

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY
AT MOSHI**

MISC. CRIMINAL APPLICATION NO. 5 OF 2022

(C/F PC Criminal Appeal No.1 of 2021 High Court Moshi Registry, Rombo District Court Criminal Appeal No.7 of 2020, Originally Criminal Case No 136 of 2017 of Mengwe Primary Court)

MOSES ELFAS..... APPLICANT

VERSUS

EDWARD MOSHI..... 1ST RESPONDENT

WILBROAD HENRY2ND RESPONDENT

RULING

28/3/2022 & 23/5/2022

SIMFUKWE, J

The applicant, pursuant to **section 6(7)(b) of the Appellate Jurisdiction Act, Cap 141 R.E 2019** has moved this court seeking for the following orders:

- 1. That, the honorable court be pleased to certify that a point of law is involved*
- 2. The costs of this application*

The gist of this application is to the effect that; At Mengwe Primary Court the respondents herein were charged and convicted with an offence of maliciously damage to properties contrary to **section 326(1) of the Penal Code Cap 16 R. E 2002**. The primary court sentenced the respondents to



pay a fine of Tsh 170,000/- each or in the alternative imprisonment for a term of three months. They were also ordered to pay Tsh 450,000/= each as compensation. The respondents herein were aggrieved, thus appealed to the District Court of Rombo vide Criminal Appeal No.7/2018 in which the matter was ordered to be tried *de novo* before a Magistrate of competent jurisdiction in order to resolve a land dispute.

The applicant herein was not satisfied, he filed PC Criminal appeal No. 1 of 2021 before this Court. However, luck was not his portion. This court partly allowed the appeal and it was the findings of this court that the parties are at liberty to institute a land dispute before the court/tribunal of competent jurisdiction subject to the law of limitation.

Still aggrieved, the applicant herein eagerly wishes to institute the third appeal before the Court of Appeal. However, since the appeal to the Court of Appeal is a third appeal, as per the requirement of the law, the appellant is required to apply before the High Court for the certificate on the point of law. He accordingly lodged the instant application.

The application was argued through written submissions as the parties were unrepresented.

In support of the application, the applicant stated that he preferred an appeal to the Court of Appeal after being aggrieved with the judgment and decree of this court. He argued that he filed Notice of appeal on time and since the original court in the series is the Primary Court that is Mengwe Primary Court, the law is to the effect that this court has to certify that there is a point of



law involved as per **section 6 (7) (b) of the Appellate Jurisdiction Act,** (supra) so as to file an appeal to the Court of Appeal.

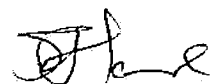
Also, the applicant stated that, in this application, he is duty bound to satisfy this court that there is a point of law involved. He was of the view that point of law is involved. In that respect he prayed that his affidavit be adopted to form part and parcel of his submission.

The applicant submitted further that the point of law is found under paragraph 5 and 6 of his affidavit. He referred to page 12, 1st paragraph 7th line of the decision of this court which is to the effect that:

"In absence of evidence to prove ownership of the land and therefore of the plants planted on it, the first ingredient was not proved."

In respect of this quotation, the applicant argued that the point of law is *whether any matter of destruction of property particularly the destruction of trees or plant, the complainant should first go to the land tribunals/court even if when it is well clear that the destruction was committed in the complainant's possession or property. That, should this be a principle of the law that whenever there is a destruction of property, then the matter of the ownership of the landed property should first be raised and be settled before the court can proceed with the determination of the criminal charge of destruction of the property reported thereto?*

The applicant was of the opinion that to make the precedent clear in the future this court should grant this application so that he can access the Court



of Appeal for determination of the intended appeal for the Court of Appeal to lay down the principle on the point of law involved as stated above.

The applicant insisted that his concern is to know whether the issue of destruction of the landed property has direct relation with the ownership of the land where the alleged destruction was committed. It was the opinion of the applicant that the impugned judgment of this court did not put it clear rather it quoted with approval the judgment of the High Court in the case of **Asha Amir Mng'agi Mneka, PC Criminal Appeal No. 5 of 2021 (Unreported)**.

It was applicant's prayer that this court to afford him an opportunity to access the Court of Appeal by allowing this application for the Court of Appeal to view this position and make a principle on that for the betterment of justice and precedent in the future cases. He also implored the court to certify that there is point of law for better administration of justice to utilize his Constitutional right of appeal.

