

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

MISCELLANEOUS LAND APPLICATION NO. 69 OF 2021

(Originating from the High Court of Tanzania at Mbeya in Land Appeal No. 24 of 2020, from the District Land and Housing Tribunal for Mbeya Land Appeal No. 150 of 2019 and original Igava Ward Tribunal Land Dispute No. 1 of 2019)

IMANI BAHARIA.....APPLICANT

VERSUS

HAMISI MLWILO.....RESPONDENT

R U L I N G

30th May & 10th June, 2022

KARAYEMAHA, J

This is an application for certificate on a point of law to appeal to the Court of Appeal against the decision of the High Court at Mbeya in Land Appeal No. 24 of 2020. It is by way of chamber summons made under section 47 (3) of the Land Disputes Courts Act, [Cap. 216 R.E. 2019] (hereinafter, the Act). The application is supported by an affidavit deposed by Sambwee Mwalyeo Shitambala instructed to act as such.

In the supporting affidavit it is stated that the applicant was aggrieved by the decision of this Court hence seeking for certificate on point of law to appeal in order to assail it. It is further averred that in the

intended appeal there are points of law which need to be resolved by the Court of Appeal including first, whether this Court made a proper construction of the principle of adverse possession in accordance with the law and secondly, whether the case was proved beyond reasonable doubt.

The application is challenged by the respondent through the counter affidavit sworn by Mr. Salvatory Twamarenke dully authorized by the respondent. It is averred therein that the application is vehemently disputed because there is no any point of law to be resolved since the impugned decision properly construed laws regarding adverse possession and that the case was proved as required by law.

When the application was called on for hearing, Mr. Sambwee Shitamabala represented the applicant and Mr. Salvatory Twamarenke represented the respondent. The application was argued by way of written submission on consensual basis by parties.

Arguing in support of the application, Mr. Shitambala premised his submission asserted to be points of law. Essentially, he focused his complaint on the fact that the principle of adverse possession was not considered in accordance with the law. He said adding that the High court erred when it decided that the whole application was time barred. It was his further submission that this Court's decision based on hearsay and no

reality was attested by the respondent. On whether the case was proved to the required standard the learned counsel focused his complaint on the failure by the Court to consider the proceedings and evidence properly. It was, therefore, his view that these are points of law requiring the intervention of the Court of Appeal to decide whether this Court properly considered the principle of adverse possession and whether the case was proved to the standard required in law.

Mr. Twamarenke, on his part, contested the application. His submission focused on the elaboration that the principle of adverse possession was properly considered. He then proceeded explaining what should the court consider when determining whether adverse possession was proved. The learned Counsel cited cases of **Yeriko Mgege vs. Joseph Amos Mhiche**, Civil Appeal No. 137 of 2017, **Trustees of Holly Sisters of Tanzania vs. January Kanuli Shayo and 136 others**, Civil Appeal No. 193 of 2016 and **Safari Mwazembe vs. Juma Fundisha**, Civil Application No. 503/06 of 2002 to highlight the factors to be considered when the issue of adverse possession arises.

On whether the case was proved to standard required by law, Mr. Twamarenke illustrated principles governing proof of the case by a part alleging to be the owner of the land. To bolster his position, he cited the

case of **Abdul Karim Haji vs. Raymond Nchimbi Alois and another**, Civil Appeal No. 99 of 2004, **Tabu Mohamed Saadan vs. Issa Magwila (in person and in the capacity as Administrator of Estate of the late Minisha Mchawed)**, Land Appeal No. 271 of 2020.

In both circumstances, the learned Counsel contended that the Court properly considered the principle of adverse possession and that the respondent proved his case to the standard required in law. He concluded that the points of law raised by the applicant lack justification for this Court to give leave so that the matter may be considered by the Court of Appeal.

The contending submissions bring out one profound issue for determination by the Court and this is as to whether the decision of the Court sought to be impugned consists of a point of law worth of certification for consideration by the Court of Appeal.

It is settled that for a land matter originating from the Ward Tribunal a person wishing to access the Court of Appeal on a third bite has to comply with the provisions of section 47(3) of the Act. The section provides as follows:

"43 (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".

