

TANZANIA / JUDGMENT

winford mlagha vs daniel paulo mwasile others 2022 tzca 642 19 october 2022

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19 October 2022

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IN THE COURT OF APPEAL OF TANZANIA AT MBEYA (CORAM: MWAMBEGELE, J.A.. KOROSSO. 3.A. And RUMANYIKA. 3.A.^ CIVIL APPLICATION NO. 112/06 OF 2022 WINFORD MLAGHA A APPLICANT VERSUS DINALES PAULO MWASILE (Administratrix of the Estate of the late Paulo Mwasile).....1st RESPONDENT RUTH MLAGHA..... 2nd RESPONDENT MBEYA CITY COUNCIL..... 3rd RESPONDENT (Application for second bite leave to appeal to the Court of Appeal of Tanzania, against the Judgment and decree of the High Court of Tanzania, at Mbeya) fNgwala, 3.1 dated the 18thday of December, 20017 in Land Apoeal No. 12 of 2013 RULING OF THE COURT 27th September, & 19*' October, 2022 RUMANYIKA. J. A.: This is a second bite application for leave to appeal to the Court. The High Court (Utamwa, J.) refused the applicant leave to appeal on 26/10/2020 in a first bite attempt vide Misc. Land Application No. 125/2017. The application is predicated under Rule 45(b) of the Tanzania Court of Appeal Rules, 2009 (the Rules). It is supported by an affidavit deposed by Winford Mlagha, the applicant None of the respondents filed an affidavit in reply to i oppose the application. Perhaps, this was a deliberate omission on their part due to the reasons that will shortly come to light. It is gathered from the record that the High Court of Tanzania at Mbeya passed the impugned judgment in Land Appeal No. 12 of 2013 on 18/12/2017 to confirm the decision of the District Land and Housing Tribunal of Mbeya at Mbeya (the DLHT) which had dismissed the applicant's claim over two plots situated at Nzovwe area, within the City of Mbeya. They are Plot Numbers 826 Block R and 980 Block R allegedly to have been allocated to him by the 3rdrespondent also to the 2nd respondent. Hence double allocation. As alluded above, the DLHT ruled against him, as it found that there was no double allocation. As he was not satisfied and challenged it, yet the High Court confirmed that decision. Aggrieved, he lodged a notice of appeal and applied for copies of the proceedings, judgment and decree on 20/12/2017 and duly served the same onto the respondents. And then, he filed in the High Court an application for leave to appeal under section 47 of the Land Disputes Courts Act, Cap. 216 R.E. 2019 (Now R.E. 2022) henceforth "Cap. 216". He lost that battle on 26/10/2020. He did not give up. However, as he was late in the day, the applicant applied for extension of time successfully and lodged the present application. 2 The applicant has raised four grounds to show that, if he is granted leave, he has an arguable appeal. His grounds are; one, that there was illegality in the re-allocation of the disputed two plots but though he raised the

issue of double allocation, it was not well canvassed; two, that the proceedings and judgment of the DLHT were tainted with illegalities namely failure of the Chair to record the opinion of assessors as appearing in the proceedings and the judgment; three, failure of the High Court judge to appreciate an unexplained irregular changes of assessors before the tribunal and, four, that the issue of lack of jurisdiction of the trial tribunal was not determined by both the DLHT and the High Court. When the application came up for hearing on 27/09/2022, the applicant appeared in person unrepresented. Mr. Victor Mkumbe, learned advocate represented the 1st and 2nd respondents, whereas Mr. Francis Rogers learned Senior State Attorney represented the 3rd respondent. The applicant relied on his affidavit and written submission filed on 16/09/2021 under rule 106 (1) of the Rules. Mr. Mkumbe readily supported the application. However, he expressed his worries about what is it really that the applicant is seeking to challenge because, he contended, the Notice of Motion referred to the substantive 3 decision of Ngwala, J. dated 18/12/2017 in Land Appeal No. 12 of 2013, while the present one is a second bite attempt for leave to appeal against that decision. Like Mr. Mkumbe, Mr. Rogers had no objection to the application. When, with respect to rule 45(b) of the Rules cited by the applicant as the enabling provisions to file it, in line with the provisions of section 47(1) of Cap. 216 we prompted him about the competence of this application, he contended that it is properly before the Court. That also, was Mr. Mkumbe's firm view. The applicant had no rejoinder. He reiterated his previous reliance on his affidavit and written submission filed in support of the application. For our determination, the issue is whether, in land matters, after the High Court has refused leave to appeal, an aggrieved party can, by way of a second bite under rule 45 (b) of the Rules come to the Court. For ease of reference, that rule reads as follows: "45. In civil matters:-

