

**IN THE HIGH COURT OF TANZANIA  
(LAND DIVISION)**

**AT DAR ES SALAAM**

**MISC. LAND APPLICATION NO. 142 OF 2020**

(Arising from Judgment and Decree of Land Appeal No. 155 of 2018 at the High  
Court Land Division Dated 09<sup>th</sup> March 2020)

**BONI HAMDANI SHAIBU ..... APPLICANT**

**VERSUS**

**FATUMA MOHAMED SHARIFF..... 1<sup>ST</sup> RESPONDENT**

**ABDALLAH ALLY ULINDA ..... 2<sup>ND</sup> RESPONDENT**

**STRAIGHTLINE AUCTION MART LTD..... 3<sup>RD</sup> RESPONDENT**

**RULING**

**Date of Last Order: 29/11/2021 &  
Date of Ruling: 13/12/2021**

**A. MSAFIRI, J.**

The applicant is seeking leave to appeal to the Court of Appeal against the decision of this Court in Land Appeal No. 142 of 2020 dated 09<sup>th</sup> March 2020. By way of chamber summons supported by the affidavit of the Applicant himself Boni Hamdani Shaibu, the application has been brought under Section 47 (2) of the Written Laws (Miscellaneous Amendment Act No. 3 of 2018) and Section 5(1) (c) of the Appellate Jurisdiction Act Cap. 141 R.E 2002 and Rule 45 (A) of the Court of Appeal Rules, 2009.

According to the applicant's affidavit, the issues to be addressed by the Court of Appeal of Tanzania against the decision of this Court is to which documents between Judgment and Proceedings the Court has to consider in determining whether the matter is Res Judicata. *Alles*

By the order of the Court the Application was argued by way of written submissions. The applicant's submission in chief was drawn and filed by Thadei Agathon Hyera, Learned Counsel while 1<sup>st</sup> respondent's submission was drawn by Beatus Malima Learned Advocate.

According to Mr. Hyera's arguments for this Application, the applicant intends to seek wisdom of the Court of Appeal of Tanzania as to what documents the Court has to consider in determining the issue of the res judicata between the Judgement and proceedings on the sense that, this Court and the Tribunal held the matter to be Res Judicata. However in his opinion, the matter is not res judicata since in the Civil Case No. 95 of 2001 the Resident Magistrate Court for Kinondoni discussed the issue of administration of estates, while, in the Application No. 129 of 2012 before the District Tribunal the issue was on who was the lawful owner of the disputed property. Therefore, he is in opinion that in both scenarios issues were different and the matter do not fall under Section 9 of the Civil Procedure Code Cap. 33 R.E 2002. He further argued that even parties are different as the applicant was never been joined. Therefore, the Court would have found that, the Civil Case in Resident Magistrate's Court filed by the respondent was against the two defendants only and did not include the applicant.

In reply to the above submissions, Mr. Malima stated that, there is no point of law to be considered by the Court of Appeal of Tanzania. The Appellate Judge in this matter considered such cases and applied them accordingly. The applicant has failed to show where the Appellate Judge has erred. Therefore, he argued that the Application does not disclose point of law worthy the consideration of the Court of Appeal of Tanzania

*Atls.*

and he prayed for dismissal of the same. To cement his argument Mr. Malima cited the case of **National Bank of Commerce Limited vs. Juvenary Mugyabuso (Administrator of Estate of Francis Kaigwa and Francis Kaigwa) Misc. Land Application No. 832 of 2017** High Court Land Division.

It is trite law that, before considering granting leave to appeal to the Court of Appeal, the Court must satisfy itself that, the Applicant demonstrates that, there is a point of law involved for the attention of the Court of Appeal. This is and will remain the position as was in the case of **Harban Haji Mosi and Another vs. Omar Hilal Seif and Another, Civil Reference No. 19 of 1997** (Unreported) Lugakingira J.A (as he then was) who held inter alia that: -

*"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.....".*

In the light of the case of **Principal Secretary, Ministry of Defence & National Service vs. Devram Valambhia** [1992] TLR 185 the Court of Appeal observed that;

*"In our view when the point at issue is one alleging illegality of the decision being challenged, the Court has a duty, even if it means extending the time for the purpose, to ascertain the point and, if the alleged illegality be established, to take appropriate measures to put the matter and record right".*

*ALL*

In an application for leave to appeal under Section 5 (1) (c) of the Appellate Jurisdiction Act, like the present one, leave may be granted where there is likelihood of success of the intended appeal. The court have no reason to canvass on the merits and demerits of the intended appeal. In the above cited cases of **Harban Haji Mosi and another** (*supra*) and **Principal Secretary, Ministry of Defence & National Service vs. Devram Valambhia** (*Supra*) the courts insisted that in such applications 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.

Having carefully considered the application and the serious tug of war existing between the parties on the issue of Res Judicata, I am convinced that this is a fit case for grant of leave to appeal to the Court of Appeal of Tanzania as requested. Application is hereby granted as prayed. The Applicant to file an appeal within thirty (30) days from the date of delivery of this Ruling. Costs in the cause.

**It is so ordered.**

Dated at Dar es Salaam this 13<sup>th</sup> Day of December 2021.



**A. MSAFIRI**

**JUDGE**