

TANZANIA / JUDGMENT

goodhope hance mkaro vs assistant registrar of titles and 2 others 2023

tzhc 23590 10 november 2023

COURT
TZHCDECIDED
10 November 2023

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1 IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA THE SUB REGISTRY OF
MWANZA AT MWANZA MISC. LAND APPLICATION NO. 89 OF 2023 [From High Court (Mwanza)
Land Appeal No 37 of 2021] GOODHOPE HANCE
MKARO.....APPLICANT VERSUS ASSISTANT REGISTRAR OF
TITLES.....1ST RESPONDENT ATTORNEY
GENERAL.....2ND RESPONDENT KAMPUNI YA BIASHARA YA
UMATI.....3RD RESPONDENT

RULING

Oct. 18th & Nov. 17rd, 2023 Morris, J This application is at the instance of Mr. Goodhope Hance Mkaro. He is moving this Court to grant him leave to appeal to the Court of Appeal. He is resolute to challenge this Court's decision dated July 31st, 2023 in Land Appeal No. 37 of 2021. The application is brought 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 (the AJA); and rule 45 (a) of the Tanzania Court of Appeal Rules, 2009. 2 The affidavit of the applicant supports his application. However, through the counter affidavit of Constantine Mtalemwa, the 3rd respondent contests the application. The 1st and 2nd respondents did not file respective affidavits in contest. The main grounds advanced by the applicant in his affidavit include the claim that this Court erred to order joining the 3rd respondent as a necessary party at the appeal level. Further, the applicant alleges that, the Court erred to strike out the appeal on the basis that the same was filed without prior 90 days statutory notice; and that the Court wrongly applied the Government Proceedings Act, Cap 5 R.E. 2019 (the GPA) as the specific law in appeals against the registrar of titles. I ordered the application to be argued by way of written submissions. The filing schedule was compiled with by both applicant and 3rd respondent. The 1st and 2nd respondents did not file their submissions. For the application, Mr. Gilla adopted and reproduced grounds pointed in paragraph 6.0 of the affidavit. To him, the decision sought to be challenged raises legal points which are worth consideration by the Court of Appeal. In his view, there are conflicting decisions of this Court 3 regarding the requirement of the 90 days' notice. He referred to the case of Salaudin Mohamed Musa vs Registrar of Titles and Another, Land Appeal No. 30 of 2023

(unreported). Mr. Gilla further submitted that allegations of the 3rd respondent in his counter affidavit (especially paragraphs 12, 13 and 14) regarding the signature of the applicant are unfounded. That is, the same were raised by the 3rd respondent's counsel himself. The applicant maintained that he authored the signatures. I was further referred to the case of Costancia Chaula and another v Evarist Maembe and another, Civil Application No. 227/17 of 2021 (unreported). In reply it was submitted by Advocate Mtalemwa that the notice of appeal was filed against the decision of this court dated 31/7/2023. But the ground as to whether the court improperly added the 3rd respondent as a necessary party was delivered on 3/3/2023. Therefore, the applicant is estopped from seeking leave to appeal against the latter decision. On such basis, he argued that the first ground contained in 6.0 (a) is misconceived and bad at law. Regarding the second ground contained in paragraph 6.0 (b) of the affidavit, it was the submissions of Mr. Mtalemwa that, according to the 4 case of Burafex Limited (formerly known as AMETAA Ltd.) v The Registrar of Titles, Civil Appeal No. 235 of 2019 (unreported); an appeal against the Registrar of Title is regarded as a suit. Therefore, 90 days' notice is applicable. To him, there is a conflict between the Land Registration Act, Cap 334 R.E 2019 and the GPA. However, he considered the latter to be the specific law in suits against the government. Consequently, it is mandatorily applicable hereof. It was his further conclusion that, such position being fundamental, the applicant retains no legal ground worth determination by the Court of Appeal. Further, Mr. Mtalemwa submitted that, the application is tainted with untrue averments and credentials with different applicant's signatures. Therefore, he prayed to this Court to compare the applicant's signatures on such documents. To him, thus, Costancia Chaila's Case (supra) is accordingly distinguishable. He, hence, prayed that this application should be disallowed. In rejoinder it was submitted by the applicant that the order joining the 3rd respondent in appeal was an interlocutory one. Therefore, the applicant could not have lodged the notice of appeal against that decision before final disposal of the appeal. That is, lodging a notice of appeal in 5 respect of the whole decision in Land Appeal No. 37 of 2021 had the resultant effect of appealing against any decision emanating from the said appeal; interlocutory matters inclusive. The applicant also maintained that his affidavit was proper before the law and it contained truths as required by law. I have keenly considered the rivalry submissions. I will start addressing the contention by the 3rd respondent regarding the signatures of the applicant. It is alleged that the signature appended on the affidavit is not the applicant's as it differs with the one affixed on documents presented before/ and certified by the Registrar of Titles. I am inclined to disagree with Mr. Mtalemwa on a trio-reason foundation. One, apart from being verified by the applicant, the affidavit was sworn before the Commissioner for Oaths (Denis Pauline Kakere). Two, the letters attached to the counter affidavit are purported correspondence of the applicant to the 1st respondent. They are, thus, not conclusive documents regarding accuracy of latter's signature. In essence, they are evidentiary credentials which may attract contention. Three, I am not clothed with the forensic expertise necessary for identifying signatures and/or handwritings. Hence, as stated in 6 Costancia Chaila's Case (supra), I am profoundly loath to probe into which of the two is the applicant's correct signature, at this stage. I have also taken liberty to study the filed affidavit and counter affidavit. The objective was to see to it that the applicant indeed exhibits or demonstrates an arguable case which merits the Court of Appeal's attention. Under the stated paragraph 6.0 (a)