- (a) ... (not applicable).
- (b) Where an appeal lies with the leave of the Court, application for leave shall be made in the manner prescribed in rules 49 and 50 and within fourteen days of the decision against which it is desired to appeal or, where the application for leave to appeal has been made to the High Court and refused, within fourteen days of that refusal..." (Emphasis added). As the law stands now/ after the coming into force of the Written Laws (Miscellaneous Amendments) (No.3) Act, 2018- Act No.8 of 2018, which amended section 47 of Cap. 216, the High Court and the Court have concurrent jurisdiction in applications for leave to appeal to the Court. To appreciate the position, as it stood before the said amendments, section 47(1) of the Cap 216 read: "47(1) Any person who is aggrieved by the decision of the High Court on the exercise of its original revisional or appellate jurisdiction, may with the leave of the High Court appeal to the Court of Appeal..." After the amendments that section reads: "(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 the leave of the High Court or Court of Appeal, appeal to the Court of Appeal.

- (3) N/A
- (4) N/A (Emphasis added). With the above quoted amendments of section 47 of Cap. 216, the High Court no longer has exclusive jurisdiction and the monopoly to grant leave to appeal to this Court in land matters. Under the old position, where, any person aggrieved by refusal of leave to appeal by the High Court sitting as a land court in exercise of original, appellate or revisional jurisdiction had no second bite option but an appeal. We took that proposition also in our unreported decisions in *Hamisi Mdida Said Mbogo v. The Registered Trustees of Islamic Foundation*, Civil Appeal No. 232 of 2018, *Mustafa Athuman Nyoni v. Issa Issa Athuman Nyont*, Civil Application No. 322/10 of 2020 and *Twaha Michael Gujwile v. Kagera Farmers Cooperative Bank*, Civil Application No. 352/04 of 2021. For instance in *Twaha Michael Gujwile* case (*supra*), the Court stated that: "...after the amendments, the position has drastically changed; a paradigm shift from the old position is in place where now the High Court sitting as a land court and the Court of Appeal, have concurrent jurisdiction to grant leave in decisions of the High Court sitting as a land court rendered in its exercise of its revisions! or appellate jurisdiction." (Emphasis added). That legal position applied, on our part, we are satisfied to hold that the second bite application for leave to appeal is, in terms of section 47(2) of the Cap.216 rightly and competently before the Court as it was conceded by the learned attorneys. As regards the merit of the application, there is no gainsaying that our reading of the grounds raised by the applicant at paragraphs 6, 7, and 8 of his affidavit, and more so the alleged illegality, namely an unexplained case changing of the assessors' hands, the issue of the trial tribunal having not been clothed with jurisdiction and the alleged misdirection on the applicant's complaint of double allocation of the disputed plots are likely to have resulted into miscarriage of justice. All this is enough material reasonably to substantiate this second bite application, if leave to appeal is granted, arguable in the intended appeal. What amounts to material required, as is the case, for the determination of an application for leave to appeal, it has been stated in a number of cases including *Sango Bay Estates Ltd & Others v. Dresdner Bank* [1971] EA 17 where the *de funct* East African Court of Appeal stated that: "Leave to appeal from an order in civil proceedings will normally be granted where *prima facie*, it appears that there are grounds of appeal which merit seriousjudicial consideration." (Emphasis added). Similarly, with inspiration of the decision of the High Court (Commercial Division) in *Citibank Tanzania Ltd v. Tanzania Telecommunications Company Ltd and 5 Others*, Misc. Commercial Cause No. 6 of 2003, at Dar es Salaam (unreported), cited therein, the Court, in *Gaudencia Mzungu v. IDM Mzumbe*, Civil Application No. 94 of 1999 (also unreported) stated that: "...Leave is not granted because there is an arguable appeal... What is important is whether there are *prima facie*, grounds meriting an appeal to this Court..." (Emphasis ours). Having considered the notice of motion, the parties' affidavits, their written submissions, their arguments and the authorities cited to us by the applicant, we are satisfied that the application for leave to appeal to the Court 8 has met the above threshold required. It is merited. We hereby grant it. However, considering the fact that the applicant and the second respondent are son and mother respectively whose relationship has most likely diminished due to such long standing land dispute and,

in order to solicit harmony between them, we make no order as to costs. Order accordingly. DATED at DAR ES SALAAM this 17th day of October, 2022. J. C. M. MWAMBEGELE JUSTICE OF APPEAL W. B. KOROSSO JUSTICE OF APPEAL S. M. RUMANYIKA JUSTICE OF APPEAL The ruling delivered this 19th day of October, 2022 in the presence of Mr. Victor Mkumbe, learned counsel for the 1st and 2nd Respondents and Ms. Imelda Aluko, learned counsel for the 3rd Respondent, is hereby certified as a true copy of the original. j- R. W. CHAUNGU DEPUTY REGISTRAR COURT OF APPEAL 9

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