In reply to the applicant's submission, the respondents filed their joint written submission. Opposing the application, the respondents argued that there is no any point of law sufficient to grant this application. They argued further that there is no any evidence to support the applicant's argument since the 1st appeal and 2nd appeal decided and gave direction as what should be done to solve the issue of land ownership for the trial court to proceed with determination of conviction. (sic) That, the dispute over land ownership which resulted to the offence of destruction must be determined first for justice to stand.



The respondents went on to submit that the decisions of both appellate courts did not nullify the trial court decision rather it was directed that ownership of land should be determined first, before concluding that the case was proved beyond reasonable doubt. It was stated further that the High court decision clearly decided the matter and gave direction for justice to be done. Thus, no point of law is violated.

It was the respondents' view that the applicant is aware and educated knowing that the issue of destruction of property over the land have a direct relation with ownership of the land is of highly (sic) consideration where both appellate courts consider it and make it clear. Hence, the applicant must comply with such direction in order to save time of court and justice to prevail.

It was the respondents' prayer that this court should dismiss this application as there is no any point of law involved or which required interpretation of the Court of Appeal.

I have given consideration to the arguments for and against the application as advanced by both parties, I find the issue for determination is ***whether there is point of law to be considered by the Court of Appeal.***

It is a mandatory requirement of law that a party intending to appeal to the Court of Appeal as third appeal in criminal case, he/she must apply to the High Court for the same to certify existence of point of law. This is provided for under **section 6(7)(b) of the Appellate Jurisdiction Act**, (supra) under which this application has been preferred. Emphasis has been made by the Court of Appeal in numerous decisions. In the case of **Magige**

Nyamoyo Kisinja vs Merania Mapambo Machiwa, Civil Appeal No. 87 OF 2018, at page 7 it was held that:

"We must emphasize that the point to be certified by the High Court must be that of legal nature and significant to warrant the decision of the Court. It is not enough for a party in a third appeal, like in the instant appeal, to simply think the lower court is wrong in its decision to have his case heard by the Court of Appeal. Matters of law which the Court is called upon to determine must transcend the interest of the immediate parties in the appeal. Indeed, in some cases matters of law placed before the Court for determination are of public importance especially when an interpretation of the law is involved."

The applicant's point of law which he called upon this court to certify is found under the 5th and 6th paragraphs of his affidavit. The same has been reflected in his submission and I hereby reproduce verbatim issues that the applicant stated in his affidavit as well as page 2 of his submission. The applicant believed that the questions for determination by the Court of Appeal are: -

- 1. whether any matter of destruction of property particularly the destruction of trees or plant, the complainant should first go to the land tribunals/court even if when it is well clear that the destruction was committed in the complainant's possession or property.*
- 2. Should this be a principle of the law that whenever there is a destruction of property, then the matter of the ownership of the*

landed property should first be raised and be settled before the court can proceed with the determination of the criminal charge of destruction of the property reported thereto?

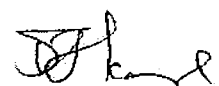
I have taken time to study keenly the affidavit and the submission of the applicant, particularly paragraph 5 and 6. It seems to me that the above quoted issues raise point of law worth to be determined by the Court of Appeal.

In the case of **Mohamed Mohamed and Another v. Omari Khatib, Civil Appeal No. 68 of 2011 at pages 11-13, CAT (unreported)**, the Court established what constitutes a point of law, that:

"... for instance, where there is a novel point, where the issue raised is unprecedented, where the point sought to be certified has not been pronounced by the Court before and is significant and goes to the root of the decision, where the issue at stake involves jurisdiction, where the court(s) below misinterpreted the law etc..."

[Emphasis added.]

In this case, the records of the trial court reveal that ownership of the land where the destroyed trees were planted is disputed. In the circumstances, I am of considered opinion that the raised point of law is worthy the attention of the Court of Appeal to make precedent clear since the two appellate courts were of the same views on the issue of destruction to property in relation to ownership of the land on which the destroyed plants were planted.




In the upshot, I hereby certify the following point of law to be determined by the Court of Appeal -

"Whether whenever there is allegation of the offence of destruction of property particularly the destruction of trees or plants, then the matter of ownership of the landed property should first be raised and be settled first before the court can proceed with determination of the criminal charge of destruction of property?"

In the event, I hereby grant the application with no order as to costs.

It is so ordered.

Dated and delivered at Moshi, this 23rd day of May, 2022.


S. H. SIMFUKWE
JUDGE
23/5/2022