From the above provision, the appellant who wishes to appeal to the Court of Appeal for a third appeal for a land dispute originating from the Ward Tribunal is required to get a certificate from the High Court that the point or points of law are involved in the matter for determination of the Court of Appeal. This position was restated in **Abdallah Matata vs. Raphael Mwaja**, CAT-Criminal Appeal No. 191 of 2013 (Dodoma-unreported). The superior Court fortified its earlier position as follows:

"In order to lodge a competent appeal to the Court, the intended appellant has to go through the High Court first with an application for a certificate that there is a point of law involved in the intended appeal. It is only when the appellant is armed with the certificate from the High Court, that a competent appeal may be instituted in this Court."

See also: **Omari Yusufu vs. Mwajuma Yusufu & Another** [1983] TLR 29; **Dickson Rubingwa vs. Paulo Lazaro**, CAT-Civil Application No. 1 of 2008; and **Harban Haji Mosi & Another vs. Omari Hila Seif**, CAT-Civil Reference No. 19 of 1997 and **Jerome Michael vs. Joshua Okanda**, Civil Appeal No. 19 of 2019 (all unreported).

I am also aware of the requirement that the High court must be satisfied that what is raised falls within a point of law to be determined by the Court of Appeal. In **Dorina N. Mkumwa vs. Edwin David Hamis**,

Civil Appeal 4 No. 53 of 2017, CAT - Mwanza (unreported) where the Court of Appeal held:

"Therefore, when the High Court receives application to certify point of law, we expect the ruling 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"

The parties' diametric positions relate to the question as to what this Court decided. While the applicant contends in the 1st point that the decision was arrived at without construing the principle of adverse passion in accordance with the law and that the case was not proved to the required standard, the respondent holds the view that the Court properly considered the principle properly and the case was proved as required under the law and so no point of law worth consideration by the Court of Appeal

With respect, I hold the view that the position held by the respondent is flawed. The question as to whether the principle of adverse possession was properly construed is not dealt with by looking at adequacy

or not of the evidence adduced by parties. It is determined by looking at relevant principles promulgated by case law and the law itself. The respondent's contention would only make some plausible sense if the parties' contention touched on the probative value of the evidence so far adduced. In my view, an answer to this question would require a review of the law with a view to ascertaining, if what is alleged by the applicant indeed occurred, and whether such indulgence reflected the appropriate position of the law. This, in my unflustered view, is a question of law and not a question of fact.

The other point raised by the applicant is whether the case was proved to a standard required by law. Inviting this court to consider this issue as a point of law, Mr. Shitambala complained that this court did not dig deep in the proceedings properly. In my view, Mr. Shitambala's argument is that had the court looked at the evidence properly, it wouldn't arrive at a decision it reached. Undisputedly, this question is to be determined by reviewing the evidence adduced by the parties. As rightly argued by Mr. Twamarenke, this Court considered the evidence by the parties and reached at the decision as it did. In my considered opinion, the Court of Appeal would be required to review the evidence on record with a view to ascertaining whether the respondent proved the case to a balance

of probability. My reflection on it does not bring to a conclusion that it is a point of law but a question of fact.

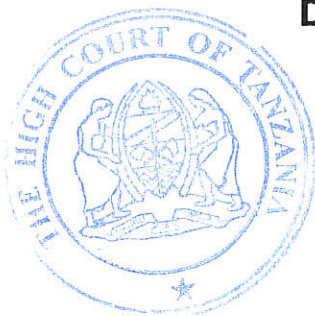
It is my conviction, therefore, that only one point of law exists worth enough to constitute a point of consideration by the Court of Appeal by way of appeal that is contemplated by the applicant. Accordingly, I certify the following as a point of law worth consideration by the Court of Appeal:

"Whether the High Court construed the principle of adverse possession in accordance with the law."

In consequence thereof, I partly grant the application as prayed, and let the costs of the matter be in the cause.

Order accordingly.

DATED at MBEYA this 10th day of June, 2022



A handwritten signature in black ink, appearing to read "J.M.K.", is written above a horizontal line.

J. M. KARAYEMAHA
JUDGE