

**IN THE HIGH COURT OF TANZANIA
DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA**

MISC. LAND APPLICATION NO.69 OF 2020

(Arising from the judgement of the High Court of Tanzania at Shinyanga her lady Justice E.Y MKWIZU, J dated 23rd October, 2020 in Land Appeal No. 14/2020, originating from Land Application No. 18/2018 at Shinyanga District Land and Housing Tribunal)

LUKELESHA SHEKAAPPLICANT

(Administrator of the Estate of the late JILALA KWANGU)

VERSUS

CHARLES BUDOLE.....RESPONDENT

RULING

23rd & 29th Sept, 2022

NONGWA, J.

The applicant named above has preferred this application under Section 47 (1) of the Land Dispute Courts Act, Cap 216 [R.E 2019] and section 5(1) (c) of the Appellate Jurisdiction Act, Cap 141 [R.E 2019] praying for orders that

'1. That this Honorable Court be pleased to grant leave to the applicant to appeal to the Court of Appeal of Tanzania against the judgement and Decree of the High court of

*Tanzania at Shinyanga her Lady Justice E.Y. Mkwizu dated
23rd day of October, 2022 in Land Appeal No. 14 /2020.*

- 1. Costs of this Application be provided for*
- 2. Any other reliefs this Honourable Court may deem fit and just to grant.'*

The application has been supported by an affidavit of the applicant Lukelesha Sheka in which at paragraph 7, he states the intention to appeal to the court of appeal, that is to challenge the decision of the high court in in land appeal no. 14/2020 basing on the grounds that; firstly that the high court erred in law by holding that the disputed land was given or left to the hands of Gigwa Jilala disregarding the chain of credible evidence adduced by the applicant at the tribunal. Secondly, that the High court erred in law for disregarding the fact that the applicant had been appointed as the administrator of the estates of the late Jilala Kwangu prior the suit being instituted before the trial tribunal and lastly, that the highcourt disregarded the apparent contradicting evidence on record adduced by the respondent.

The background in a nutshell is that the applicant was the Respondent in the Land Application No. 18/2020 before District Land and Housing Tribunal Shinyanga, also the applicant was the appellant in Land Appeal No. 14/2020 that was before the High court Shinyanga Registry. In land application No.18/2018 the decision was in favour of the Respondent, the applicant was aggrieved and appealed, that is Land Appeal No.14/2020, again the appeal was decided in favour of the Respondent, hence this application for leave to appeal to the court of appeal.

From the records, the dispute is on piece of land alleged to be measuring 70 acres according to PW1 and 20 acres according to PW2, located at Nyenze village, Mwadui Luhumbo Ward within Kishapu district Shinyanga region. The land is said to have been left by the parties' grandparent Jilala Kwangu (the deceased) who died in 1925 and 2018 Charles Budole, the Respondent, filed at the District Land and Housing Tribunal, Land Application No. 18 of 2018 for declaration that he is the owner of the suit land and that respondent is a trespasser.

From the records, it was from the respondent testimony that after the death of his great grandparent, Jilala Kwangu, his estate was divided amongst his children including the respondent's grandmother Gigwa Jilala who gave the respondent's father Budole Izengo and Budole gave the same to the respondent in the year 2006 before his death in 2010.

That in the year 2017, the applicant obtained letters of administration of the estate of the late Jilala Kwangu who is stated to have died in the year 1925 and the suit land was listed among the deceased estate for purposes of distribution to the heirs. It was the applicant's argument at the trial tribunal that the suit land is part of the estate of Jilala Kwangu who died in 1925 and that since his death the land was not distributed to the heirs. It was the trial tribunal's finding in favour of the Respondent stating that the applicant failed to show when exactly his father Sheka Jilala possessed the said Land and held the position that Gigwa Jilala was allocated the land by his father, Jilala Kwangu (died in 1925), after her marriage failed and went back to his father. On appeal before the high court, it was found that the appeal had no merit, hence the desire to go to court appeal.

At the hearing, the learned counsel for the applicant Mr. Geoffrey Tuli stated that, the push to go to the court of appeal are on three grounds, however he abandoned the second ground and submitted on the 1st and 3rd grounds.

The counsel contended that the honourable Judge erred in deciding that the land in dispute was given to Gigwa Jilala without considering the evidence that was presented at the District Land and Housing Tribunal of Shinyanga, where the applicant made it clear that upon death of Jilala Kwangu who was the owner of the land, it remained under the care of Zengo Jilala and that after the death of Zengo Jilala, the land remained under the care of Sheka Jilala and that after Sheka Jilala, the Land remained under the care of Lukelesha Sheka who is the applicant.

He continued to argue that, the Judgement of the High court, based more on the evidence of DW3 Nyanga Ndoma who testified that the land was given to Gigwa Jilala, also at the District Land and Housing Tribunal decision, also quoted the evidence of DW3 Nyanga Ndoma that the land was given to Gigwa Jilala. That DW3 evidence is very clear at page 35 of the typed proceeding that, the witness said Gigwa Jilala was never given the land. That, despite of arguing these issues at the High Court, the honorable Judge did not give any consideration as such being enough ground for them to go to the Court of Appeal to Challenge the decision of the High Court.

Submitting on the 3rd ground, Mr. Tuli argued that Judge erred in law when he failed to consider contradiction of evidence that was given by the Respondent. He further stated that there were contradictions in the evidence

of PW1 (the Respondent Charles Budole) and that of PW2 (Khali Mbalimo) as seen at page 7 of the typed proceedings, as to number of acres being 70 acres as per PW1 while PW2 said at page 18, was 20 acres a thing that brought doubts on their evidence and this court ought to have given consideration. These grounds being on points of facts, they prayed for leave to file the appeal to the court of appeal for the court to discuss these facts.

