

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

MISC LAND APPLICATION No. 124 of 2020

(Arising from Land Appeal No 28 of 2019 in the High Court of Tanzania at Mbeya)

BETWEEN

JAMIL TWALHA RASHID MBISA	1ST APPLICANT
ASAA TWALHA.....	2ND PPLICATNT
ASIA TWALHA.....	3RD APPLICANT
HALIMATWALHA.....	4TH APPLICANT
HASSAN TWALHA.....	5TH APPLICANT
JAZILA TWALHA.....	6TH APPLICANT
LAZIA TWALHA.....	7TH APPLICANT
MISK TWALHA	8TH APPLICANT
RAIYA TWALHA.....	9TH APPLICANT
SHUFAA TWALHA	10TH APPLICANT
SILAJU TWALHA.....	11TH APPLICANT
TWAIBU TWALHA	12TH APPLICANT
ZOMBE TWALHA.....	13TH APPLICANT
AZIZI MULSARI	14TH APPLICANT
DEBORA MKONGWI	15TH APPLICANT
EDWINI SUKEMO	16TH APPLICANT
FATUMA HUSSEN	17TH APPLICANT
FELE F. RAMADHAN	18TH APPLICANT
GEORGE MWAKATOBÉ	19TH APPLICANT
JENY	20TH APPLICANT
JUMANNE YUNUSU.....	21ST APPLICANT
LUKIA JOHN	22ND APPLICANT
MICHAEL MWAMBUGI.....	23RD APPLICANT
MWAJUMA MUSSA	24TH APPLICANT
RASHID RAMADHAN	25TH APPLICANT
ZABIBU KHATIBU MWAPILI	26TH APPLICANT
ASHA SAIDI.....	27TH APPLICANT

VERSUS

AYASI RASHID MBISA

(Administrator of the Estate of Rashid Mohamed Mbisa) RESPONDENT

RULING

A. A. MBAGWA, J.

This is an application for leave to appeal to the Court of Appeal. It has been brought under section 47(2) of the Land Disputes Courts Act by way of chamber summons and it is supported by the applicants' joint affidavit. In contrast, the application is opposed by the respondent, **AYASI RASHID MBISA** through his counter affidavit.

The facts obtaining in this matter may be told as follows;

The respondent, **AYASI RASHID MBISA** instituted a suit to wit, Application no. 217 of 2017 in the District Land and Housing Tribunal for Mbeya against the applicants claiming ownership of the land in dispute. After hearing the evidence of both parties, the trial Tribunal dismissed the case and declared the applicants lawful owners of the suit premises.

Aggrieved by the Tribunal decision, the respondent successfully appealed to this Court (Hon. Mambi J) in Land Appeal No. 28 of 2019. Consequently, the Court set aside the decision of the trial Tribunal and ordered that the land in dispute be divided among the heirs of the late Rashid Mohamed Mbisa.

The applicants were not amused by the decision of this Court hence they are determined to challenge it in the Court of Appeal. Thus, in a bid to pursue the appeal, they have brought the instant application.

In their joint affidavit, the applicants state that there are arguable issues to be determined by the Court of Appeal namely, that the opinions of

assessors were not read out before the parties and that the application was time barred.

The respondent, on his part, resisted the application through counter affidavit. He stated that the alleged issues were not raised as grounds of appeal.

When the matter was called on for hearing, the applicants were represented by Philip Mwakilima who was assisted by Beatrice Kessy, learned advocates while the respondent has the services of Amani Angolwisye, learned advocate.

Submitting in support of the application Mr. Mwakilima said that there is an important point to be determined by the Court of Appeal. He referred to paragraphs 3 and 12(a) of the applicants' affidavit and submitted that it is apparent that the decision of the Tribunal, despite being in favour of the applicants, was a nullity as it lacked the contents of being a decision. Mr. Mwakilima expounded that the opinions of assessors were not read to the parties hence an incurable irregularity. The applicant's counsel told the Court that owing to the foregoing irregularity the High Court was supposed to nullify the proceedings and judgment of the trial Tribunal and order trial de novo. To bolster his argument, Mwakilima cited section 23 of the Land Disputes Courts Act and regulation 19(2) of GN No. 174 of 2003 and submitted that both provisions require the assessors to give out their opinion before delivery of judgment. He submitted that since the

trial Chairman violated the above provisions, the only way to rectify this irregularity is for the applicants to appeal to the Court of appeal hence a need to obtain the leave. Further, the applicants' counsel cited the case of **Edina Adam Kibona vs Absolom Swebe**, Civil Appeal No. 286 of 2017, CAT at Mbeya and argued that the Court nullified the judgment upon noticing that there were no opinions of assessors.

In view therefore, Mr. Mwakilima implored the Court to grant leave without costs.

In rebuttal, Mr. Amani Angolwisye, counsel for the respondent resisted the application. He contended that the applicants failed to meet the conditions for grant of leave. He lamented that the applicants failed to demonstrated arguable points worth of determination by the Court of Appeal instead their submission was presented in a way as if they were challenging the Tribunal's decision. To fathom his argument, the respondent's counsel referred this Court to the case of **Hamza Tibendelana vs Abdallah Magezi & 3 others**, Misc Land Application No. 45 of 2019, High Court of Tanzania at Bukoba in particular at page 6

The respondent's counsel further argued that the High Court did not deliberate on the issues advanced by the applicants because they were not raised as grounds of appeal. He was therefore opined that the same cannot be argued in the Court of Appeal as they were not decided by the

lower Court. As such, Mr. Angolwisye impressed the Court that there are no arguable issues to be determined by the Court of Appeal.

With regard to the case of **Edina Adam Kibona (supra)**, the learned respondent's counsel submitted that it was irrelevant to present case in that it was about opinion of assessors and not on leave to appeal.

Finally, the counsel implored the Court to dismiss the application for want of merits.

I have keenly gone through the rival submissions along with the record. It is a settled law that in application for leave to appeal the key issue for determination is whether applicant's grounds raise an arguable issue of law or fact worth to be considered by the Court of Appeal. See **Bulyanhulu Mine Limited and 2 others vs Petrolube (T) Limited and another, Civil Appeal No.364/16 of 2017, CAT at Dar es Salaam.**

The applicants have raised two grounds namely, that opinions of assessors were not read out before the parties and that the matter was instituted in the Tribunal out of prescribed time. The respondent, on his part, disputes the grounds advanced by the applicants on the basis that they were not raised in the appeal before this Court.

I should point out very clearly that my role in this matter is not inquire into the merits of the judgment sought to be challenged nor do I have to

weigh the chances of success for the intended appeal. What is incumbent upon me, at this juncture, is to determine whether the applicants have shown arguable issues which might require consideration of the Court of Appeal. See the case of **Grupp vs. Jangwani Sea Breeze Lodge Ltd**, Commercial case No.93 of 2002.

Applying the principle above, I am of the considered views that the two grounds in relation to opinion of assessors and time limitation deserve consideration of the Court of Appeal as they touch on jurisdiction issue. That said and done, I find this application meritorious and consequently grant the applicants leave to appeal to the Court of Appeal. Each party should bear its own costs.

It is so ordered.

Right of appeal is explained.


A. A. Mbagwa

JUDGE

20/04/2022

Court: Ruling delivered before E.R Marley, Ag. Deputy Registrar in the absence of the applicants, and respondent this 20th day of April, 2022.




E. R. Marley
Ag DEPUTY REGISTRAR
20/04/2022