

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE KIGOMA DISTRICT REGISTRY**

**MISC. LAND APPLICATION NO. 58/2021**

(Arising from the Land Appeal No. 07/2021 in this Hon Court, Hon A. Matuma,J and the original Land Application No. 44 of 2018 in the District Land and Housing Tribunal for Kigoma at Kigoma, Hon. F. Chinuku – Chairperson)

**ABDUL YAHAYA KIDAGIRA (Administrator**

**of the estate of the late YAHAYA HEMEDI KIDAGIRA) .....1<sup>ST</sup> APPLICANT**

**MUHIDINI YAHAYA .....2<sup>ND</sup> APPLICANT**

**VERSUS**

**MACHO HUSSEIN SAIDI .....1<sup>ST</sup> RESPONDENT**

**ZIKIE YAHAYA HEMEDI .....2<sup>ND</sup> RESPONDENT**

**TAUSI SHABANI HEMEDI .....3<sup>RD</sup> RESPONDENT**

**RULING**

6/6/2022 & 25/7/2022

**L.M. Mlacha,J**

This is a ruling on an application for leave to appeal to the Court of Appeal against the decision of this court made in Land Appeal No. 7 of 2021 (Matuma,J). The application is made 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 and section 95 of the Civil Procedure

Code Act, Cap 33 R.E 2019. It is supported by the affidavit of Mr. Sadiki Alik, counsel for the applicants Abdul Yahaya Kidagira (Administrator of the estate of the late Yahaya Hemedi Kidagira) and Muhidini Yahaya. Attached to the affidavit are copies of the application, the judgment of the District Land and Housing Tribunal, the judgment of this court and the Notice of Appeal. The respondents, Muhidini Yahaya, Zikie Yahaya Hemedi and Tausi Shabani Hemed were dully served and filed a counter affidavit in opposition.

The grounds upon which leave is sought are contained in para 8 of the affidavit which reads thus: -

- i. Whether the High Court did not misdirect itself in holding that the Applicant's father who was alleged to have been a witness to a sale agreement tendered as exhibit P3 was the one who sold the piece of land to the 1<sup>st</sup> Respondent while confirming that the alleged vendor (the 2<sup>nd</sup> Applicant) as it was pleaded by the 1<sup>st</sup> Respondent before the DHLT did not sale the piece of land and he did not sign the alleged sale agreement.
- ii. Whether it was legally correct for the court to have decided (sic) that it was the Applicant's father who sold the piece of land while the 1<sup>st</sup>

Respondent did never plead as such and the court did not call upon the parties counsel to address on the new allegation raised suo mottu and decided by the court.

- iii. Whether upon demise of a Muslim believer his estate automatically passes to his heirs and that they can legally sale the estate without being administrator(s)/ administratrix of the estate.
- iv. Whether a fact pleaded by a litigant in a particular pleading can be regarded as a proof of that fact without testifying on the facts during trial.
- v. Whether the court can grant bigger size of a land than at least the size testified for though not pleaded.
- vi. Whether the court can grant a land mention size of that land while the size of the land was not pleaded and not mentioned in a particular sale agreement.
- vii. Whether the court correctly held that the 2<sup>nd</sup> Respondent once owner of the piece of land by just pleading that he sold his land.
- viii. Whether the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents had good titles over the lands to pass to the 1<sup>st</sup> Respondent regarding *nemo dat quod non habet* rule.



- ix. Whether on balances of probability the Applicants proved the land in dispute to be one of the estate properties of the late Yahaya Hemedi Kidagira.
- x. Whether it was legally correct for the 1<sup>st</sup> Respondent to purchase the suit land without first inquiring as to how the alleged vendors acquired the pieces of lands in compliance to caveat emptor rule.

Mr. Sadiki Aliko appeared for the applicants while the first and third respondents were represented by Mr. Eliutha Kiviyiro and Mr. Kagashe respectively. The second respondent appeared in person. Mr. Sadiki Aliko adopted the contents of the affidavit as part of his submission. While referring to **Binti Mlevi v. Halima MwinyiShehe** Miscellaneous Civil Application No. 635/2020 (High Court at Dar es salaam) and para 8 of the affidavit, counsel submitted that the court can grant leave if the application has an arguable appeal to the Court of Appeal. He said that the duty of the applicant is just to point out the grounds. He told the court that the decision of this court has legal defects calling the attention of the highest court of the land. Giving details he said that the court directed itself on issues which were not raised at the District Land and Housing Tribunal at the appellate stage. He said that pages 12 to 13 of the judgment show that

the judge accepted that the second respondent did not sign the sale agreement to sell the land to the first appellant but went on to say that it was sold by his father a fact which was not pleaded anywhere in the pleadings. This contradicts the principle that parties are bound by their pleadings, he submitted. He referred the court to **Mexo's Investment Ltd v. DLHT Training Company Ltd** CAT Civil Appeal No. 91/2019 pages 23 – 24 on this point. Counsel proceeded to say that none of them said that the land was sold by his father. The issue was raised by the court. He said that the parties were denied a right to be heard on this issue contrary to article 13(6) (a) of the constitution.