of the affidavit, the applicant intends to challenge the decision of this Court that ordered addition of the 3rd respondent as the necessary party. Vide Misc. Civil Application No. 140 of 2021, the 3rd respondent applied to be joined in Land Appeal No. 37 of 2021. The order to join him was delivered 3/3/2023. For obvious reason, no appeal was filed against that decision. The same was interlocutory in essence. It is also true that through his notice of appeal, the applicant intends to challenge Land Appeal No. 37 of 2021 not Misc. Land Application No. 140 of 2021. Further, as correctly argued by the applicant, the decision in the latter did not finalize the matter between parties therein. Therefore, it was not appealable under section 5 (2) (d) of the AJA. Nonetheless, so long as the whole appeal was later determined subsequent to the addition and/or involvement of the party whom the applicant perceives 7 as having been wrongly added; in my view, parties bear contentious arguments for and against the appropriateness of such joinder of a completely new party at the appellate level of the proceedings. Further, under paragraph 6.0 (b) and (c) of the affidavit, the applicant will be challenging the decision of this Court which struck out the appeal on the basis of the GPA's requirement for the 90 days' statutory notice. To the 3rd respondent, this statute (the GPA) is a specific law which must apply hereof without exception. To the opposite party (applicant), however, the invocation of such statute was a total misemployment of the law. In view of the foregoing contentions, to me, parties herein should be accorded an opportunity to resolve such allegations to finality. It is a principle of the law that, in an application for leave, the applicant needs to simply raise arguments whether legal or factual which are worth consideration by the Court of Appeal. Once the subject arguments pass that test, the Court is obligated to grant leave to appeal. That is, it is not my duty to determine whether or not the disputations have any merit. Lest, this Court risks to overstep its mandate and illegitimately delve into matters falling into the Court of Appeal's jurisdiction. 8 The foregoing demur is also based on courts holdings in *Simon Kabaka Daniel v Mwita Marwa Nyang'anyi & 11 Others* [1989] 64; *Lightness Damiani and 5 others v Said Kasim Chageka*, Civil Application No. 450/17 of 2020; *Suleiman Nchambi v Sunny Auto Works*, Misc. Civil Application No.89 of 2019; and *Cosmas Anton Itungulu v Timoth M. Irunde*, Misc. Land Application No. 69 of 2021 (all unreported). Further, section 47(1) of the Land Disputes Courts Act, (supra) provides that: "47. (1)not applicable.....";

- (2) A person who is aggrieved by the decision of the High Court in the exercise of its revisional or appellate jurisdiction may, with leave of the High Court or Court of Appeal, appeal to the Court of Appeal." Principally, the quoted section does not specify factors to be considered by courts in granting or disallowing the application for leave to appeal. However, case law does. For instance, in *British Broadcasting Corporation v Erick Sikujua Ng'maryo*, Civil Application No. 138 of 2004 (unreported) requisite conditions were set. 9 They are contained in the excerpt below: "... 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 and on the materials before the court...leave to appeal will be granted where the grounds of appeal raise issues of general importance or a novel point of law or where the grounds show a prima facie or arguable appeal...However, where the grounds of appeal are frivolous, vexatious or useless or hypothetical, no leave will be granted" (emphasis added). Basing on

the foregoing court pronouncement, leave to appeal should be granted on a sound legal foundation. In the circumstances of this matter, I am satisfied that the application is meritorious. It contains issues which are contentious and will, in my view, stir arguable proceedings at the next stage of the matter. The prospective arguments are likely to arise out of, the addition of a new party at the appellate stage of the litigation; and the applicability of the GPA in appeals against the decisions of the Registrar of Tittles. 10 I, accordingly, grant leave to applicant for him to appeal against the decision of this Court in Land Appeal No. 37 of 2021. I make no order for costs. It is so ordered. C.K.K. Morris Judge November 17th, 2023

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