

**IN THE HIGH COURT OF TANZANIA,**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**MISC. LAND CASE APPLICATION NO. 469 OF 2020**

*(Arising from Judgment of the Temeke District Land and Housing Tribunal for  
Temeke, Land Appeal No.04 of 2017 before Hon. H.R. Kirumbi and Kijichi Ward  
Tribunal Land Case No. 196 of 2016)*

**KAHITIRA MASINDE BWIRE ..... APPLICANT**

**VERSUS**

**GODFREY MTEI ASSENGA ..... RESPONDENT**

**RULING**

*Date of last Order: 26.07.2021*

*Date of Ruling: 29.07.2021*

**A.Z. MGEYEKWA, J**

Before this court is an application for leave to appeal to the Court of Appeal of Tanzania to challenge the decision of this Court in Land Appeal No. 117 of 2017, delivered on 04<sup>th</sup> August, 2020 by Hon. F.K. Manyanda, J. The application is made under section 47(2) & (3) of the Land Disputes Courts Act, Cap, 216 [R.E. 2019], Rule 45 (a) of the Court of Appeal Rules of 2019. The Applicant prayed for the following orders;-

1. *That this Honorable Court be pleased to grant leave to appeal to the Court of Appeal of Tanzania and for a certificate that a point of law is involved against the decision in Land Appeal No. 117 of 2017 of delivered on 04<sup>th</sup> August, 2020 by Honorable Justice F.K. Manyanda.*
2. *Costs to follow the event.*
3. *Any other relief(s) this court may deem fit and just to grant.*

When the matter was called for mention before this court on 24<sup>th</sup> March, 2021, by the court order, the preliminary objection was argued by way of written submissions whereas, the learned Advocate for the applicant filed her submission in chief on 04<sup>th</sup> May, 2021 and the respondents' Advocate filed his reply on 12<sup>th</sup> May, 2021 and the rejoinder was filed on 25<sup>th</sup> May, 2021. The applicant had the legal service of Mr. Mashiku Sabasaba, learned counsel whereas the respondent had the legal service of Ms. Mr. Paschal Chuwa, learned counsel.

In his written submission, the learned counsel for the applicant submitted that the reason for applying for leave to appeal to the Court of Appeal contains matters of law in which he wants the Court of Appeal of Tanzania to determine whether this court was legally justified to interfere with the factual finding of the lower tribunal. The counsel for the Applicant insisted in his submission that the reason for this application for leave to appeal to the Court of Appeal contains matters of law in which he wants

the Court to make it clear whether the Hon. High Court Appellate Judge was legally justified to interfere with the factual finding of the lower tribunal. The learned counsel for the applicant seeks refuge to the case of **Simon Kabaka Vs Mwita Marwa & 11 Others** [1989] TLR 64 that the grounds of appeal contained legal issues which need consideration of the Court of Appeal. He also referred this court to the case of **Hamisa Mdida & Another v The Registered Trustees of Islamic Foundation**, Civil Appeal No. 232 of 2018 (unreported), the Court of Appeal of Tanzania held that:-

*“An application for leave do not involve a rehearing of the matter for which leave to appeal is being sought...”*

On the strength of the above submission, the learned counsel for the applicant urged this court to allow the applicant's application.

In response, the learned counsel for the respondent forcefully resisted the application. He contended that the points of law raised by the applicant are purely based on evidence. To buttress his submission he referred this court to paragraph 6 of the applicant's affidavit. He valiantly contended that the second appellate court did not enter into an error. He added that this court evaluated the evidence adduced before the District land and Housing Tribunal to certify itself whether the Trial Tribunals reached a fair decision. To bolster his submission he cited the case of

**Materu Lesion & J Foya v Sospeter** [1988] TLR 102, the court held that:-

*"Appellate Court may in rare circumstances interfere with trial court findings of fact. He do so in instances where Trial Court had omitted to consider or had misconstrued some material evidence or had acted on a wrong principle or had erred in its approach to evaluate evidence".*

The learned counsel for the respondent went on to state that in the course of evaluating the evidence on record, this court corrected the tribunal findings. The learned counsel for the applicant further submitted that the High Court can step into the shoes of the District Land and Housing Tribunal for Temeke to do what the lower Court ought to have done. Fortifying his submission, he cited the case of **Damsoni Ndaweka v Ally Said Mtaera**, Civil Appeal No. 38/1993 at Arusha where the Court of Appeal of Tanzania held that:-

*"In the instant case, the learned Judge on the first Appeal having failed to the evidence as a whole and weigh it against the finding of the trial court, We shall step into the shower of the High Court to do what it ought to have been done".*

On the strength of the above argumentation, the learned counsel for the respondent beckoned upon this court to dismiss the instant application.

