

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**MISC. LAND CASE APPLICATION NO. 385 OF 2019**

(Arising from Land Appeal No. 106 of 2017 and originating from the District Land and Housing Tribunal for Temeke District at Temeke in Application No.166 of 2011)

**MOHAMED S. MASANJA ..... APPLICANT**

**VERSUS**

**MBARAKA A. M BASALA ..... RESPONDENT**

**RULING**

Date of Last Order: 30/03/2021 &  
Date of Ruling: 04/06/2021

**S.M KALUNDE, J:-**

This is an application for leave to appeal to Court of Appeal against the decision of this Court in **Land Appeal No. 106 of 2017** delivered on 15<sup>th</sup> November, 2018. The application is preferred by way of a Chamber Summons under **Section 5(1)(c) of the Appellate Jurisdiction Act, Cap 141 R.E 2002** and **Rule 47 of the Tanzania Court of Appeal Rules, 2009 G.N No. 368 of 2009**. The application is supported by an affidavit affirmed by **Mohamed Suleiman Masanja**, the applicant.

The brief facts of the leading up to the present application are that, through **Application No.166 of 2011**, filed before the District Land and Housing Tribunal for Temeke District at Temeke (**"the tribunal"**), the Applicant, sued the respondent

for trespassing on the suit land erecting wall without following dimensions of their boundaries. Unfortunately to him, the decision of the tribunal was not in his favour, he therefore appealed to this Court through **Land Appeal No. 106 of 2017**. His appeal was dismissed for lack of merits. He still wishes to be heard on a second appeal to the Court of Appeal, hence this Application.

With leave of the Court, the application was argued by way of written submissions, in drawing and filing the written submissions, the applicant enjoyed the legal services of **Mr K.M Nyangarika**, learned advocate, while the respondent was represented by **Mr Ibrahim Shineni**, learned advocate. Both parties adhered to the filing scheduled on time and the same has been helpful in drafting this Ruling.

Through his affidavit, the applicant raised two issues for consideration on appeal. The two grounds may be summarised as follows:

- (i) That there is illegality in the role taken up by assessors; in that there was change of assessors during trial; that, there was change of the chairperson without assigning reasons; and that, the assessors did not record their opinion before delivery of judgment.
- (ii) The appellate Court failed to properly evaluate the oral testimony and evidence adduced at the tribunal and hence arrived at an erroneous conclusion.

In support of the application Mr Nyangarika argued that, the appellate Judge failed to consider the glaring illegality in the tribunal records where the Chairman of the tribunal and assessors were changed without assigning reasons. He also said that the opinion of assessors was not read over to the parties before judgment was delivered as required by law. In support of this view, he cited the case of **Edina Adam Kibona vs Absolom Swebe (Sheli)** (Civil Appeal No.286 of 2017) [2018] TZCA 310; (10 December 2018).

In response, Mr. Shineni argued that the illegality, in relation to the role of assessors, in proceedings before the trial tribunal was not raised at the appellate Court hence the application should be refused. He insisted that, the appellate Court directed its mind in the grounds of appeal raised by the appellant to arrive at the conclusion and concluded that the new issue was not a subject of consideration at the appellate level and should not be entertained and wanted the same be dismissed with costs.

In re-joining Mr, Nyangarika insisted that the glaring illegality in the tribunal records ought to have drawn the attention of this Court in its duty to re-evaluate evidence. He concluded that, the illegality deserves the attention of the Court of Appeal, he prayed the application be granted with costs.

Having considered submissions from both parties, I will now consider the merits of otherwise of the application. At this stage my duty is to find whether, on the basis of materials

before the court, the grounds of appeal raised are of general importance or a novel points of law worth of consideration by the Court of Appeal or whether the grounds show a *prima facie* or arguable appeal. The above view was stated by the Court of Appeal in various decision including the case of **Harban Haji Mosi and Another vs Omar Hilal Seif and Another**, Civil Reference No. 19 of 1997 and **Rutagatina C.L vs The Advocates Committee and Clavery Mtindo Ngalapa**, Civil Application No. 98 of 2010, CAT at Dar es Salaam. Both unreported.

In **Harban Haji Mosi and Another vs Omar Hilal Seif and Another** (supra) the Court of Appeal observed that:

*"Leave is grantable 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."*

In his affidavit and submissions filed to support the application, the applicant complained of illegality in the tribunal proceedings in that there was no pinion of assessors and that, if there is one, the assessors were not afforded and opportunity to read over the opinion before delivery of the judgment of the tribunal as required by law. While I admit that the matter was not raised in the first appeal, I am mindful that, that requirement is a requirement of law which affects the jurisdiction of the tribunal and the appeal before this Court. That said I am satisfied that, being a point of law relating to the jurisdiction of

the tribunal, this issue may be raised at any stage including appellate level.

Having carefully considered submissions by the parties, and in appreciating the fact that an application for leave is grantable upon demonstration of a point of law or *prima facie case* on appeal, I am of the view that there is a point of law worth of consideration by the Court of Appeal. On the basis of the foregoing, this application succeeds.

The applicant is granted leave of appeal to the Court of Appeal as prayed. No order for costs is made. It is so ordered

**DATED at DAR ES SALAAM this 04<sup>th</sup> day of August, 2021.**



**S.M. KALUNDE**

**JUDGE**