

**IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA**

(CORAM: JUMA, C.J., MWARIJA, J.A. And MUGASHA, J.A.)

CIVIL APPEAL NO 53 OF 2017

DORINA N. MKUMWA.....APPELLANT

VERSUS

EDWIN DAVID HAMIS.....RESPONDENT

**(Appeal from the Decision of the High Court of Tanzania
at Mwanza)**

(Hon. Kalombola, J.)

**dated the 9th day of October, 2013
in
Misc. Land Appeal No. 02 of 2011**

JUDGMENT OF THE COURT

9th & 11th October, 2018

JUMA, C.J.:

This third appeal over land disputes originating from Ward Tribunals demonstrates the seriousness with which the High Court ought to take the question whether an appeal to the Court of Appeal involves of point of law. This appeal is also a classic example of the urgent need to address the problem of delays in final determinations of what are otherwise simple and straightforward land disputes. In the instant appeal, a simple and straightforward land dispute between litigious neighbours, over a small road, was

allowed to take a total of nine years to pass from the Ward Tribunal of Mwisenge in Musoma, to the Court of Appeal.

The background which gave rise to the dispute over a small patch of land arose from one neighbour blocking a road by using thorn shrubs, planting a garden of maize and bananas creating a barrier across a stretch of that road.

It was the respondent, EDWIN DAVID HAMIS, who initiated a complaint (Application No. 25 of 2009) before the Ward Tribunal of Mwisenge in Musoma Municipality. He complained that the appellant, DORIN MKUMWA, had blocked a road, and had employed labourers who dug up the road and planted maize and banana plants. In its decision, the Ward Tribunal ordered the appellant to open up the road.

Respondent appealed to the District Land and Housing Tribunal of Musoma in Appeal No. 42 of 2010 (hereinafter referred to as "**the District Land Tribunal**"). The first appellate District Land Tribunal confirmed the decision of the Ward Tribunal, on 10/12/2010 the District Land Tribunal delivered its judgment confirmed the decision of the Ward Tribunal and ordered the appellant to open up road for public use. Her second appeal to

the High Court at Mwanza (Misc. Land Appeal No. 2 of 2011) was similarly dismissed by Kalombola, J. who reiterated that the appellant should open up the road use of which had been planned.

After applying for Certificate of the High Court on involvement of the point of law, the appellant brought this third appeal, based on three grounds of appeal.

At the hearing of the appeal on 9th October 2018, Mr. Anthony Nasimire, learned counsel, appeared for the respondent. The appellant, who appeared in person, in a few words, expressed her full reliance on her written submissions in support of her appeal which she urged us to consider. The appellant's written submissions did not address the three grounds of appeal which she had filed earlier. Instead, the submissions were directed at the composition of Ward Tribunal. The appellant drew our attention to page 22 of the record of appeal to complain that only four members were in attendance to sign the judgment of the Ward Tribunal for Mwisenge in Musoma Municipality. She contended that eight members should have participated in the proceedings of the Ward Tribunal. This

anomaly, she added, contravenes both section 11 of the Land Disputes Court Act, and the Ward Tribunal Act No. 7 of 1985.

In response to the appellant's written submissions Mr. Nasimire, learned counsel for the respondent urged us to dismiss the appeal on the ground that this being a third appeal, it is not accompanied with a mandatory Certificate of the High Court on involvement of point of law in this appeal. He submitted that since this appeal originated from the Ward Tribunal, the respondent should have applied for the Certificate of the High Court under section 47 (2) of the Land Disputes Courts Act, Cap 216, instead of applying for certificate, as she did, under section 5(2)(c) of the Appellate Jurisdiction Act, Cap 141. The latter provisions, he submitted further, were inapplicable to land disputes originating from Ward Tribunals.

Mr. Nasimire argued that even if the appellant had properly brought her application for a Certificate on point of law under the applicable section 47 (2) of Cap 216, still, the order which the learned Judge of the High Court made does not show what point or points of law which were certified for determination by this Court. He argued that in so far as the Order of the High Court appearing on page 70 of the record of appeal is concerned,

the appellant's application for Certificate on point of law should be taken to have been dismissed by the learned Judge of the High Court. He further submitted that the grounds of appeal which the appellant preferred in her Memorandum of Appeal do not relate to the contents of the Order of the High Court purporting to be a Certificate on involvement of the point of law in this appeal. He concluded by urging us to dismiss the appeal altogether for want of a Certificate of the High Court.

Having looked at the Order of the learned Judge certifying point of law, in so far as the citation of section 5(2) (c) of the Appellate Jurisdiction Act (AJA) is concerned, we must say that the learned counsel for the respondent is right to submit that this provision which the appellant invoked to apply for a Certificate, is inapplicable in respect of land disputes originating from Ward Tribunals. We think, had the learned Judge taken a few moments to read this provision, she should have plainly seen that it specifically refers to appeals originating from matters falling under *Head (c) of Part III of the Magistrates' Courts Act*, which are far from matters originating from Ward Tribunals which are clearly governed by subsection (2) of section 47 of the Land Disputes Courts Act, which provides:

"47(2)-Where an appeal to the Court of Appeal originates from the Ward Tribunal, the appellant shall be required to seek for the Certificate from the High Court certifying that there is point of law involved in the appeal."

From the above cited provision, the right of appeal in land disputes originating from Ward Tribunals to the Court of Appeal is conditional upon grant of a Certificate of the High Court obtainable under section 47 (2) of Land Disputes Courts Act. According to this provision, substantive right to appeal to the Court over matters originating from Ward Tribunals cannot be exercised by obtaining a Certificate under any provision of the AJA.

