

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LAND DIVISION

AT ARUSHA

MISC. LAND APPLICATION NO. 66 OF 2021.

(C/F Land Appeal No. 14 of 2020 at the High Court of Tanzania Land Division at Arusha, Originating from Land Application No.82 of 2016 at the Land and Housing Tribunal for Manyara Region at Babati)

JASHU JETA (*Administratrix of estate of late Jeta Chana Modhiwadia*).....APPLICANT

Vs

NATHA CHANA MODHIWADIA (*Administrator of Estate of the late Chana Uka Modhiwadia*)..... RESPONDENT

RULING

Date of last Order:30-5-2022

Date of Ruling:2-6-2022

B.K.PHILLIP, J

This application is for leave to appeal to the Court of Appeal against the decision of this Court in Land Appeal No.14 of 2020.The application is made under section 47 (2) of the Land Disputes Court Act (Cap 216 R.E 2019) supported by two affidavits. The first one is sworn by the applicant whereas the second one is sworn by learned advocate Daudi Saimalie Lairumbe. The Respondent filed a Counter affidavit in opposition to the application . The learned Advocates Daudi Saimalie

Lairumbe and Mpaya Kamara appeared for the applicant whereas the learned Advocate was Jeremiah.S. Mjema appeared for the respondent.

A brief background to this application is that the applicant is the administratrix of the estate of late Jeta Chana Modhiwadia. She instituted Land Application No. 82 of 2016 at the Land and Housing Tribunal for Manyara Region at Babati (Henceforth " the Land Tribunal"), against the respondent herein praying for the following orders; That the suit land measuring 3114 acres situated at Magugu in Babati District, Manyara Region, be declared that it forms part of the estate of the late Jeta Chana Modhiwadia and permanent injunctive order be issued against the respondent , its employees or any servant from the disposal of the suit farm by way of sale, mortgage or otherwise.

The respondent filed his defence together with a counterclaim in which he prayed for declaratory order that the suit land measuring 3114 acres located at Hanang District, belongs to him as the administrator of the estate of the late Chana Uka Modhiwadia. The application was heard inter-parties and the Land Tribunal entered a Ruling in favour of the applicant. It declared that suit land forms part of the estate of the late Jeta Chana Modhiwadia.

Aggrieved by decision of the Land Tribunal, the respondent herein appealed to this Court vide Land Appeal No. 14 of 2020. This Court allowed the appeal. It quashed and set aside the decision of the Land Tribunal and declared that the suit land belongs to the estate of the late Uka Chana Modhiwadia. Further, it ordered that the respondent herein should proceed with the administration of the estate deceased by

distributing the suit land to the lawful heirs. Aggrieved by the decision of this Court , the applicant wants to appeal the Court of Appeal, hence she lodged this application so as to obtain the leave to appeal to the Court of Appeal. I ordered this application to be argued by way of written submission. The submissions were filed as ordered.

The advocates for the applicant started their submission by adopting the contents of the two affidavits in support of this the application. They went on submitting that the intended appeal shall have the following grounds of appeal which they contended that are worth the attention of the Court Appeal ;

- i) The first appellate Court erred in law in holding that the authenticity of Exhibit P2 that had been tendered and admitted without objection from respondent could be challenged by self-same respondent at the appellate stage.
- ii) The first appellate Court erred both in fact and law in holding that there was no proof that the suit land was given to the here-in appellant's husband.
- iii) The first appellate Court erred both in fact and law in declaring the respondent herein as the owner of the suit land in trust of the estate of the late Uka Chana Modhiwadia.
- iv) The first appellate Court erred both in law and fact in declaring the suit land as the lawful property of the late Uka Chana Modiwadia, as the administrator of the estate of the Uka Chana Modhiwadia.

- v) The first appellate Court erred both in fact and law in ordering the respondent to proceed with administration of estate by distributing the suit land to the lawful heirs which was not an issue before the appellate Court.
- vi) The first appellate Court erred both in fact and law in making a decision on the basis of the handwriting records of the District Land and Housing Tribunal which differed in some respect with the typed proceedings which had been availed to the appellant (the applicant herein) without availing the same to the appellant and availing her an opportunity of a prior hearing thereon.

The applicant's advocate beseeched this Court to grant this application.

In rebuttal, the advocate for the respondent submitted as follows; That this application is defective on the ground that the names of parties appearing in the amended petition of appeal and in the judgment which this application emanates from are Natha C. Modhiwadia (appellant) Vs Jashu Jeta (Administratrix of Estate of late Jeta Chana Modhiwadia) (respondent) whereas the parties in this application and the notice of appeal are Jashu Jeta (*Administratrix of Estate of late Jeta Chana Modhiwadia*) Vs Natha C. Modhiwadia (*Administratrix of Estate of late Chana Uka Modhiwadia*)

Furthermore, he submitted that in the corrected judgment and decree on appeal the names of parties are Natha C. Modhiwadia as appellant Vs Jashu Jeta (*Administratrix of Estate of the late Jeta Chana Modhiwadia*) as respondent. Unless the defect mentioned herein above is corrected, it has the effect of rendering this application defective,

hence leave should not be granted because the parties in this application are different from the ones appearing in the corrected judgement, contended, the respondent's advocate. To bolster his argument, he cited the case of **Mic Tanzania Limited vs Hamis Mwinyijuma and two others, Civil Appeal No. 64 of 2016.**

In addition, he contended that the concern on the defect he has pointed out can be entertained by this Court despite the fact that the same has been raised belatedly, at the stage of filing the written submission. To cement his argument, he cited the case of **Marwa Kachang'a Vs The Republic, Civil Appeal No. 84 of 2017.**

In conclusion, the respondent's advocate submitted that if this Court finds that the concern on the names of the parties has been raised at a wrong time, in order to avoid to grant application to the wrong parties this Court can raise the same *suo motu*.

In rejoinder, the advocates for the applicant submitted that the respondent's advocate has raised an issue which was not pleaded in both the affidavit in support of this application and the counter affidavit in opposition to this application. Further, they submitted that the arguments raised by the respondent's Advocate are based on the corrected judgement and decree dated 9/2/2022 which were not annexed to the counter affidavit. Thus, they are not part and parcel of the pleading filed Court on 9/9/2021.

I have taken due consideration of the rival the arguments raised by the learned advocates. Let me say outright that the concern on the the names of the parties in the notice of Appeal and this application vis-vis the ones which appear in the corrected judgment and decree is not

reflected the pleadings. It is not in dispute that the notice of appeal and this application were filed in Court in September 2021. The judgment which is annexed to this application is dated 27th August 2021 whereas the corrected Judgment and decree are dated 9th February 2022. The names of the parties in this application are the same to the ones appearing in the judgment and decree of this Court dated 27th August 2021 which is annexed to this application. It is obvious that the applicant could not have indicated the names appearing in the corrected judgment and decree because by the time he was preparing the notice of appeal and this application, the corrected judgment and decree were not into existence. Under the circumstances, I am of the settled opinion that as far as the pleadings are concerned there is no any defect in this application.

Without prejudice to what I have stated herein above and by way of passing, I wish to point out that the difference in the names of the parties pointed out by the respondent's advocate is that in this application Natha C. Modhiwadia referred to as the Administrator of Estate of late Chana Uka Modhiwadia whereas in the corrected judgment and decree Natha C. Modhiwadia is not indicated as the Administrator of Estate of late Chana Uka Modhiwadia. The words "*Administrator of Estate of the late Chana Uka Modhiwadia*" are missing. However, in the impugned decision Hon. Masara, J. said the following regarding the omission of the words "*Administrator of Estate of the late Chana Uka Modhiwadia*" in the title of the case;

" While I agree with Mr Mjema that the Appellant ought to have been sued as the administrator of the Estate of the late Uka Chana Modhawadia, I do not agree with him that the appellant was sued in his own capacity. The only omission leading to

such suggestion is the fact that in the application form the appellant was not referred to as the administrator of the Estate of the late Uka Chana Modhawadia in the title. I do agree that the words " as the administrator of the Estate of the late Uka Chana Modhawadia " ought to have been included in the title after the name of the appellant. In this respect, I am guided by the Court of Appeal decision in the case of Suzana S. Waryoba Vs Shija Dalaw, Civil Appeal No. 44 of 2017 (unreported), where the Court of Appeal held,

"before we pen-off, we we wish to address one little disquieting aspect. This is that the appellant sued as an administratrix of the estate of the late Stanslaus Waryoba. However, that aspect did not reflect in the title of the case. We are of the considered view that that the fact that Suzana Waryoba was suing in her capacity as the administratrix of the estate of the late Stanslaus Waryoba should have been reflected in the title of the case . However we hasten to remark that the omission is not fatal given that it was clear throughout that she was suing in that capacity and the judgment of the primary Court which appointed her as such , was tendered in evidence as the very outset . We only wish to accentuate that when a litigant sues as an administrator or administratrix of the estate , it is desirable that the same should be reflected in the title (emphasis added)

.....This suffices to conclude that the appellant was sued as the administrator of the estate of the late Uka Chana Modhawadia despite the fact that such capacity was not reflected in the title. It is my holding that the omission did not prejudice any of the parties herein.."

From the above position expressed by this Court, adding the words " *as administrator of the estate of the late Chana Uka Modhwadia*" after the respondent's name, as it is in the judgment of this Court that was issued in August 2021 does not prejudice any party in this matter and in fact it reflects the truth and correct status of the parties.

Having said that above, let me proceed with the determination of the merit of this application. Granting leave to appeal is among the

discretionary powers of this Court. In the case of **Tanzacoal East Africa Limited Vs Minister of Energy and Minerals, Misc Commercial application 331 of 2015** (unreported) the Court said the following;

" there is no scope of granting leave to appeal unless two conditions are satisfied to wit;

- (a) The case should involve a substantial question of law worth the consideration of the Court of Appeal.*
- (b) That the grounds raised must be issues of general importance or novel points of law or prima facie case necessitating the intervention of the court of appeal"*

And in the case of **Abubakari Ali Hamid Vs Edward Nyelusye , Application No 51 of 2007** (unreported) the court said the following ;

"Leave to appeal is granted where the proposed appeal stands reasonable chances of success or where but not necessary the proceedings as a whole reveal such disturbing features as to require the guidance of the Court of Appeal"

As it can be deduced from the submissions made by the learned advocates, the advocate for the respondent did not submit on the merit of the application. I have taken due consideration of the submissions made by the advocates for the applicant on the merit of this application. Upon reading the impugned judgment between the lines, I am of a settled opinion that the applicant's intended grounds of appeal are worthy the consideration of the Court of Appeal. Therefore, I hereby

grant the applicant the leave to appeal to the Court of Appeal against decision of this Court in Land Appeal No.14 of 2020.

Dated this 2nd day of June 2022



A handwritten signature in black ink, appearing to read "B.K. Phillip", written over a horizontal line.

B.K.PHILLIP

JUDGE