

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA**

AT SHINYANGA

MISC.LAND APPLICATION NO 19 OF 2020

***(Arising from Land Application No. 40 of 2020 of Shinyanga District Land
and Housing Tribunal)***

ALEX MACHA.....APPLICANT

VERSUS

HOSEA JORAM..... RESPONDENT

RULING

25th March & 16th April, 2021

MKWIZU, J.

The applicant lodged this application seeking leave to appeal to the Court of Appeal of Tanzania. The application is made under section 47 (1) of the Land Disputes Courts. Act, Cap. 2016 R.E 2002 read together with Rule 45 (a) of the Tanzania Court of Appeal Rules, 2009, accompanied by an affidavit deposed by the applicant on 29th April, 2020. The prayers in the chamber summons are that:

*"1. That, this Honourable court be pleased to grant leave to the
applicant within which to appeal to the Court of Appeal of Tanzania
against the Judgment of the High Court of Tanzania at Shinyanga in*

Land Appeal case No. 83/2010 C/F Land Appeal No. 96/2016

delivered on the 3rd April 2020.

2. Cost of this application to be provided for

3. Any other orders of this honourable Court may deem fit to grant.”

When the application came for hearing on 25th March, 2020, Applicant had the service of Mr. Alhaji Majogoro learned Advocate while the respondent was assisted by Mr. Jacob Somi also learned Advocate. In supporting the application, Mr. Majogoro prayed first to adopt the affidavit of the applicant in support of the application to be part of his submissions. He in addition submitted that, the trial court erred in law in holding that the disputed property was re -surveyed from plot No. 25 Block O and changed to Plot No. 206 Block O without any legal document to prove the same. He argued that looking at page 8 -9 of the impugned judgment, there was a change of a plot number from Plot No. 25 to 206 Block O but no evidence of resurvey was produced to authenticate the same.

On the second issue, Mr. Majogoro submitted that the High Court erred in disregarding the appellant's evidence by basing on the document which was

admitted for identification purpose only. It was respondent's claim during trial that he acquired the suit plot as a gift from one Amosi Kitula but apart from the documents tendered for identification, no proof was given to substantiate the said fact. The issue for court's determination as per the applicant's counsel's submission is whether it was proper for the court to disregard the appellant's evidence basing on the document received for identification purposes only.

The third issue submitted Mr. Majogoro, is whether it was proper for the High court to disregard total the issue of adverse possession claimed by the applicant. He pointed to page 4 of the High court's Judgment, contending that high court disregarded the issue without justification.

The fourth issue pointed by Mr. Mojogoro is whether it was proper for the appellate Judge to shift the burden of proof from the Respondent to the applicant. He said at page 9 of the Judgment, the appellate Judge forgot that it is the respondent, original complainant that had a burden of proving his case especially on the change of the plot and not the applicant.

The last issue is whether on the balance of probability the respondent managed to prove ownership of the suit and the alleged transfer. In this point Mr. Majogoro prayed for leave because he believes that the respondent did not prove ownership of the land in dispute and did not prove the alleged transfer. He cited the case of **Coca cola Kwanza Ltd v. Charles Mpuga & 103 others** Civil Appeal No. 393 of 2017 in support of his stance.

In reply, Mr. Somi was of the view that the pointed out issues are not triable warranting the court to grant leave to appeal to the court of Appeal. He cited the case of **Hamisi Mdida & Said Mbogo Vs Registered Trustees of Islamic Foundations**, Civil Applications No. 232 of 2018 contending that leave to Appeal cannot be granted unless there are arguable points for Court of Appeal's consideration. He submitted that the District Land and Housing Tribunal evaluated the evidence and found in favour of the respondent and the respondent proved that the Plot was Re surveyed and he was given Plot No. 206 Block O.

Mr. Somi went on challenging the chamber summons for making references to Land Appeal No. 83/2010 consolidated with appeal No. 96/2006 as the appeal numbers on which the judgement was given while in fact the decision emanates from Appeal No 83 of 2016 and 96 of 2016. He therefore prayed the application to be refused.