In reply, Mr. E. Sululu, the learned counsel for Responded, asked the court to adopt the contents of the counter affidavit to form part of his submission and further argued that leave to appeal to the court of appeal is not automatic, there has to be issues of general importance. He referred this court to the position in the case of **British Broadcasting Corporation vs Erick Sikujua Ng'imaryo, Civil Application No. 138 of 2004 CAT**, the position that has been adopted by this Court, in **Dilu Mahangi vs Migeni Mahangi Misc. Land Application No. 28/2022, High court at Shinyanga.**

That first ground itself is baseless as the said reason was already argued and decided upon before Hon. Mkwizu J., at page 4 of the typed Judgement of the high Court and at page 5-6 of the Judgement it has been explained thoroughly as to why the court conceded with the decision of District Land and Housing Tribunal. Mr. Sululu did not see the basis of the same issue that the two courts below has argued to go to court of Appeal again for determination.

Mr. Sululu, insisted that the court of appeal should not be a room of unmeriting matters therefore, the court of appeal is not a place of trial and error. Referring the case of **Damoda Malteser and another t/a Zanzibar**

stores vs A.H. Jaliwala t/a Zanzibar Hotel. TLR 1980 page 31, Mr. Sululu asserted that, it is the stand of the Court of Appeal that where there are same findings of two courts below on the same matter there is always very minimal chance for the party to win at the Court of Appeal.

On the allegation that there were contradiction on the evidence at the trial tribunal, Mr Sululu averred that the two Courts below decided on the ownership issue and not the acres, there was no evidence showing that the suit land was ever measured, it is un-surveyed land, none knew the exact number of acres of the land, the High Court did not see the importance of number of acres otherwise the Judge could have ordered the District Land and Housing Tribunal to take more/additional evidence for that matter. The court confirmed that the respondent was the owner. He insisted that the applicant has failed to establish reasonable grounds for the court to grant leave to appeal.

Rejoining, Mr. Geoffrey Tuli, insisted that going to the Court of Appeal is a right, the court is there to save people, the case of **Dilu Mahangi** (supra) does not suit the case at hand as it different from the case at hand, the case is on evidence that is on record, not extraneous matters of the land being un surveyed, and that their grounds are on evidence, and only pray for leave to go to Court of Appeal where the court will go through the evidence tendered not otherwise.

Admittedly, leave to appeal generally is granted where there are grounds of appeal that raises issues of general importance, this is the position in the cited case of **British Broadcasting** (supra) where the court of appeal stated

that leave to appeal as a matter of general principle 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.

Therefore, leave to appeal is not automatic, as it has been observed in the case cited by the counsel for the respondent when objecting the application, the case of *Dilu Mahangi* (supra). In that case the applicant wanted the court to find that he has an arguable appeal because the trial tribunal and the high court ought not to have believed oral evidence to establish the sale and purchase of the suit land and treatment of his evidence as hearsay. The high court found that the ground did not suffice for grant of leave as the issue was already settled by the court of appeal that even oral evidence suffices to prove sale and purchase of land not only written agreement which are acceptable as evidence. Moreover, that the evidence law is clear that oral evidence must in all cases whatsoever be direct as per section 62(1) (b) of the Evidence Act, Cap 6 R.E 2019.

The situation in the case of **Dilu Mahangi** (supra) is different from the application at hand, thus distinguishable. The present application is on the ground ownership of the disputed land regarding the chain of ownership from the initial owner who died in 1925. The applicant is not satisfied with the decision of the High court and wants to exercise his right to appeal so as to use all avenues in what he believes will lead him to justice. I understand that sometimes matters should come to an end, yes but should be an end that the aggrieved party is satisfied that justice has been done to his maximum satisfaction. The law is very clear under section 47 (1) (2) of the Land Dispute Courts Act, Ca[216 [R.E 2019], it provides inter alia;

'(1) A person who is aggrieved by the decision of the High Court in the exercise of its original jurisdiction may appeal to the Court of Appeal in accordance with the provisions of the Appellate Jurisdiction Act. (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.'

It is obvious that when the appeal is to a second appeal court from a decision which has upheld the findings of a trial court, this barrier of applying for leave to appeal becomes greater, this is sometimes expressed as the doctrine of 'concurrent findings. From case laws, it is difficulty of obtaining leave to appeal to the highest court of the land.

In the case of **Said Ramadhani Muyanga V. Abdallah Salehe, [1996] TLR 75** it was stated that, leave to appeal to the Court of Appeal is grantable where the applicant has shown that there is a legal and factual issues for determination by the Court of Appeal. This court has no jurisdiction to go into merits or deficiencies of the decision to be appealed at from this court but only to determine whether there is arguable issues fit for consideration by the Court of Appeal. While being guided by the position of the case laws cited this the court has found that, the applicant has an arguable issue as demonstrated in this ruling, that is the chain of ownership of land as who is the lawful owner of the disputed land, and the contradiction on testimonies of the two witnesses over the size of the land in dispute.

In the finality, leave to appeal to the Court of Appeal against the judgement and Decree of the High court of Tanzania at Shinyanga dated 23rd day of October, 2022 in Land Appeal No. 14 /2020 is hereby granted. From the circumstances of this case, the parties being relatives and from the nature of the application this court orders no costs.




V. M. NONGWA

Judge

29/9/2022