IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

MISCELLANEOUS LAND APPLICATION No. 185 of 2019

(Arising from Land Appeal No. 21 of 2019 and originating from Land Case No.23 of 2016 in the Geita DLHT)

HENRY PETER MAINA.....APPLICANT

VERSUS

CRDB BANK PLC GEITA BRANCH.....RESPONDENT

RULING

28th & 30th September, 2021

TIGANGA, J.

The applicant, Henry Peter Maina, filed this application seeking to be granted leave to file an appeal to the Court of Appeal against the judgment of this court (Rumanyika, J.) dated 03/10/2019 in Land Appeal No. 21 of 2019. The application is filed by the chamber summons made under under the provision of section 47(2) of the Land Disputes Courts Act, Cap 216 as amended by the Written Laws (Miscellaneous Amendments) (No. 3) Act, 2018 [now R.E 2019] and it has been supported by an affidavit sworn by Mr. Henry Peter Maina, the applicant himself.

According to the affidavit that was filed in support of the application, the following issues were raised by the applicant as the base through which he intends to challenge the impugned decision;

1. Whether it was proper for the High Court Judge to disregard the Court of Appeal decision under the principles of precedent.
2. Whether it was proper to affirm the lower court's judgment while assessors' opinion was not availed in the presence of the parties.
3. Whether it was proper for the first appellate Court to limit the means of challenging Mortgages issues/ instruments.

The respondent opposed the application through the learned counsel Mr. Rwiza who swore the counter affidavit in which he contested the application and stated that, no sufficient reasons have been shown for this court to grant leave, therefore he asked for the application to be dismissed for want of merits.

When the matter was called on for hearing on 27/09/2021, Mwanaupanga, learned counsel appeared for the applicant whereas Mr. Jeremiah also learned counsel appeared for the respondent.

In the submissions made in support of the application, counsel for the applicant began by praying to adopt the application and referred this court to paragraph 6 of the affidavit of the applicant which contains

three issues upon which leave is sought. He prayed to argue the first two issues together stating that there was no opinion of the assessors in the proceedings and the High Court took note of that fact but went ahead and stated that as the said opinion was reflected in the judgment the omission to record the same in the proceedings is not fatal.

That, according to the counsel, was contrary to section 23(1)(2) of the Land Disputes Courts Act read together with regulation 19 of the District Land and Housing Tribunal Regulations of 2003 which directs the Chairperson to require assessors to give their opinion in writings.

He stated further that, the said provisions were once subject of discussion in the case of **Edna Adam Kibona vs Absolom Fede**, Civil Appeal No. 216 of 2017 where the court held that, it is mandatory that the two provisions have to be complied with. Where the same have not been adhered to, the omission renders the proceedings irregular and therefore vitiated.

He further submitted that, at page 3 of the impugned decision, the court though noted that the provisions were not complied with, it stated that there was an exception on that. It was the counsel's opinion that since there was a Court of Appeal's decision on that, it was not proper for the Court to decide against that precedent. Citing the case of

JUWATA vs KIUTA [1988] TLR 146, in which it was stated that the courts and tribunals below the Court of Appeal are bound by the decision of the Court of Appeal regardless their correctness, it should be asked whether the High Court was correct to ignore the decision or authority of the Court of Appeal and to affirm the decision of the tribunal.

On the third ground which intends to challenge the High Court's decision to limit the means of challenging the mortgage, counsel referred to page 4 of the impugned decision where the court mentioned forgery, undue influence and illegalities as the only matter which a person can base in suing for breach of mortgage contract. The counsel held a strong opinion that, it was not correct as there are so many things which a person can base to challenge mortgage, citing section 59 of the Law of Marriage Act and section 192 (2) of the Land Act which when read together show that in disposition of matrimonial properties, consent of the spouse is also necessary. Therefore when the consent is lacking, one of the spouse can seek remedy before the court.

Also section 127(1) (a) which makes it mandatory that a mortgagee should give 60 days notice if the mortgagor default before exercising the right to the mortgage and once that provision is not complied with, the

mortgagor can have a claim in court. He concluded that it was therefore not proper for the court to limit the grounds upon which mortgage contract can be challenged. He asked for the application to be granted with costs.

Replying to the applicant's submission in chief, the counsel for the respondent started with the second ground and prayed to submit that, it is not true that the High Court affirmed the impugned judgment without the opinion of assessors. He referred this court to paragraph 2 of page 3 of the impugned judgment and stated that the court came to a conclusion that the said opinions were irrelevant as the defendant who was in default admitted to being indebted.