Counsel submitted that the judge said that the sale was legal under Islamic Law an issue which was never discussed in the lower court. He had the view that this was a misdirection. He directed me to page 26 where it is written that the first respondent is the lawful owner of the land, 2 acres. He said that the pleadings did not say anything on the size of the Land. He said that the issue here is whether the court at an appellate stage was correct to decree 2 acres while the respondent did not pledge so. Finally, he submitted that the first respondent was supposed to question before he



bought under the principle of buyer beware. He added that the nemo dat rule also cut across the sale of the 3<sup>rd</sup> respondent.

Mr. Eliutha Kiviyiro agreed that there was no signature of the seller, the second respondent in the sale agreement but argued that it did not mean that there was no sale because the sale was done during the life of the late Yahaya Hemed Kidagila who was a witness. He said that what was done by the judge was a scrutiny of the evidence and nothing else. On the size of the land counsel had the view that the land is not surveyed but known. On the issue of Islamic Law, counsel agreed that it was mentioned but argued that it was not the basis of the decision. It was a mere observation. On caveat emptor, counsel had the view that the parties being relatives there was no doubt on what was sold. The first respondent was their sister in law; she was not a stranger in the family. She knew what she was buying. He went on to say that issues of nemo dat rule were fully discussed. He argued the court to dismiss the application saying everything was dealt fully.

The second respondent opted to leave everything to the court.

Mr. Kagashe submitted that the applicants and the second respondent are sisters and brothers from the same mother and father. The first respondent is their sister in law. The third respondent is their relative also. He said that there was no dispute that the first respondent bought land from the third respondent in 2011. The conflict is brought by the second applicant and the second respondent who said that they never sold. Counsel submitted that this was found to be a conspiracy by the court. Counsel challenged the grounds saying that Mr. Sadiki had 2 grounds of appeal but is now raising 10 grounds to the Court of Appeal. He has no such a right, he said. While referring to **Halid Maulid v. R.** Criminal Appeal No. 94/2021, page 2, counsel submitted that issues not raised in the lower court cannot be raised at this stage. He said that the judge did not apply Islamic Law; he only said that they moved to Islamic leaders to solve their problem. He said that the principle of buyer beware does not apply. He argued the court to dismiss the application with costs.

Mr. Sadiki Alik joined issues with counsel for the respondents in his rejoinder.

I had time to examine the grounds set out in para 8 of the affidavit and the opposing views shown in the counter affidavits closely. I have also



considered the application and submissions made carefully. The principles or the bases upon which leave can be granted or refused are contained in case law. In **Harban Haji Mosi & another v. Omar Hilary Seifu & another** (CAT) Civil Reference No. 19 of 1997 it was said thus:

*"Leave is grantable 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 unmeriting matters and to enable it to give adequate attention to cases of true public importance."* (emphasis added)

See also **British Broadcasting Corporation v. Eric Sikujua Ng'wamaryo**, (CAT), Civil Application No. 138 of 2004 pages 6 -7 and **Rutagatina C.L vs The Advocates Committee & another**, (CAT), Civil Application No. 98 of 2010.

**In Rutagatina C.L.** (supra) page 5 the court said thus:

*"An application for leave is usually granted if there is good reason, normally on a point of law or on a point of public importance that calls for this court's intervention."*

In **Gaudence Mzungu v. IDM Mzumbe**, Civil Application No. 94 of 1999, the Court of Appeal put it this way:



*"What is important is whether there are prima facie grounds meriting an appeal to the Court of Appeal."*

Those are the circumstances under which leave may be granted or refused. I may add that in the course of hearing the application of this nature, much as the applicant may point out the weaknesses of the judgment sought to be appealed against, where the court has the view that leave should be granted, it is not expected to make a different finding and critical observations against the decision sought to be appealed against. The applicant may do but the court should not. In my view, it is enough to say that the applicant has demonstrated a prima facie or good grounds meriting consideration by the Court of Appeal. It will then point out those grounds which will be the basis of the appeal. But where the court has the view that leave cannot be granted, it must go to the root of the judgment and establish the basis. The court must say why leave should not be granted. It must give reasons. This calls for an in-depth discussion of the evidence on records and the judgment sought to be appealed.

From the decisions above, it can be stated that leave may be granted in view of the existence of any of the following;

- i) where there is a point of law or a point of public importance,

- ii) where the proceedings and or the judgment has disturbing features and or
- iii) where the appeal has a reasonable chance of success.

Having examined the judgment, proceedings and submissions carefully, I have the view that the applicant have managed to demonstrate 4 points which I think, worthy consideration by the Court of Appeal. The points may be put thus:

1. Whether it was correct to hold that it was the applicants' father who sold the land while the first respondent did not pledge this fact and whether it was correct to raise this issue suo mottu and decide it.
2. Whether the 2<sup>nd</sup> and 3<sup>rd</sup> respondents had good titles to pass to the first respondent regarding the *nemo dat quod non-habit* rule.
3. Whether it was legally correct for the 1<sup>st</sup> respondent to purchase the suit land without first inquiring as to how the alleged vendors acquired the pieces of lands in compliance to caveat emptor rule.
4. Whether it was correct for the judge to introduce issues of Islamic Law in the matter and apply it.

That said, leave is granted. I make no order as to costs.



It is ordered so.



**L.M. MLACHA**

**JUDGE**

**25//7/2022**

**Court:** Ruling delivered through virtual court services.

Right of Appeal Explained



**L.M. MLACHA**

**JUDGE**

**25//7/2022**