

**IN THE COURT OF APPEAL OF TANZANIA  
AT DAR ES SALAAM**

**(CORAM: LILA, J.A., SEHEL, J.A., And MWAMPASHI, J.A.)**

**CIVIL APPLICATION NO. 450/17 OF 2020**

**LIGHTNESS DAMIANI .....1<sup>ST</sup> APPLICANT**  
**ASHRAFU KAMBANGA .....2<sup>ND</sup> APPLICANT**  
**DAVID MWAMWAJA .....3<sup>RD</sup> APPLICANT**  
**HADIJA YUSUFU SALEHE (administratrix of the late**  
**Said Shomvi Msisili)..... 4<sup>th</sup> APPLICANT**  
**OMARI KIBERITI .....5<sup>TH</sup> APPLICANT**  
**ALEX ENOCK .....6<sup>TH</sup> APPLICANT**

**VERSUS**

**SAID KASIM CHAGEKA ..... RESPONDENT**

**(Application for leave to appeal from the Ruling of the High Court of  
Tanzania, (Land Division) at Dar es Salaam)**

**(Makani, J.)**

**dated the 21<sup>st</sup> day of September, 2020.**

**In**

**Misc. Land Application No. 339 of 2020**

**RULING OF THE COURT**

*30<sup>th</sup> August, & 17<sup>th</sup> November, 2022*

**LILA, JA.:**

The applicants herein were respondents in Land Appeal No. 40 of 2019 in the High Court of Tanzania (Land Division) sitting at Dar es Salaam. In that appeal, the respondent herein, had challenged the decision of the District Land and Housing Tribunal for Mkuranga (henceforth the DLHT or the Tribunal) which had, in Land Application No. 31 of 2014, among other orders, declared the applicants to be the lawful

owners of the suit land located at Mlamleni village, Kimbangulile Hamlet within Mkuranga District in Coast Region. Upon a hearing, the High Court (Maghimbi, J.) overturned the DLHT decision and held that the applicants had failed to prove their claim and declared that the land measuring about 100 acres (the suit land) belonged to the late Kassim Chegeka whose estate was yet to be administered with the effect that neither of the rightful heirs or relatives had good title to pass to other persons from whom they claimed to have bought pieces of land. It is worth noting here that the respondent applied and was appointed the administrator of the estate of the late Kassim Chegeka.

The applicants were aggrieved and were inclined to appeal to the Court against the High Court. Alive of the requirement to seek and obtain leave to appeal before lodging the appeal to the Court, they preferred an application for leave in the High Court, which was unsuccessful. They are before this Court on a *second bite* preferred under section 5(1)(c) of the Appellate Jurisdiction Act, Cap. 141 R. E. 2019 (the AJA), Rule 45 and other enabling provisions of the Tanzania Court of Appeal Rules, 2009 (the Rules). The application is supported by an affidavit jointly sworn by the applicants.

Before the High Court, as would be gleaned from the resultant ruling, the applicants advanced three grounds in moving the High Court to grant them leave to appeal to the Court. Page two of that ruling outlined them as hereunder:-

1. That, one of applicants died in the course of the proceedings but the administrator was not given an opportunity to be heard though the court was duly informed.
2. That, the advocate who was representing the respondent one Mohamed had no valid practicing licence but acted for the respondent although the court was duly notified, and
3. That, the appeal was determined without paying due regard to the applicants' submission and lastly that time limitation to sue was not considered.

In her ruling, the learned judge (Makani, J.), first appraised herself of the principles guiding the courts in applications of this nature. The Court's decisions in **British Broadcasting Corporation vs Erick Sikujua Ng'maryo**, Civil Application no. 133 of 2004 (unreported) and **Simon Kabaka Daniel vs Mwita Marwa Nyang'anyi and 11 Others**

[1989] TLR 64 were relied on by her as propounding the legal position that leave to appeal is grantable where the applicant demonstrates serious points of law or disturbing features requiring guidance or worth consideration by the Court.

Gauging the above principles against the facts placed before her by the applicants, the learned judge rejected those grounds on the basis that they did not meet the threshold for granting leave to appeal. Consequently, she dismissed the application with costs. Given its significance in the determination of this application, we think it will be useful to quote in full the relevant part of that ruling thus:-

*"From the records, there is no doubt that the applicants were declared the lawful owners of the suit property. On appeal the decision of the Tribunal was set aside and the respondent herein was declared the lawful owner. I have noted, upon looking at the applicants' grounds of intended appeal that, these are new grounds which were not raised and hence could not have been addressed by the Tribunal or this court during appeal. The applicants were required to show how this court in the course of the appeal*

