IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

MISCELLANEOUS LAND APPLICATION NO. 96 OF 2019

(Arising from the High Court of the United Republic of Tanzania at Mwanza District Registry in Land Appeal No. 02 of 2018 before Hon. Matupa, J. dated 03rd May, 2019, originating from Land Application No. 24 of 2016 of Irenza Ward Tribunal and Land Appeal No. 05 of 2017 of the District Land and Housing Tribunal for Geita District at Geita).

JACKSON WILLIAM.....APPLICANT

VERSUS

DAMAS KATENYA ....RESPONDENT

RULING

Date of last Order: 08/05/2020
Date of Judgment: 12/06/2020

F. K. MANYANDA, J.

In this application I am called upon to certify that there is a point of law requiring determination by the Court of Appeal of Tanzania. The application has been made under Section 47(2) of the Land Disputes Courts Act, [Cap. 216 R. E. 2019] through a Chamber Summons supported with an affidavit sworn by the Applicant Jackson William. The background of this matter is that the said Applicant unsuccessfully sued the Respondent at the Irenza Ward Tribunal in Land Application No. 24 of 2016 over a shamba. Being aggrieved by the decision of the trial Ward Tribunal appealed to the District Land and Housing Tribunal for Geita District which also decided in favor of the respondent by upholding the trial Ward Tribunal decision. Undaunted, the Applicant appealed to the High Court in

Land Appeal No. 02 of 2018 where Hon. Matupa, J. (as then was) on 17th April, 2019 dismissed the appeal in its entirety with costs.

Hearing of this application was ordered to be conducted by way of written submissions. The Applicant was represented by Mr. Felix James, learned Advocate, who drew and filed the written submissions in support of the application while the Respondent was represented by Mr. Mr. Steven Makwega, learned Advocate, who drew and filed the written submissions in opposition to the application. Mr. James argues that the application raises two points of law which demand consideration by the Court of Appeal namely:

(i) Whether the High Court delivered judgment that based on misapprehension of evidence in record (sic) on the side of respondent; and

(ii) Whether both appellate courts decided the appeal based on the issues which were not raised during trial.

Supporting the first point of law in the application Mr. James contends that the High Court gave its judgment in misapprehension of the evidence on record. It is his argument that the evidence at the trial Ward Tribunal was that the suit land was never abandoned because since 1919 when it was acquired by the Applicant's father it continued to be occupied by his aunt until his father's death. The trial Ward Tribunal decided in his favour basing on this piece of evidence. Mr. James contends that both appellate courts misapprehended the evidence on holding that the Applicant's father abandoned the suit land for some years hence decided in his disfavor. He

is of the views that this finding is not supported by the evidence. Thus is a point of law the Applicant seeks the Court of Appeal to determine. To support his position he cited the case of **Agness Severine Versus Mussa Mdoe** [1989] TLR 164

On this point Mr. Makwega submitted that both the High Court and the District Land and Housing Tribunal in its appellate jurisdiction properly analyzed and evaluated the evidence and when weighed on the scale found in favour of the Respondent. He is of the view that this concurrent findings of evidence cannot be interfered by Court of Appeal unless there is a glaring error or omission which is apparent on the face of record which is not a case in this matter. He did not cite any case law to support his position.

I have thoroughly gone through the judgment of the High Court and found that after analyzing the evidence inclined with the position of the appellate DLHT. At page 7 Hon Matupa, J. stated:

> *"I am inclined to that position of the appellate District Land and Housing Tribunal. One, it is clear from the testimony of both witnesses for the appellant and for the Respondent, that the father of the Appellant had abandoned the land for long period. In fact, before he left, he sold the land to Madebe, who had in turn invited his sister to use it and abandoned it. It is also not in dispute that the father did not mind to fend for the mango trees nor did he take care of the graves. In fact, he at one time sold timber out of mango trees, which is inconsistent with a person who maintained the land."*

This finding comes from witnesses of both the Appellant and the Respondent as presented in the trial Ward Tribunal. Both the DLHT and

the High Court concurrently found this fact and hence decided in favour of the Respondent. The decision based on this finding is challenged by the Applicant. To my opinion, the evidence appear to have been on record the issue in controversy is not about its sufficient but it is about its apprehension. I am convinced that this makes a point of law calling for determination by the Court of Appeal. Guidance is found in **Agnes Severin 's case (supra)**. In that case the appeal to the Court of Appeal was upon a certificate by the High Court that appoint of law was involved in the decision. The Judge of the High Court certified an issue that *whether the concurrent decisions of the courts below were supported and justified by the evidence*. The Court of appeal found that such point of law was ambiguous and unsatisfactory way of certifying a point of law. It held that:

