IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[IN THE DISTRICT REGISTRY OF ARUSHA]

AT ARUSHA

MISC. CIVIL APPLICATION NO. 52 OF 2020

(C/F the High Court of Tanzania (PC) Civil Appeal No. 22 of 2015, Emanating from District Court of Arusha, Misc. Civil Revision No. 26 of 2014, Originating from Enaboishu Primary Court, Civil Case No. 184 of 1999)

NAI JOEL *(Suing as the Administratrix of the Estate of the late* **PAULO LOTOROVUKI)** ..... **1ST APPLICANT**

NAFTALI LOGILAKI ..... **2ND APPLICANT**

Versus

SIMON LUCAS ..... **RESPONDENT**

RULING

21st April & 28th May, 2021

Masara, J.

This application is preferred under the provisions of section 5(1)(c) and 5(2)(c) of the Appellate Jurisdiction Act, 1979, Cap. 141 [R.E 2019] whereas the Applicants are moving the Court to grant them leave to appeal to the Court of Appeal and certify that there are points of law involved in the decision of this Court (PC Civil Appeal No. 22 of 2015) which was delivered on 9/8/2018. The application is supported by a joint affidavit deponed by the Applicants. The Respondent opposed the application in a counter affidavit deponed by himself.

This Application arise from a series of cases filed between the parties some of which their records are missing in this application. Initially, the Respondent successfully sued the Applicants and two other people, who are not parties in this application, at Enaboishu Primary Court (the trial Court) vide Civil Case No. 184 of 1999. The Respondent was claiming for a piece of land measuring 8 acres (the suit land). The trial Court delivered its judgment on 22/6/2000 requiring the Applicants to hand over the suit land to the Respondent. The Respondent was in turn ordered to pay compensation for the plants that were

found on the suit land. The compensation was valued at TZS 2,569,807. The Applicants appealed to the District Court of Arumeru vide DC Civil Appeal No. 45 of 2000. The said appeal was dismissed on 31/7/2003 for being time barred. Upon filing Application for execution, the Applicants were ordered to vacate the suit land, and the execution orders were carried on by the Olturotu Ward Executive Officer.

In the midst of the execution, the 2nd Applicant filed another case at the trial Court claiming for the compensation. The Respondent admitted the claim and consent judgment was entered. Enforcing to be paid, the 2nd Applicant filed Execution Application No. 105 of 2004. The Respondent resisted payment stating that he could not pay the compensation since the Applicant had not handed to him the suit land. That brought about Civil Revision No. 26 of 2014 which was filed in the District Court aiming at revising the decisions of the trial Court. In its decision, the learned Resident Magistrate of the District Court, found out that there were two conflicting decisions of the trial Court. She ruled out that both compensation and the handing over the suit land should be done simultaneously. The Applicants were aggrieved. They wanted the land to be declared theirs since the Respondent failed to pay them the compensation within the time provided by the trial Court. The Applicants appealed in this Court, vide PC Civil Appeal No. 22 of 2015, subject of this Application. This Court (Maghimbi, J.) dismissed the Appeal holding the Applicants responsible for failure to hand over the suit land to the Respondent. The Applicants are still aggrieved; hence this Application.

At the hearing of the application, the Applicants were represented by Mr. Elibariki Maeda, learned advocate while the Respondent appeared in Court in person, unrepresented. The application was heard through filing written submissions.

Submitting in support of the Application, Mr. Maeda stated that the first point he seeks to be certified is whether the High Court was right in altering the decision of the trial Court in Civil Case No. 184 of 1999 substituting it with its own order without affording the parties the right to argue on that point. According to him, the impugned High Court decision contravenes section 31(2) of the Magistrate Courts Act. Mr. Maeda maintained that the provision requires Judges to give opportunity to the parties to heard on any issue while exercising their revisionai powers.

The second point sought to be certified is whether the High Court was justified to order the Applicants to vacate the suit land before compensation was made. Mr. Maeda submitted that vide Civil case No. 105 of 2004 the trial Court had ordered the Respondent to compensate the 2nd Applicant TZS 2,569,807 within eight months commencing from 3/10/2005 but the Respondent failed to pay the compensation to date.

The other point was on the valuation report. Mr. Maeda contends that the valuation of TZS 2,569,807 was made in 2004 and was for the 2nd Applicant alone. That the High Court judgment does not provide an order for the payment of compensation to the 1st Applicant. Mr. Maeda invited the Court to certify the purported legal points so that the intended appeal in the Court of Appeal can find legs to stand.

Arguing against the application, the Respondent stated that the High Court never altered the decision of the trial Court; on the contrary, it blessed the same by ordering the Applicants to hand over the suit land to the Respondent so that he distributes it to the boma. It is at that stage that the Respondent will compensate the Applicants as directed by the trial Court.

On the second point, the Respondent maintained that the Applicants failed to challenge the decision of the trial Court in Civil Case No. 184 of 1999. He insisted that all appeals filed were dismissed. Therefore, the trial Court decision was not altered. It stands the way it was made and it has to be executed as is.

On the last point, the Respondent amplified that the Case subject of this Application is Civil Case No. 184 of 1999; therefore, Civil Case No. 105 of 2004 is irrelevant. He maintained that the Revision in the District Court dealt with Civil Case No. 184 of 1999. The Respondent concluded that the grounds raised in this Application were never raised at the High Court and as such cannot be certified for determination by the Court of Appeal. He therefore urged the Court to dismiss the application with costs.

