

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

(CORAM: NDIKA, J.A., FIKIRINI, J.A, And KIHWELO, J.A.)

CIVIL APPLICATION NO. 28/08 OF 2019

FELISTER MAGAYANE.....APPLICANT

VERSUS

MABULA GENGE.....RESPONDENT

**(Application for Revision from the Ruling of the High Court of Tanzania
at Mwanza)
(Matupa, J.)**

dated 14th day of April, 2016

in

Miscellaneous Land Application No. 107 of 2015

.....

RULING OF THE COURT

12th & 15th July, 2021

FIKIRINI, J.A.:

It all started at Mtakuja Ward Tribunal in Geita when the respondent, Mabula Genge, sued for the ownership of the land in Land Case No. 2 of 2013. The Tribunal declared the applicant, Felister Magayane the lawful owner of the disputed land. Aggrieved the respondent appealed to the District Land and Housing Tribunal for Geita at Geita in Land Appeal No. 86 of 2013, and won. Prompted with the decision of the District Land Housing Tribunal, the applicant through Land Case No. 46 of 2014 appealed to the High Court without success.

Dissatisfied she was desirous of appealing to this Court but denied a certification on point of law in Miscellaneous Land Application No. 107 of 2015.

To what exactly transpired at the High Court, the following is the brief account. That on 14th April, 2016, the High Court (Matupa, J) struck out the application, following a point of objection raised by Mr. Kassim Gilla, learned counsel for respondent, that the application was incompetent for failure to annex a copy of the decision as well as the decree, an omission which offended Rule 49 (3) of the Court of Appeal Rules, 2009 (the Rules).

Further to that Mr. Gilla also contended that the respondent had not been served with a notice of appeal, which was contrary to Rule 84 (1) of the Rules. And that those omissions in totality had offended Rule 46 of the Rules.

Still in pursuit of her right, the applicant by notice of motion under section 4 (3) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002 (the AJA) and Rule 48 (1) of the Rules, supported by her affidavit, has moved this Court urging it to revise the High Court decision on the following grounds that:

- (a) The impugned ruling and extracted order are fraught with serious illegalities confusions and irregularities which the High Court Judge erred in failing to determine the application before him.
- (b) The High Court Judge erred in law to exercise his jurisdiction properly for striking out the application for certificate on a point of law for the reason that the applicant has failed to serve notice of appeal to the respondent.

Parties filed written submissions and had the opportunity of addressing the Court on 12th July, 2021, when the application was called for hearing. The applicant essentially had nothing much to impress upon the Court, save for praying her list of authorities to be received and the High Court decision revised.

Mr. Gilla, on his part, prayed for the respondent's written submission filed on 15th January, 2019, to be adopted, and made brief remarks. Expounding on the written submission filed, it was his contention that the affidavit in support of the notice of motion lacked annexures such a copy of notice of appeal, a letter that requested for the necessary documents,

and the ruling being contested. Arguing that to be contrary to Rule 47 (1) of the Rules. Upholding that the High Court was thus correct in striking out the application.

The Court inquired from the applicant if the application was dismissed or struck out, as with the latter she ought to have to go and correct the anomaly and refile her application before the High Court. Her response was that she was a lay person, but did comply to the requirement.

As indicated earlier on that parties filed written submissions, in which the applicant contended that the Judge erred by invoking the provisions of Rule 49 (3) and 84 (1) of the Rules, arguing that those were the preserves of this Court and not the High Court. She considered the decision by the High Court Judge as an error apparent on the face of record which needs to be revised. To bolster her submission, she referred us to the case of **Solvent Extraction Co v Bihar State Forest Development**, AIR 1998 Part III at p. 3 and **Mulla** at p. 4118 – 4121. The applicant, thus invited us to invoke the powers conferred on this Court under section 4 (3) of the AJA, and revise the High Court order which is not appealable.

The respondent on the contrary, avowed that compliance with Rule 84 (1) of the Rules was compulsory and referred us to the case of **Kantibhai M. Patel v Dahyabhai F. Mistry** [2003] T. L.R. 437, in which the Court laid out the steps to be taken once a notice of appeal has been filed. Failure to annex a copy of the notice of appeal to the affidavit filed in support of the application in Miscellaneous Civil Application No. 107 of 2015 as well as failure to serve such notice on the respondent were fatal rendering the application for a certificate on a point of law incompetent and therefore the High Court properly struck out the application.

As rightly submitted by the applicant in her written submission and referred case of **Richard Julius Rukambura v Issack Mtwakakila & Another**, Civil Appeal No. 2 of 1998, CAT, (unreported) that the jurisdiction of court is paramount in any court proceedings. And that has in actual fact been our concern on the appropriateness of this application before us. For that reason, we will undertake to sort that first.

Appeals in land matters are governed by section 47 (1) and (4) of Land Disputes Court Act, Cap. 216 R.E. 2019 (the Land Disputes Act). For those matters originating from the Ward Tribunal, the governing provision is sections 47 (1), (3) and (4) of Land Disputes Act. For ease of reference

sections 47 (3) and (4) which are particular to the matters originating from the Ward Tribunal, are reproduced below:

(3) 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.

(4) The procedure for appeal to the Court of Appeal under this section shall be governed by the Court of Appeal Rules.

Therefore, in order for the applicant to prosecute her appeal before this Court, she has to be armed with a certificate on point of law issued by the High Court as dictated under sections 47 (3) and (4). In the same way she is as well required to comply to the dictates of Rule 46 (1) of the Rules, which provides as follows:

*"Where an application for a certificate or for leave is necessary, **it shall be made after the notice of appeal is lodged.**"*[Emphasis added]

In paragraph 3 of her affidavit in support of her application, the applicant has averred that she has already lodged her notice of appeal at

the time when Miscellaneous Land Application No. 107 of 2015 was filed. She however, never annexed a copy of the notice of appeal intended or the impugned decision. The paragraph is provided below for ease of reference:

“That, I being dissatisfied with the whole decision of the High Court and decided to lodge a Notice of appeal intending to appeal in the Court of Appeal.”

Since no copy of a notice of appeal lodged was annexed, which is a prerequisite to the determination of an application before the High Court for certificate on point of law, we find the omission fatal.

Also, in paragraph 4 of her affidavit in support of the application for certification, the applicant pointed out six (6) points she intended for this Court to determine, eventually. Without annexing a copy of the decision intended to be appealed against, it will be difficult for the Judge to be sure, if there is truly an issue on a point of law justifying grant of the application for certification on point of law.

Of course, the omissions alluded above are what led to the striking out of the application for being incompetent under Rules 46 (1) of the Rules.

On our part, we find the High Court Judge correctly struck out the application for being incompetent.

To this end we conclude that the application before us was brought prematurely and accordingly dismiss it with costs.

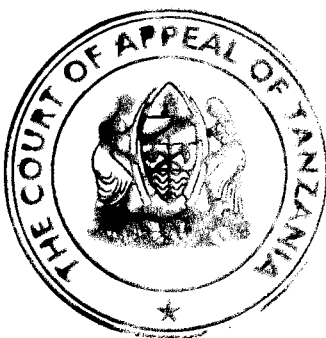
DATED at MWANZA this 15th day of July, 2021.

G.A.M. NDIKA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The ruling delivered on 15th day of July, 2021. In the presence of applicant in person- unrepresented and Mr. Kassim Gilla, learned advocate for the respondent is hereby certified as the true copy of the original.




G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL