

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

AT SHINYANGA

MISC. CIVIL APPLICATION NO 49 OF 2021

*(Arising from the decision of the High Court of Tanzania, Shinyanga District Registry
in Land Appeal No. 33 of 2021 dated 22nd 24th September, 2021 [G.J Mdemu J])*

**KAJILO SHALALI.....APPLICANT
VERSUS**

MALINGILA NJILE..... RESPONDENT

RULING

26th August & 28th October 2022

MKWIZU, J:

This court on 24th September 2021, (G. J. Mdemu J) had delivered a judgement in Land case appeal No. 33 of 2020. The applicant was aggrieved with that decision on appeal. He lodged a notice of appeal followed by this application for leave in terms of the then section 47 (1), of the Land Disputes Courts Act, Cap. 216 of the RE, 2002 and rule 45 (a) of the Court of Appeal Rules, GN. No 368 of 2009.

The application is by a chamber summons supported by an affidavit deposed by Kajilo Shalali, the applicant affirmed on 22nd October 2021. The application is resisted by the respondent through a counter affidavit deposed by Malingila Njile respondent himself on 17th May, 2022,

When the application was placed for hearing before me on 30th June 2022, both the applicant who was reported sick and Mr Emmanuel Sululu , his

advocate were absent in court. The respondent appeared in person, unrepresented. The matter was ordered to be heard through written submissions, Applicant was required to file his written submissions on 13/7/2022, reply to submissions by the respondents on 27/7/2022, and rejoinder if any were to be filed in court on 3/8/2022. The applicant did comply with the written submissions filing schedules, but the respondent did not and no extension of time was sought to have him file the required written submissions hence this *ex-parte* ruling against the respondent.

In his submissions in support of the application, the applicant said leave to appeal to the Court of Appeal is not an automatic right. It is within the discretion of the Court to grant or refuse. It is only granted where the grounds of appeal raise issues of general importance or novel point of law or shows a *prima facie* case or arguable appeal which requires the intervention of the Court of Appeal. He on this point relied on the decision of **British Broadcasting Corporation V Eric Sikujua Ng'amaryo**, Civil Application No 138 of 2004, (Unreported). The Applicant's counsel went further to state that, paragraph 5 (i) (ii) and (iii) of the applicant's affidavit has deposed the grounds worth consideration by the Court of Appeal.

I have given the application and the applicant's submissions the consideration it deserves. The settled law is that leave may be granted where there is a point of law, the intended appeal stands a good chance of success or there is a point of public importance to be determined by the Court of Appeal. See for instance the case of **Rugatina C.L v. The Advocates Committee and Clavery Mtindo Ngalapa**, Civil Application No. 98 of 2010, where the Court of Appeal stated that:

"Leave is granted 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 matter and to enable it to give adequate attention to cases of true public importance."

By its nature, the powers of this court in leave application are limited to screening obligations to find whether the proposed grounds carry with them issues of sufficient importance for the Court of Appeal's determination with a thin line separating the powers of evaluation of the merit of the proposed grounds which is reserved for the Court of Appeal only which sometimes entices to allow whatsoever the intending appellant offers as ground(s) of appeal. To avoid that, I will try to traverse through this court's decision and the proposed grounds to see whether there are raised serious issues worth consideration by the Court of Appeal without extending to evaluating the validity or otherwise of the decision of my brother Judge, the function which is, as stated earlier on, reserved for the Court of Appeal.

There are three issues raised in paragraph 5 of his affidavit in support of the application. They are:

- i. Whether the Appellate Trial Court was proper to hold that the Respondent has been in occupation of the suit land since 1984 in absence of the of evidence to prove the same*
- ii. Whether the sale agreement tendered by the Respondent proving his purchase of the suit land was a proper document to*

be considered by the Appellate Court in declaring the Respondent as the lawful owner of the suit land upon purchasing the same from Sosoma Ngashi in 1984

iii. Whether the Appellate Court was proper to hold that the matter before him was purely land dispute and not Probate cause.

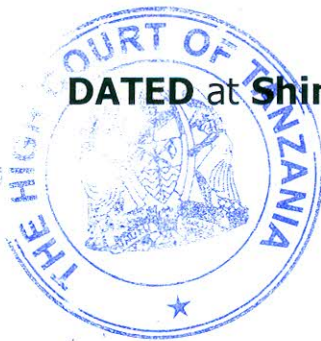
Amplifying the legality of the intended grounds of appeal, Mr. Sululu said, on the first and second intended grounds, the applicant intends to challenge this court's decision on whether the trial tribunal's decision was properly upheld in the absence of evidence to support the same, basing on the doubtful sale agreement and without joining the seller as a part to the suit.

And the third ground is on whether it was properly held that the matter between the parties is a land dispute and not a Probate cause. He said the applicant was sued in his capacity as an administrator of the estate of the late Madama Mduta the dispute that arose after the applicant had started her administrative duty of the division of the deceased estate to the heirs. The counsels' contention here is, the respondent was, in that situation required to object the inclusion of the disputed property in the deceased's estate in a probate court and not to institute a land matter. He supported his argument with the case of **Kangaulu Mussa V Mpunghati Mchodo**(1984) TLR.348 where it was held that: "***there should also be some order and sanity in the institution of proceedings. Where a matter has started in one court it is proper for that matter and the resultant effects to be concluded in that court.***"

Properly considered, the application raised two main issues for the Court of Appeal deliberations.

- i. *Whether the trial tribunals decision was properly upheld in the absence of evidence to support the same*
- ii. *Whether the dispute between the parties was properly categorized as a land matter and not a probate dispute.*

Leave is therefore granted in respect of the two grounds above. No order as to costs.



DATED at **Shinyanga** this 28th day of **OCTOBER** 2022.


E.Y. MKWIZU
JUDGE
28 /10/2022