

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**MUSOMA – SUB REGISTRY**

**AT MUSOMA**

**MISC. LAND APPLICATION NO 39 OF 2021**

*(Arising from Misc. Land Appeal No. 3 of 2021 of the High Court of Tanzania at Musoma, from the decision of the District Land and Housing Tribunal for Mara at Musoma in Appeal No. 60 of 2020 originating from Land Application NO. 12 of 2020 of Isenye Ward Tribunal))*

**WASHINGTON JUMA KITERA ..... APPLICANT**

***VERSUS***

**BHOKE MAKINDI ONYANGO ..... RESPONDENT**

**RULING**

1<sup>st</sup> & 21<sup>st</sup> March 2022

**F. H. MAHIMBALI, J.:**

Having lost the suit in both lower tribunals and the High Court, the applicant intends to appeal before the Court Appeal of Tanzania, the highest Court of the land. It being the land issue and the third appeal, the applicant is required under section 47(3) of the LDCA to obtain from this Court a certificate on point of law.

The applicant's points on certificate of law are two, namely:

1. Whether or not the issue of boundary between the parties involved all 3 acres in dispute
2. Whether or not the Village Council had mandate and power to allocate the land in dispute to the Respondent it had already allocated to the applicant without revocation of the first allocation.

Unfortunately, the applicant's application is brought under section 47 (1) and (2) of the LDCA, Cap 216, R.E 2019 instead of section 47(3) of the LDCA.

During the hearing of the application, the applicant was represented by Godfrey Muroba, learned advocate whereas the respondent appeared in person and fended for herself.

Submitting for the application, Mr. Godfrey Muroba learned advocate first prayed that the affidavit in support of this application be adopted to form part of this application. He further prayed to abandon the prayer for leave to appeal to CAT as it is inapplicable, instead he prayed that there be only certification on point of law to the CAT. He however, just argued the second point of certificate on point of law. Learned advocate seemed to have abandoned the first ground of certificate on point of law.

Submitting for the second ground of certification on point of law whether the village land council had mandate to allocate the same land twice to the applicant and later to the respondent after it had allocated the same land to the applicant in 2011, he argued that this is a point of law worth of determination by CAT as the applicant neither consented nor was he consulted in the said latter allocation. In support of his

argument, he referred this Court to the case of **Village Chairman KCU – Mateka vs Antony Hyera** (1988) TLR 188- where it was held that there cannot be land allocation to another person without prior consultation to the former owner. Also, in the case of **Agro Industries Ltd vs AG (1994) TLR 43**, it was held that:

- In the eyes of law be it public enterprises or private any revocation must take into account the interest of the original owner.

As the right of ownership of the said land had not been revoked from the original owner, he insisted that the village land council was not legally justified to re- allocate the same land to the subsequent owner (respondent).

The respondent on the other side just replied that this application is without any merit. It is just intended to delay the execution of the case. She thus countered the application and prayed that her counter affidavit dully deponed be adopted to form part of this submission.

Having heard both submissions, the vital question now is whether this application is meritorious as per law. In the case of **DORINA N. MKUMWA VERSUS EDWIN DAVID HAMIS**, Civil Appeal no. 57 of

2017, the Court of Appeal regarding application on certificate on point of law, emphasised that: -

*"It is therefore self-evident that applications for Certificates of the High Court on points of law are serious applications. Therefore, when High Court receives applications to certify point of law, we expect Rulings 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 point of consideration by this court, is whether this application is worth of consideration for its grant. I have considerably digested the serious arguments by the applicant's counsel and equally gone through the decision of this Court. Whereas this Court ruled that, I quote at page 5 of the judgment:

*"It is on record that, save for the first ground, the remaining grounds are new. Thus, the second, third, fourth and fifth grounds of appeal were not raised in the first appellate tribunal. The said grounds of appeal were not raised in the first appellate tribunal. The said grounds are premised on the complaint that the disputed land was unlawfully allocated to the respondent in 2012. It is the appellant's*

*contention that the land had been allocated to him in 2011. In my view, the second, third, fourth and fifth grounds of appeal are based on a question of fact, not of law which the Court can entertain without being decided upon by the first appellate tribunal. It is trite law that, save for points of law, a matter not raised during the first appellate court cannot be raised and determined in a second appeal. Similar stance was taken in **Jovet Tanzania Limited Vs. Commissioner General Tanzania Revenue Authority**, Civil appeal No.217 of 2019 (unreported) when the Court of Appeal disregarded issue which was not raised before the Tax Board and Tax Tribunal"*

The issue for consideration still triggers my head, is whether the application is meritorious. Should this Court now certify that "*Whether or not the Village Council had mandate and power to allocate the land in dispute to the Respondent it had already allocated to the applicant without revocation of the first allocation*".

Hon Kisanya, J while determining this issue, observed that it was the appellant's case that the disputed land was allocated to him by the Village council in 2011. In its endeavour to prove that fact, he called Cassian Chacha and Tongo Gombamara, members of the Nyiberekera Village which allocated the disputed land to him. It is in evidence that the appellant and his witnesses deposed that the land that was allocated

to the appellant (disputed land) was virgin land (forest) and cultivated land. However the both lower tribunals were of the findings that the appellant's witnesses failed to show the boundaries of the land that was allocated to him (the appellant).

On this the High Court (kisanya, J) after having observed that much, he ruled:

*"Upon alleging that the disputed land was allocated to him by the village Council, the appellant was duty bound to prove that fact., including the boundaries of the land allocated to him by the village council. He failed to prove that fact, because the witnesses who are said to have allocated him the said land, failed to show its boundaries. On the other hand, the respondent's evidence including boundaries of the disputed land was supported by his witnesses."*

With this finding, is there an issue of double allocation as alleged worth of determination by the Court of Appeal? What is evident in record, is an issue of fact as who between the applicant and the respondent is the rightful owner of the disputed land? This has been deliberated from the Ward Tribunal to the High Court and it is settled by evidence that the respondent's case is weightier. Forwarding this matter to the Court of Appeal on matters of facts is to make this Court (High Court) act as a conduit pipe to allow whatsoever the intending appellant



proposes as point of law to be perfunctorily forwarded to the Court as point of law. in the circumstances of this matter, I don't see any point of law for the certification to the Court of Appeal.

From the foregoing, the application is dismissed with costs. There is nothing of point of law worth of determination by the Court of Appeal.

It is so ordered.

DATED at MUSOMA this 21<sup>st</sup> day of March, 2022.



F. H. Mahimbali

JUDGE

**Court:** Ruling delivered his 21<sup>st</sup> day of March, 2022 in the presence of both parties and Mr. Gidion Mugoa – RMA.



F. H. Mahimbali

JUDGE

21/03/2022