Having gone through the submission of the learned counsel it would appear to me that power to grant leave to appeal to the Court of Appeal is exclusively vested to this court as it was held in the case of **Nuru Omary Ligalwike v Kipwele Ndunguru**, Civil Application No. 42 of 2015 (unreported), the Court *held inter alia that*

*"Leave to appeal can only be granted by the High Court under S. 47 (1) of the Act and that it is that court which is vested with exclusive jurisdiction to do so. It means, therefore, that the requisite leave can only be granted under s. 47 (1) of the Act."*

It is trite law that leave to appeal to the Court of Appeal is granted if *prima facie* grounds are meriting the attention of the Court of Appeal as it was held in the case of **Sango Bay v Dresdner Bank A.G** [1971] EA 17, it was held that:-

*"Leave to appeal will be granted where **prima facie** it appears that there are grounds which merit serious judicial attention and determination by a superior Court."* [Emphasis added].

The rationale behind obtaining leave was explained by the Court of Appeal of Tanzania in the case of **Saidi Ramadhani Mnyanga v Abdallah Salehe** (1996), TLR, the Court of Appeal of Tanzania held that:-

*"To spare the Court the specter of unmeriting matters and enable it to give adequate attention to cases of true public importance".*

Guided by the above authorities, the applicant has tried to move this court by showing that there are arguable grounds that merit the attention of the Court of Appeal of Tanzania. In paragraph 6 of the applicant's affidavit, the applicant's Advocate wants the Court of Appeal of Tanzania to determine whether it was proper for this court in its appellate jurisdiction to interfere with the findings of the lower tribunal the evidence which was based on factual evidence and whether upon interference this court did properly evaluated the evidence on record.

In determining these grounds raised by the applicant, without assuming the power of the appellate Court and as far as this matter is concerned, this issue was elaborated by this Court in the case of **Materu Lesion & J Foya v Sospeter** [1988] TLR 102 in which Hon. Moshi, J. had this to say:-

*"Appellate Court may in rare circumstances interfere with trial court findings of fact. He does so in instances where Trial Court had omitted to consider or had misconstrued some material evidence or had acted on a wrong principle or had erred in its approach to evaluate evidence".*

On page 4 paragraph 3 of the High Court Judgment of which the applicant is seeking leave to challenge Hon. Manyanda elaborated well the position of the law and he stated that:-

*"Since it is a complaint that the DLHT failed to analyse well the evidence and reach the correct conclusion, I will visit the evidence," I think that was very clear to what the applicant is seeking to hear from the Court of Appeal. Had he failed to understand it in the case of Materu (Supra) then the Applicant could have understood it from the case of Damsoni Ndaweka v Ally Saidi Mtera Civil Appeal No. 5 of 1999 in which the Court of Appeal observed that upon the subordinate court failure to weigh the evidence of the Trial tribunal properly, then Court of Appeal stepped into the shoes of the High Court do what it ought to have done. And that is what was done by the High court towards the tribunal. It is the same Court of Appeal that the applicant is seeking the same position which it has already given in its different decisions. I think it should be well understood that the Court of Appeal will not put hands to every individual like in spiritual prayers, once the position is given the rest have to adopt".*

Guided by the above excerpt, it is clear that this court stepped into the shoes of the tribunal and analysed the evidence on record. Therefore this ground on point of law cannot hold water.

Having failed to surmount that hurdle, the Court cannot exercise its discretion by granting the applicant's application for leave to appeal to the Court of Appeal of Tanzania. Thus, this application is with no merit, I proceed to dismiss it without cost.

Order accordingly.

  
A.Z. MGEYEKWA  
**JUDGE**  
26.07.2021

Ruling delivered on 26<sup>th</sup> July, 2021 in the presence of the applicant. In the absent of the respondent.



  
A.Z. MGEYEKWA  
**JUDGE**  
26.07.2021