

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

MISC. LAND APPLICATION NO.256 OF 2021

(Originating from Land Appeal No.73 of 2020)

LUSIUS KAPUNGU (Suing as Administrator of the Estate of the Late

ENGLIBERT CHALLE KAPUNGU) **APPLICANT**

VERSUS

CONRAD CHALLE KAPUNGU.....**RESPONDENT**

Date of Last Order: 13.04.2022

Date of Ruling: 23.05.2022

RULING

V.L. MAKANI, J

The Applicant LUSIUS KAPUNGU is seeking for leave to appeal to the Court of Appeal of Tanzania against the decision of this court in Land Appeal No. 73 of 2020 (Hon. Z.D. Mango, J). He has moved the court vide section 5(1) of the Appellate Jurisdiction Act, CAP 141 RE 20198 and section 68 (e) and 95 and Order XLIII Rule 2 of the Civil Procedure Code, CAP 33 RE 2019 (the **CPC**).

The application is supported by the affidavit of the applicant. And the respondent has filed a counter affidavit in opposition.

The matter proceeded by way of written submissions. Mr. Emmanuel Machibya, Advocate drew and filed submission on behalf of the applicant; while Mr. Godian Magusi, Advocate drew and filed submissions in reply on behalf of the respondent.

In his submissions, Mr. Machibya stated that the point for determination at the Court of appeal is that this court erred in law and fact by dismissing the appeal on the basis that the matter tried at the District Land and Housing Tribunal for Ilala (the **Tribunal**), (Land Application No.425 of 2016, Hon. L.R Rugarabamu) on 16/03/2020 was purely a land case and was not part of the estate of the late Engilbert Challe Kapungu. He said there is a point of law which needs determination by the Court of Appeal of Tanzania that the house in dispute is part of the Estate of the late Engilbert Challe Kapungu and hence has to be included in Probate and Administration Cause, that is, Mirathi No.04/2016. He said the respondent herein in his caveat failed to establish that the dispute house belongs to him hence was included to form part of the estate of the deceased. He

said since the respondent refused to allow division, the applicant herein applied to the Tribunal for declaration that the disputed land forms part of the deceased estate which the respondent is also among the heirs to benefit from the division.

Mr Machibya went further to say that pursuant to the provision of section 58 of the Probate and Administration of Estates Act, CAP 352 RE 2002 the respondent after failing in his caveat had no remedy to produce the Gift Deed which is also claimed to have been forged for its signature differs with the signature of the deceased. That the Tribunal and this court stated that they have no jurisdiction to order for examination of the Deed of Gift which is claimed to have been forged by the respondent herein though there were a lot of doubts and irregularities. He prayed for this application to be allowed.

In reply, Mr. Magusi said that, the learned Judge was correct in concurring with the decision of the Tribunal and dismissing Land Appeal No.73 of 2020 because the suit property was not part of the estate of the late Engilbert Challe Kapungu. He said the ownership of the suit property had already been transferred to the Respondent since 2013 after being bequeathed to him by the deceased. He said

the appellate court valuated the evidence adduced at the Tribunal together with the submissions which proved that the respondent is the lawful owner of the disputed property since 12/04/2013 when the deceased passed ownership to the respondent by means of gift of love and natural affection. That this act excluded the said property from being among the properties of the deceased. Mr. Magusi pointed out that the applicant herein did not tender ruling of the Primary Court at the Tribunal to challenge that the respondent was not the lawful owner of the suit property. It is for that reasons that the said property was not included in the list of the deceased persons estate at the Primary Court. He said when interrogated at the Primary Court the applicant replied that the said suit property was not among the list of deceased's properties. That the appellate court considered all the evidence and testimonies by the parties including exhibits and as a result it came out with a well-reasoned and fair judgment. Mr. Magusi said the applicant failed to prove his claim as per section 110 (1) of the Law of Evidence, CAP 6 RE 2019. He insisted that the Deed of Gift was not forged as alleged by the applicant and further that the transfer of ownership of the suit property was by Engilbert Challe Kapungu and witnessed by the authority, Ukonga Primary Court (Hon.

Cuthbert Nkande, PCM) who was called to testify at the Tribunal. Counsel prayed for the application to be dismissed with costs.

There was no rejoinder submissions that were filed by the applicant.

Leave to appeal to the Court of Appeal 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 rationale behind is to spare the Court of Appeal of stream of matters, which have no merit, and or which have already been dealt with the lower courts.

In the case of **British Broadcasting Corporation vs. Eric Sikujua Ng'maryo, Civil Application No. 133 of 2004** (unreported) as follows:

*"Needless to say, leave to appeal is not automatic. It is within the discretion of the Court to grant or refuse leave. The discretion must, however, be judiciously exercised on the materials before the court. As a matter of general principle, leave to appeal 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 (see: **Buckle v***

Holmes (1926) ALL E.R. Rep. 90 at page 91). However, where the grounds of appeal are frivolous, vexatious or useless or hypothetical, no leave will be granted”.

It is, therefore, the duty of the applicant to demonstrate serious points of law that need to be considered by the Court of Appeal (see **Simon Kabaka Daniel vs. Mwita Marwa Nyanga’nyi & 11 Others [1989] TLR 64**).

I have considered the arguments by Counsel of the parties and I have also gone through the affidavit and counter affidavit. The point for determination is whether the applicant has advanced points of law which needs the intervention of the Court of Appeal.

In this application, there are two issues to be considered; **One**, whether the Primary Court in Shauri la Mirathi No.04 of 2016 had jurisdiction to entertain land disputes and, **two**; whether the issue of ownership of the suit property was well addressed by this court in Land Appeal No. 73 of 2020.

It is clear from the typewritten judgment of this court in Land Appeal No.73 of 2020 at page 5 that the only courts with jurisdiction to

entertain land matters are Court of Appeal of Tanzania, High Court Land Division, District Land and Housing Tribunals, Ward Tribunals and Village Land Councils. Thus, the Primary Court has no jurisdiction, to declare that the suit property belongs to the estate of the late Englibert Challe Kapungu. In view thereof, the honourable Judge covered well this point and it does not need further intervention of the Court of Appeal.

On the second issue, Hon. Judge addressed the issue of ownership. That it is on the weight of the Deed of Gift tendered by respondent at the Tribunal that the suit property was bequeathed to the respondent by deceased. Hon. Judge observed further that nothing was tendered as evidence on part of the appellant to prove that the suit property forms part of the estate of the deceased. Further, there was no proof by the appellant that the said Deed of Gift was forged. (see page 6 of the typewritten Judgment). In view thereof, the issue of ownership was also well canvassed by this court.

For the forgoing I find nothing controversial in the reasoning and decision of the Judgment in Land Appeal No.73 of 2020 which needs the attention of the Court of Appeal of Tanzania as set out in **BBC**

vs. Eric Ng'imaryo and Simon Kabaka Daniel (supra). The application thus has no merit, and it is hereby dismissed with costs.

It is so ordered.


V.L. MAKANI
JUDGE
23/05/2022

