thus, this application has no merit the same is dismissed with costs.




F.N. MATOGOLO

JUDGE

04/8/2022.

Date: 04/08/2022
Coram: Hon. F. N. Matogolo –Judge.
L/A: B. Mwenda
Applicant: Absent
For the Applicant: Absent
Respondent: Absent
Respondent: Absent
Grace


Mr. Jonas Kajiba - Advocate.

My Lord I am appearing for the Respondent. I am also holding brief for Mr. Leonard Sweke advocate for the applicant. The matter is for ruling. We are ready.

COURT:

Ruling delivered.




F. N. MATOGOLO,
JUDGE.
04/08/2022.