There is another anomaly in the short Order of the High Court that is more concerning to us. The learned Judge who heard the application for a Certificate, failed to address the points of law which the appellant had proposed in her supporting affidavit for certification by the High Court. In the fourth paragraph of her affidavit, the appellant had asked the High Court to certify the following matters, which we reproduce as they appear on pages 62 and 63 of the record of appeal:

"(a)-Whether the plot No. 15 Block "D" Mwisenge Road in dispute where the government house of Maji Mara can erected (sic) house therein of the said plot without plan of Musoma Town.

(b)-Whether the second appellate court was made conflicting decision to state that my appeal in the district Land and Housing Tribunal was registered as Appeal No. 25 of 2009 and not Land Appeal No. 42 of 2010 as indicated in the high court judgment that the appeal was Land Appeal No. 25 of 2009 which are not true.

(c)-Whether the second Appellate court fail to observe that this Land dispute originating in the ward Tribunal of Mwisenge as a Criminal case No. 25 of 2009 and not land case No. 25/2009 as indicated in the district land Tribunal.

(d)-Whether the Ward Tribunal of Mwisenge have powers or jurisdiction to entertain Registered land matter.

(e)-Whether the second Appellate court of the high court of Tanzania (Land Division) is still enforce or is already repealed according to the law because is indicated in the high court of Tanzania judgment.

(f)-Whether the second and first Appellate courts have powers to exchange a criminal matter to be a land case disputed matter as indicated in their decision/judgment in both court.

(g)-Whether the second appellate court did not error for not mollifying both lower Tribunals decision after the ward Tribunal sit with 2 women as members in the ward Tribunal instead of three as required by law."

There is no doubt that the above affidavit which proposes points of law is understandably inelegant. We shall reproduce below, what transpired on 14/06/2016 when the High Court heard the application for certification of point of law and made a short order:

"Date: 14/06/2016

Coram: Hon. De-Mello, J;

Applicant: Present in person

Respondent: Absent

C/Clerk: Kagilwa

Dorina the Applicant: *I am here for the Application to Appeal to Court of Appeal on point of law. The DLHT as well as the High Court decided against my favour claiming the disputed suit land to be a planned road which is not.*

Order: *The Application as rightly stated is merited not on point of law alone, as it traversed from the lower Trial Tribunal to the District Land Tribunal. The Applicant believes*

there is a controversy as to whether or not the land in dispute is a planned road or not. She claims to be lawful occupier and owner of that suit land. Strangely, up to now the Respondent is enjoying peaceful occupation cultivating vegetables and fruits. It is less an acre which was given to the Applicant by the same public authorities.

Order: *I certify there is a point of law for the Court of Appeal to consider and determine.*

Let the application be granted as prayed for the Court of Appeal to set the record right. The Respondent in defiance.

I order.

Sgd. J.A. De-Mello

Judge

14/06/2016."

After comparing the contents of the supporting affidavit with the Order purporting to grant a Certificate on point of law, it is concerning to us that the learned Judge failed to make a formal determination by way of a Ruling from which to extract the formal order appearing on page 70 of the record of appeal. The Order of the High Court is problematic inasmuch as it has

failed to indicate the points of determination and reasons leading to that Order.

The learned Judge, who had a more direct proximity to the appellant, should have extracted more from the lay appellant and prepare a proper Ruling. It is not clear what point or points of law which the learned Judge certified when she stated: *there is a point of law for the Court of Appeal to consider and determine*. It is similarly not clear to us what is that we are required "*to set the record right*". Just as it was not clear to Mr. Nasimire the learned counsel for the respondent what points of law were certified by the High Court; it is not as clear to us, what points of law are involved in the instant appeal before us.

In land disputes, the High Court is the final court on matters of fact. The Legislature has taken this finality so seriously that it has, under subsections (1) and (2) of section 47 of Cap. 216 [as amended by the Written Laws (Miscellaneous Amendments) (No.3) Act, 2018 Act No. 8 of 2018] imposed on the intending appellant the statutory duty to obtain either leave or certificate on point of law before appealing to this Court. It

is therefore self-evident that applications for Certificates of the High Court on points of law are serious applications.

Therefore, when High Court receives applications to certify point of law, we expect Rulings showing serious evaluation of the question whether what is proposed as a point of law, is worth to be certified to the Court of Appeal. This Court does not expect the certifying High Court to act as an uncritical conduit to allow whatsoever the intending appellant proposes as point of law to be perfunctorily forwarded to the Court as point of law. We are prepared to reiterate that Certificates on points of law for appeals originating from Ward Tribunals mark a point of finality of land disputes that are predicated on matters of fact. Certificates are designed to ensure that land disputes originating from Ward Tribunal come to an expeditious end, preferably in the High Court. On this stance, we abide with our earlier unreported decision in **TIMOTHY ALVIN KAHOHO V. SALUM ADAM MFIKIRWA**, CIVIL APPLICATION NO. 215 OF 2013 where we restated that a decision of the High Court refusing to grant a certificate on a point of law under section 47(2) of Land Disputes Courts Act, is final and no appeal against it lies to this Court.

We therefore hold that this appeal must be dismissed because the High Court has not certified any point of law involved in this appeal. Each side shall bear its own costs.


DATED at **MWANZA** this 10th day of October, 2018.

I. H. JUMA
CHIEF JUSTICE

A. G. MWARIJA
JUSTICE OF APPEAL

S.E. MUGASHA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.


S. J. Kainda
DEPUTY REGISTRAR
COURT OF APPEAL