*erred in law and fact and/or there is a controversy that requires the intervention of the Court of Appeal. In other words, grounds of the intended appeal were not dealt with at the Tribunal or this court at the appeal level. In that respect, it is my considered view that of this court that there is nothing on the part of the law that needs the attention of the Court of Appeal. There is therefore no controversy whatsoever on the finding, reasoning and application of the law in the judgment by the Honourable Judge and there is no issue of importance which has been raised and which is arguable, disturbing and would require the guidance of the Court of Appeal.*

*For the above reasons, the application for leave to appeal to the Court of Appeal has no merit and it is hereby dismissed with costs. It is so ordered."*

The foregoing snag could not divert the applicants from the course towards achieving what they had set themselves to achieve. They preferred this application bringing to the fore those grounds which were considered and downplayed by the learned judge and others which they

thought would be able to move this Court to be inclined to grant them leave. These are:-

- a. That, whether the High Court was correct in deciding the appeal without giving the right to be heard to the legal representative of the late Said Shomvi Msisili who was the 8<sup>th</sup> respondent and who passed away prior the commencement of hearing of Land appeal No. 40 of 2019.
- b. That, whether the High Court was proper in refusing the applicants' application in Misc. Application No. 339 of 2020 for leave to appeal to the Court of Appeal of Tanzania with costs based on three grounds leaving other five grounds raised.
- c. That, whether the High Court was correct to allow Mohamed Majaliwa to draft, file and represent the respondent in Land Appeal No. 40 of 2019 as an Advocate although he was unqualified Advocate and relied on the same pleading to decide the appeal in favour of the respondent.
- d. Whether the High Court was correct to declare the respondent to be the owner of 100 acres of land without any proof tendered in any Court proving that such land was owned by the deceased who passed away in 1965.
- e. Whether the High Court was correct in determining the appeal based on section 99 of the Probate and Administration Act Cap.

352 of 1963 R. E. 2002 without considering the contents of the proviso thereof.

- f. Whether the High Court was correct to declare the respondent as legal owner of the land in dispute without considering the limitation period as some of the applicants started to live in the disputed area since 1973, 1989 and others 1994.
- g. Whether the High Court was correct to determine the appeal in favour of respondent on the basis that the land was for Chegeka family without considering that Chegeka is a Clan name in which the deceased land was and is distinct to the land which was owned by his relative or and the children.
- h. Whether the High Court was correct to revise the Tribunal decision in favour of respondent without considering the evidence tendered in the District land and Housing Tribunal for Mkuranga prior coming to its conclusion.

The learned counsel Mr. Octavianus Mushukuma appeared before us representing the respondent whereas the applicants appeared in persons and unrepresented. Both parties lodged and adopted the respective written submissions they lodged in terms of Rule 106(1) of the Rules. Actually, they relied on them heavily during their respective arguments before us which were significantly a reiteration of them.

The applicants' written submissions were relatively extensively long but the substance in it may conveniently be summarized thus; that, **one**, hearing of the appeal proceeded despite notice to the court that Said Shomvi Msisiri, (then 8<sup>th</sup> respondent in the appeal) had passed away and an administrator of his estate had been appointed hence denying him the right to be heard through a legal representative, **two**; the advocate who had the conduct of the appeal for the appellant was unqualified to practice hence could not draft the amended memorandum of appeal, file it and represent the respondent, **three**; that the High Court judgment was problematic for want of analysis and evaluation of evidence and failure to give reasons for the decision, **four**; the claim for ownership of the disputed land was time barred and, **five**; the learned judge framed a new issue at the appeal stage that is, whether the relatives of the deceased had any title to the disputed land which they could pass to the respondent and determined it without affording opportunity to the parties to address it. They impressed on the Court to grant the application with costs.

Mr. Mushukuma disputed that grounds fronted by the applicants would be able to move the Court to exercise its discretion and grant leave



to appeal. He, at first, attacked the applicants for introducing new evidence in this application which was not canvassed before the Tribunal and the High Court and hence irrelevant in this application. His reference was on the draft agreements and executed agreements between them and some people who were not parties to this application. Regarding the application, he asserted that leave may be granted where the grounds of appeal raise issues of general importance or of a novel point of law or where the grounds show a prima facie arguable point. To buttress up the point, reference was made to the case of **Buckle vs Holmes** (1926) All ER 90 at page 91 and **Harban Haji Mosi and Another vs Omar Hilal Seif and Another**, Civil Reference No. 19 of 1997 (unreported). Based on the principles enunciated in these cases, Mr. Mushukuma argued that neither of the grounds raised by the applicants in their submission has met the threshold conditions for the grant of leave. They do not show any point of law or serious issue worth consideration by the Court let alone being part of the grounds raised in the application which was dismissed. In fine, he supported the learned judge's findings in the dismissed application and prayed for the application to be dismissed with costs.

We have recited part of the learned judge's observation not without a purpose. Upon our careful examination of it, it seems clear to us that much as the learned judge apprised herself of the applicable principles in applications of this nature but she strayed into serious error in the manner she tackled the issue embraced in the application that was before her. From the submissions by the parties it is plain that both sides are aware of the principles governing court's exercise of discretion to grant leave to appeal as was pronounced by the Court in the often cited case of **British Broadcasting Corporation vs Eric Sikujua Ng'maryo** (supra) as was cited in the case of **Rutagatina C. L. vs The Advocates Committee and Another**, Civil Application No. 98 of 2010 (unreported), 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 judiciously exercised and on the materials before the court. As a matter of general principle, 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 (see: **Buckie v***

*Holmes (1926) ALL E. R. 90 at page 91).  
However, where the grounds of appeal are  
frivolous, vexatious or useless or hypothetical, no  
leave will be granted."*

In the light of the above stance of the law, and with respect to the learned judge, it seems clear to us that all that applicants are required to do in applications of this kind is simply to raise arguments whether legal or factual which are worth consideration by the Court. Once they pass that test, the court is obligated to grant leave to appeal. It is not the duty of the judge to determine whether or not they have any merit. By doing that it is to overstep into the mandate of the Court to which the appeal lies. It is to prejudge or predetermine the appeal. We therefore, as a reminder, hereby restate the well-established principle of law that in applications of this nature courts should avoid making decisions on the substantive issues before the appeal itself is heard which is a stance pronounced by the Court in the case of **The Regional Manager-TAN ROADS Lindi vs DB Shapriya and Company Ltd**, Civil Application No. 29 of 2012 CA (unreported) that:-

*"It is now settled that a Court hearing an  
application should restrain from considering*

*substantive issues that are to be dealt with by the appellate Court. This is so in order to avoid making decisions on substantive issues before the appeal itself is heard ..."*

In the instant case, it is clear that the learned judge considered the grounds for the application for leave and made a determination whether or not they were meritorious having regard to the manner the learned judge had dealt with them in the judgment sought to be appealed against. In the light of the above guidance, the grounds need not only be grounds of appeal but they may be arguable issues which attract the Courts attention for having them put in proper legal perspectives. That said, we think the learned judge erred when she went ahead to determine the grounds raised whether they had merits. Although we are not presiding over an appeal against the refusal to grant leave to appeal, we hasten to state that the course taken by the learned judge resulted in the grounds raised not being properly considered which resulted in unjustified refusal of the leave to appeal. Alive of that fact, the central issue for our determination is whether the applicants have advanced arguable issues which justify grant of leave to appeal to the Court.

Given the view we have taken, we are unable, with respect, to agree with the learned counsel for the respondent that the grounds for applying for leave, as gleaned from the chamber summons and elaborated in the affidavit in support of the application and both written and oral submissions before us, constitute new evidence and raise nothing new for the Court's consideration. Issues like failure to accord a party the right to be heard in the impugned decision, the advocate practicing without a valid licence, limitation period to institute a claim on landed property which touches on the jurisdiction of the court to adjudicate on the dispute, failure to evaluate evidence before arriving at a certain decision and others are definitely arguable issues before the Court. They cannot be overlooked. Much as we agree with Mr. Mushukuma that the agreements attached to the application are new evidence and therefore irrelevant herein, but we are not at one with him that the grounds for seeking leave to appeal are new. It is our decided view that the grounds raise issues which challenge the justification of the pleadings and the High Court's decision in Land Appeal No. 40 of 2019. We are satisfied, therefore, that those grounds raise important issues of law and facts for the Court's consideration.

For the foregoing reasons, we grant the applicants leave to appeal to the Court against the High Court decision (Maghimbi, J.) in Land Appeal No. 40 of 2019 dated 27/5/2020. The intended appeal has to be lodged within sixty (60) days of this ruling. Costs shall abide the outcome of the appeal.

**DATED at DAR ES SALAAM this 16<sup>th</sup> day of November, 2022.**

S. A. LILA  
**JUSTICE OF APPEAL**

B. M. A. SEHEL  
**JUSTICE OF APPEAL**

A. M. MWAMPASHI  
**JUSTICE OF APPEAL**

The Ruling delivered this 17<sup>th</sup> day of November, 2022 in the presence of the Applicants except for the 3<sup>rd</sup> and 4<sup>th</sup> applicants who are absent and Mr. Octavianus Mushukuma, counsel for the Respondent is hereby certified as a true copy of the original.



  
A. L. KALEGEYA  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**