In his rejoinder submission, Mr. Maeda insisted that Civil Case No. 105 of 2004 was execution of Civil Case No. 184 of 1999. Further, in Civil Case No. 105 of 2004, it is where the valuation of the compensation was based. Mr. Maeda reiterated that ignoring existence of Civil Case No. 105 of 2004 would render PC Civil Appeal No. 22 of 2015 a nullity.

I have carefully considered the application as presented and the written submissions for and against the application. The main issue calling for this Court's determination is whether the application has merits and whether this Court should certify the raised points for determination by the Court of Appeal.

Appeals from the High Court to the Court of Appeal, in cases originating from primary courts are not subject to some conditions. First, this Court has to sanction the intended appeal by a grant of leave to the Applicant. Second, the Applicant has to move this Court to certify that there are points of law deserving determination by the Court of Appeal. In the instant application, the Applicants

seek to be granted leave to appeal to the Court of Appeal. Leave is grantable where the prospective grounds of appeal raise issues of general importance or novel points of law or a prima facie or arguable appeal. It cannot not be granted where the grounds of appeal are frivolous, vexatious or hypothetical. This was held in the case of ***Simon Kabaka Daniel Vs. Mwita Marwa Nyang'anyi & 11 others*** [1989] TLR 64 where it was stated:

> *"In application for leave to the Court of Appeal the application must demonstrate that there is a point of law involved for the attention of the Court of Appeal..."*

Once the Court is satisfied that there are sufficient grounds for the grant of leave, this Court has to certify that there are points of law worth determination by the Court of Appeal. That is because a third appeal, such as appeals originating from decisions of primary courts to the Court of Appeal, are solely based on existence of legal points. In this I am fortified by the decision in ***Ali Vuai Ali Vs. Suwedi Mzee Suwedi*** [2004] TLR 110, the Court of Appeal held:

> *"According to section 5(2) (c) of the Appellate Jurisdiction Act 1979, a certificate on a point of law is required in matters originating in Primary Courts; it is provided therein that an appeal against the decision or order of the Hight Court in matters originating in Primary Courts would not lie unless the High Court certifies that a point of law is involved in the decision or order."*

In the instant application, the Applicants have raised three points that they seek to be certified as points of law for the determined by the Court of Appeal. The Respondent has generally denied that there are no points of law worth the determination of the Court of Appeal. The Respondent mainly relied on the fact that Civil Case No. 105 of 2004 is not relevant in this matter. I do not agree with him. As rightly submitted by Mr. Maeda, the valuation and even the payment schedules were made pursuant to that case.

Mr. Maeda in his first point submitted that the High Court was in error for altering the decision of the trial Court without affording the Applicants the right to be heard. From the record, it is prevalent that the High Court quashed and set aside the decisions of the District Court and that of Hon. Mongi. Further, the learned Judge ordered payment of compensation on the valuation made on 9/9/2004 and 11/10/2004 by Afisa Kilimo, instead of TZS 12,922,000/= that the Applicants claimed. According to Mr. Maeda, that order was made without affording the Applicants the right to submit on the same. Whereas this Court may have an opinion on the point raised, such opinion cannot be done at this stage lest it be construed to be a review of our own decision. Considering that the point raised hinges on the fundamental right to be heard, it is trite that such point be passed over to the Court of Appeal which will have the necessary documents and records to ascertain its validity. I, therefore certify that as a point of law to be determined by the Court of Appeal in the intended appeal.

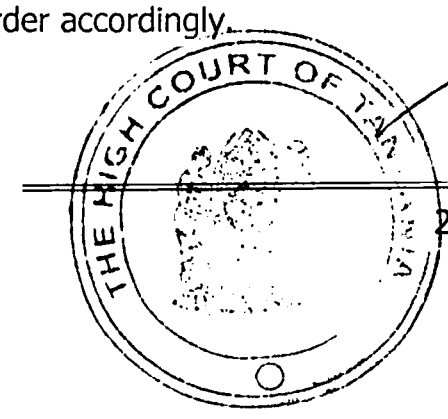
The other two points are whether the High Court properly exercised its mandate when it ordered the Applicants to vacate the suit land before compensation and whether the Court was justified to condone valuation issued by the trial Court. According to Mr. Maeda, the valuation which was ordered to be paid to the Applicants relates to the valuation carried on the property of the 2nd Applicant only; that it did not cover the 1st Applicant. In my considered opinion, these two are not purely legal points, they are subject to evidence. They are part and parcel of the point certified above. Once the Court of Appeal makes a determination whether the Applicants were afforded the right to be heard or not, it will invariably deal with issues of compensation, the rate thereof and what should begin between compensation and vacant possession of the suit land.

Having so held, leave to appeal to the Court of Appeal is granted to the Applicants. The intended appeal shall be on the following legal point:

whether the orders made by the High Court were made without affording the Applicants the right to be heard.

Consequently, and pursuant to the decision hitherto, the Applicants are at liberty to file their intended appeal within 21 days from the date of this ruling. The appeal shall be limited to the ground certified. Costs of this application to be considered in tandem with the final outcome of the intended appeal.

Order accordingly.



Y. B. Masara

JUDGE

28th May, 2021