IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

MISC. LAND APPLICATION NO.10 OF 2021

(Arising from Judgment and decree of the High Court of Tanzania at Mwanza in Land Appeal No. 14 of 2018 dated 14/12/2020 Delivered By, Manyanda J, Judge, Originating from the decision of Mkuyuni Primary Court in Matrimonial cause No. 65 of 2006.)

SETHY MAGANGA..... APPLICANT

VERSUS

ANATORIA GABRIEL..... RESPONDENT

RULING

1st & 29th July, 2022

ITEMBA, J.

The applicant herein intends to move the Court to certify that a point of law, worth a consideration by the Court of Appeal of Tanzania. The impending appeal is against the decision of the Court (Hon. Manyanda, J.) That declared the respondent to be the lawful owner of the suit land in Land Appeal No. 14 of 2018. The application has been preferred under the provisions of ***Section 46 (1) of the Tanzania Court of Appeal Rules 2019 and Section 47 (2) of the Land Disputes Courts*** Act, Cap. 216 R.E. 2019. It is supported by an affidavit of Mr. Sethy Maganga, the respondent, and it sets out grounds on which the application is based.

In opposing the application is the respondent's counter-affidavit, sworn by Ms. Anatoria Gabriel, the respondent herself. She has denied

that the impending appeal carries any point of law worth determination by the Court of Appeal.

Facts constituting the basis for this application, briefly are as follows:

In 2006 the applicant instituted a matrimonial case in the Primary Court of Mkuyuni at Mwanza which was registered as Matrimonial Cause No. 65 of 2006. It was declared by the trial Primary Court that the marriage between the parties has broken down irreparably, consequently it was ordered that properties acquired together by the spouse during the marriage be distributed equally among them. Being dissatisfied by the decision, the applicant successfully instituted a land application No. 129 of 2011 in the District Land and Housing Tribunal (DLHT) at Mwanza, whereby it was ex-parte declared held *inter alia* that '*the matrimonial court never distributed the open land which is the area in dispute*' and the as a result the DLHT changed the demarcation of the land between the applicant and the respondent. The respondent was not happy with the holding, she successfully applied to set aside an *ex-parte* judgment. Again, the applicant was aggrieved by the decision he unsuccessfully appealed to the High Court in Land Appeal No. 14 of 2018. The High Court found that the respondent is the lawful owner of the disputed land because among others, the applicant has already sold his part of land

neighbouring the respondents, so he left nothing at the disputed land. Still determined to challenge the decision, the applicant is now before this court seeking a certificate on point of law to appeal to the court of appeal of Tanzania.

When the matter came up for hearing, Ms. Ndege the learned counsel appeared for the applicant while the respondent enjoyed representation of Mr. Mutatina. In her support submission, Ms. Ndege, learned advocate, contended that two points of law are extracted from the impugned decision. These are: Whether the trial Judge considered the evidence that the dispute is over a land or house; and whether the trial judge considered the evidence that the respondent has stayed in disputed land for more than 12 years.

Submitting in support of application, Ms. Ndege's contention is that, the High Court erred for holding that the whole plot is matrimonial property while in Primary Court it was never an issue. He states further that the basis all began in the decision delivered on 19/1/2018 by the DLHT where it was declared that, the disputed land is different from the land which was referred in the matrimonial cause. She urges the Court to certify that the point of law is involved so as to allow the Court of Appeal to determine whether the property is matrimonial property or otherwise

and whether the respondent had contributed to acquisition as provided under ***Section 114(1) of the Law of Marriage Act*** (RE. 2019). She supported her contention by citing the decision in the case of ***Ramadhan Muyenga vs Abdalah,*** [TLR. 1996] 74, in which it was decided that, matters which are points of law are fit cases for consideration by the Court of Appeal.

On his part, Mr. Mutatina, learned counsel for the respondent, was of the view that the application exhibits no point of law worth a certification for determination by the Court of Appeal. In respect of the first point, he took the view that it is pure evidential matter, as ownership can not be proven by law but by evidence and that duty has been discharged by the lower court.