Regarding the first ground, he submitted that the High Court did not disregard the decision of the Court of Appeal, what it did; it discussed the issue and held that there were exceptional circumstances as the applicant admitted that he was indebted and went further asking the tribunal to order restructuring of the loan payment schedule. The court therefore distinguished the case of **Edna Kibona** (supra) and that of **JUWATA** (supra) as in the present case the applicant had admitted that he was indebted.

On the issue that the High Court limited the grounds on which one can challenge mortgage, counsel for the respondent submitted that, the parties to a contract are bound by the conditions stipulated therein under the principle of sanctity of contract and so was the applicant. He therefore stated that the statement cannot be taken to have limited the grounds for challenging the mortgage instrument. As regards to the two sections on spouse consent and notice, counsel submitted that they are irrelevant as they were not in issue before the tribunal. He prayed that, the application be dismissed as the grounds raised lack merits.

Called upon to make a rejoinder, learned counsel for the applicant insisted that the High Court did affirm the decision of the Tribunal while the opinion of the assessors was not included in the proceedings of the case. He made clear the fact that the complaint is not that the opinion was not in the decision but in the tribunal proceedings.

As to the applicability of the referred cases, counsel submitted that the same were not distinguishable as the opinion of assessors was important but the tribunal and the High Court failed to abide by the decision of the Court of Appeal. As regards the last point that, parties are bound by the terms and conditions of their contract, counsel insisted that, what the High Court did was to limit the grounds on which one can

use to challenge the mortgage instrument. He in the end prayed the application to be allowed with costs.

From the affidavits filed and submissions made in support and against the application, there arises one main issue for determination which is whether or not sufficient cause have been shown before this court can exercise its discretion under the enabling provision to grant the application.

The principles upon which the grant or refusal of the application of this nature can be made are contained in the case of **Harban Haji Mosi and Another Vrs Omar Hilal Seif and Another**, Civil Reference No. 19 of 1997 CAT, the following principles were laid down;

> *"Leave is grantable where the proposed appeal stands reasonable chances of success or where, but not necessarily the proceedings as a whole reveals such disturbing feature as to require the guidance of the Court of Appeal. The purpose of the provision is therefore to spare the court the spectre of un meriting matters and to enable it to give adequate attention to cases of true public importance"*

In the authority of **British Broadcasting Cooperation Vrs Erick Sikujua Ng'maryo** Civil Application No.138 of 2004 (CAT) - Dar Es Salaam (Unreported) (which was cited and relied on in the decision of

Swiss Port Tanzania Ltd Vs Michael Lugaiya (supra)) it was held *inter alia* that;

> *"Needless to say leave to Appeal is not automatic. It is within the discretion of the court to grant or refuse leave. The discretion should however be judiciously exercised and 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....However, where the grounds of Appeal are frivolous, vexatious, useless or hypothetical, no leave will be granted."*

Those issues with such disturbing features proving that there would be the arguable appeal must be shown by the applicant both in his affidavit and the submissions made in support of the application.

Now the issue is whether the applicant in this application has managed show through the issues raised the arguable points or disturbing feature or any novel point of law worthy to be attended by the Court of Appeal?

I have carefully considered the application, the supporting affidavit and counter affidavit together with the submissions by the counsel in support and opposition of the application in line with the guiding

principle as enunciated in the case authorities cited above. I find the applicant in his affidavit and through his counsel has raised the points, as mentioned herein above, through which he intends to challenge the impugned decision.

As this court is not in the position to probe into the points raised and upon which leave is being sought, it will confine itself on determining whether or not the applicant has presented any arguable issues which require consideration by the Court of Appeal. Without going into the merits of the proposed issues, the gist of the applicant's application mainly challenges, among other things, whether the importance of the assessors' opinion can be dispensed with and in what circumstances.

Although the respondent has raised an argument that the said grounds lack merits, I must state again that this court is not in any position to question whether or not the Honourable Judge was right or wrong to decide as she did. It is only sufficient to state that the points raised by the applicant qualify to be termed as points of law worthy of consideration by the Court of Appeal.

Having said as above, the application for leave to appeal to the Court of Appeal of Tanzania is hereby granted. Costs will be in the cause.

It is accordingly ordered.

DATED at **MWANZA,** this 30th September, 2021

J. C. TIGANGA

JUDGE

30/09/2021

This ruling delivered in the presence of Mr. Mwanaupanga, learned Counsel for the applicant, and Mr. Jeremiah, learned counsel for the respondent on line vides audio teleconference.

J. C. TIGANGA

JUDGE

30/09/2021