> *"The present appeal to this Court is upon a certificate by the High Court that appoint of law is involved in the decision, namely, whether the concurrent decisions of the courts below were supported and justified by the evidence. We wish to observe at the outset that this was an unsatisfactory way of certifying a point of law. That certificate is capable of two interpretations. It could mean posing the question whether there was any evidence at all to support the concurrent decisions of the courts below. It could equally mean to ask the question whether the evidence as adduced was sufficient to support and justify those decisions. How, this distinction is imported.* ***The question whether there was any evidence at all to support the decision is a question of law which can properly be certified for the opinion of this court****. But whether the evidence as adduced was sufficient to support the decision is a question of fact which could not properly be the subject of a certificate for the opinion of this court." (emphasis added)*

The Court of appeal found that such point of law was ambiguous and unsatisfactory way of certifying a point of law because the certificate was capable of two interpretations, that is, either whether there was any evidence at all to support the concurrent decisions of the courts below or that whether the evidence as adduced was sufficient to support and justify those decisions. Distinguishing between the two the Court of Appeal held that the former question was a point of law proper to be certified while the later was on point of fact hence not proper point to be certified.

In the instant matter, the issue is not about insufficiency of the evidence, it is misapprehension, which in my opinion is a point of law calling for determination by the Court of Appeal under a question that whether the high court decision is based on misapprehended evidence.

As regards to the second issue the Applicant defaults the Appellate Judge on ground that he raised some issues and resolved them without hearing the parties. The main issue alleged to have been raised and decided in fault is that concerning abandonment of the suit land. Mr, James pointed the issue as been depicted on page 7 of the High Court Judgement at which the Appellate Judge inclined with facts that the Applicant's father abandoned the suit land. This fact according to Mr. James lacks supporting evidence on record. To support his position, he cited the case of **Emmanuel Joseph vs. Republic**, Criminal Appeal No. 323 of 2016 which was decided by the Court of Appeal of Tanzania in which the Court of Appeal of Tanzania insisted that matters not raised at the first appeal the second court of appeal is not seized with jurisdiction to entertain.

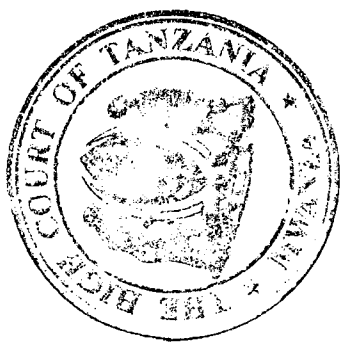
On his hand, Mr. Makwega contends that the argument by Mr. James in this issue concerning abandonment of the suit land by the Appellant's father is unfounded because the records of this case right from Ireza Ward Tribunal to the Appellate District Land and Housing Tribunal was canvassed and resolved in affirmative.

In this issue I have considered the rival arguments by the parties and find it to be a triable issue based on analysis of evidence. The guiding law is found in **Emmanuel Joseph's case (supra)** going that matters not raised at the first appeal the second court of appeal is not seized with jurisdiction to entertain. In this matter the issue of abandonment of the suit shamba was dealt with by the Appellate Judge at Page 7 under the wording quoted above. The Applicant disputes that there is no evidence to support that holding. I think this issue is worthy of consideration by the Court of Appeal, that is, whether the appellate courts dealt with issue of abandonment of the suit land which was not raised at the trial Tribunal without hearing the parties.

In the instant application after going through the affidavit of the Applicant and the submissions of both sides and the records of the case, I find that there are issues worthy of consideration by the Court of Appeal as follows:

i. Whether the high court decision is based on misapprehended evidence; and
ii. Whether the appellate courts dealt with issue of abandonment of the suit land which was not raised at the trial Tribunal without hearing the parties.

In conclusion, and for reasons above I hereby certify that this is a fit case for further consideration by the Court of Appeal on pints of law above. The application is therefore granted as prayed. Costs are to be in the cause. It is so ordered.



F.K. MANYANDA
JUDGE
12/06/2020