In rejoinder, Mr. Majogoro Submitted on the issue of correctness of Numbers of cases in which the application and the impugned decision said to have emanated from as cited in the application . He clarified that the numbers appearing in the application are the numbers which were cited by the Judge in the impugned judgment, he contended that ,the court is the custodian of the proceedings so they had to follow the quotation made in the judgment of the court. He on the rest of the issues reiterated his earlier submission in chief.

I have carefully scrutinized the application and parties' submissions. Applicant intends to appeal against the decision of this court emanating from Kahama District Land and Housing Tribunal. As a matter of law, such

an appeal is only appealable upon leave of the high court under section 47 (2) of the Land Disputes Courts Act (Cap 216 R:E 2019) . The section provides :

A person who is aggrieved by the decision of the High court in exercising of its revisional or appellate jurisdiction may with leave of the High court or Court of Appeal, appeal to court of Appeal.

This is the gist of the present application. The application has sought leave on five points as enumerated under paragraph 4 (i) –(v) of the affidavit in support of the application namely :

- i. Whether, this court erred in holding that the disputed property was resurveyed from Plot No. 25 Block O and changed to Plot No. 206 Block O without any legal document to prove the same.*
- ii. Whether it was proper on the Hon Judge to disregard the appellant's evidence by basing on the documents which admitted for identification purpose only.*

- iii. Whether it was proper for the Hon Judge to disregard in total the issue of adverse possession raised by the applicant*
- iv. Whether it was proper for the Hon Judge to shift a burden of proof from the Respondent to the applicant.*
- v. Whether on the balance of probability the respondent managed to prove ownership of land to be of one Amos Kitula and also managed to prove the transfer of the said disputed property to him.*

The application is opposed. One of the grounds in opposition was that the application is incompetent for making reference to wrong case numbers in which the impugned judgement emanated. I have curiously gone through the chamber summons; it is true that the applicant leave is sought against the decision of this court in Land appeal No 83 of 2010 C/F Land appeal No 96 2016. In his submissions, Mr. Somi is of the view that these are not the correct registration numbers of the said appeals .He was however, short of words on how the citing of the wrong case number prejudiced the respondent. I have perused the records, the decision on which leave is sought was delivered by this Court on 3/4/2020 by my brother Mdemu J. It was a decision in Land appeal No 83 of 2010 C/F Land

appeal No 96 of 2016 as cited on its title. This is exactly what applicant cited on his application. As rightly stated by the applicant's counsel, there was no way in which he could have changed the registration number of the decision he was intending to appeal from. He had no option but naming the decision in the same way it was named by the court that gave the decision. For the above reason, I find this point untenable. The application is competent and even if the numbers are incorrect, its citation did not anyhow prejudice the respondent in this matter.

As stated earlier, this is an application for leave to appeal. In **Harban Haji Mosi and another Vs. Omari Hilal Seif and another**, Civil Reference No. 19 of 1997 (unreported) Court of appeal said:

"Leave is grantable where the proposed appeal stands reasonable chances of success or where but not necessarily the proceeding as whole reveals such disturbing features as require the guidance of the court of Appeal. The purpose of the provision is therefore to spare the court the specter of un-meriting matter and enable it to give adequate attention to cases of true public importance."

And in **British Broadcasting Corporation v. Eric Sikujua Ng'amaryo**, Civil Application No. 133 of 2004 (unreported) thus:

" 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 raise issue of general importance or a novel point of law or where the grounds show a prima facie or arguable appeal."

I have evaluated the decision in Land appeal No 83 of 2010 C/F 96 of 2016, in line with the above authorities. I am convinced that the application is justified. Leave to appeal to the Court of Appeal is accordingly granted. Costs to be in the course. It is so ordered.

DATED at SHINYANGA this 16th day of APRIL, 2021.