On the second point, through which the applicant avers that lower courts have based decisions on weak evidence, he is of the view that this is the matter of evidence hence, not fit to be determined by the Court of Appeal. In supporting his submissions, he cited the decision in the case of ***Nurbhim Ruttensi vs Minister of Water Constructors Energy and Investment,*** [2005 TLR. 220]. He prays the Court to dismiss the application with costs.

In her quick rejoinder, the counsel for the applicant insisted that the Court of Appeal will not hear the evidence but it will determine who is the lawful owner based on evidence. She holds the view that the points raised are necessary for determination whether the property is personal or matrimonial property, and how did the respondent acquire the said property. He prays the application be allowed with costs.

Having heard the parties the question which arises and requires this court's determination is to whether the instant application meets the threshold requisite for certification of a point of law that warrants the attention of the Court of Appeal.

It is a settled position that appeals to the Court of Appeal that matters originating from either the Ward Tribunal or Primary Court, must undergo a process that involves ascertaining if the intended appeal carries a point of law of sufficient importance, worth of and relevant for consideration by the Court of Appeal. With respect to land matters, this requirement is provided for under ***Section 47 (3) of the Land Disputes Courts Act***, Cap. 216 R.E. 2019 which states as follows:

> *"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."*

This position of law has been emphasized in numerous decisions in this Court and the Court of Appeal. These include ***Ramadhan Muyenga vs Abdalah,*** [TLR. 1996] 74, which was cited by the applicant, ***Omari Yusufu v. Mwajuma Yusufu & Another*** [1983] TLR 29; ***Dickson Rubingwa v. Paulo Lazaro,*** CAT-Civil Application No. 1 Of 2008; ***Harban Haji Mosi & Another v. Omari Hila Seif***, CAT-Civil Reference No. 19 of 1997; ***Nurbhim Ruttensi vs Minister of Water Constructors Energy and Investment,*** [2005 TLR. 220]. and ***Marco Kimiri & Another v. Naishoki Eliau Kimiri***, CAT-Civil Appeal No. 39 of 2012 (all unreported).

In the decision of ***Abdallah Matata v. Raphael Mwaja***, CAT-Criminal Appeal No. 191 of 2013 (DDM-unreported), the Court of Appeal summarized the imperative requirement of certifying the point of law, thus:

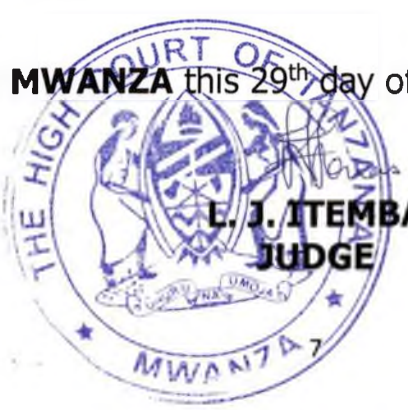
> *'In order to lodge a competent appeal to the Court, the intended appellant has to go through the High Court first with an application for a certificate that there is a point of law involved in the intended appeal. It is only when the appellant is armed with the certificate from the High Court, that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

Looking at the matter at hand, both of the proposed points of argument, raises complaints that the Court has failed to analyse evidence which was adduced by the applicant, and hold that the suit land belongs to the respondent. The first point is about failure by the trial judge to consider the evidence whether the dispute is over the land or the house. It is my considered view that this point does not pass the test set for certification on point of law since it requires proof. As to whether the trial judge has failed to consider the evidence that the respondent has stayed in disputed land for more than 12 years, first, this is completely a factual question which carries not a simplest resemblance of a point of law that can be considered for certification by this Court. Secondly, it has not been an issue for determination neither before the DLHT nor before this Court. Under those circumstances, this Court cannot allow it to be re-opened by way of an appeal to the Court of Appeal.

In the foregoing, I take the view that this application has failed the test and the same is dismissed with costs.

It is so ordered.

DATED at **MWANZA** this 29th day of July, 2022.



L. J. ITEMBA
JUDGE