

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

MISC.LAND APPLICATION NO.65 OF 2022

*(Arising from Misc. Land Appeal No.30 of 2020 in the High Court of Tanzania at Arusha,
originating from Land Appeal No.25 of 2017 in the District Land and Housing Tribunal for
Mbulu and Land Dispute No.2 of 2017 of Dongobesh Ward Tribunal)*

BETWEEN

PASCHAL MATHIAS (as Personal Legal representative

of the late Mathias Kasmiri) **APPLICANT**

VERSUS

JOHN GWALTU..... **RESPONDENT**

RULING

Date of last Order 20th September, 2022

Date of Ruling 20th September, 2022

MALATA, J

The Applicant, Paschal Mathias (as Personal Legal representative of the late Mathias Kasmiri), filed Misc. Land Application No. 65 of 2022 against John Gwaltu, the Respondent praying for certification of existence of point of law under Section 47(3) of the Land Disputes Courts Act, Cap. 216 [R.E 2019], thence, appeal to the Court of Appeal. The Application arose from the Judgement of the High Court of Tanzania in Misc. Land Appeal No. 30 of 2020 delivered on 11th April 2022. The Applicant was aggrieved by the said Judgement which dismissed Misc. Land Appeal No. 30 of 2020 arising from



Land Appeal No. 25 of 2017 of the District Land and Housing Tribunal for Mbulu and Land Dispute No. 2 of 2017 of Dongobesh Ward Tribunal.

The Application was preferred by way of Chamber Summons supported by sworn Affidavit by Paschal Mathias (as Personal Legal representative of the late Mathias Kasmiri). The gist of the complaint is that, the High Court of Tanzania refused to accord weight to the raised ground of appeal touching legal issue that, during trial there was a change and alternating Members, thus, fatally affecting the proceedings of Dongobesh Trial Ward Tribunal. This is echoed from the Applicant's Affidavit supporting the prayer for certification of existence of point of law, in particular paragraphs 7, 8 and 9. The relevant paragraphs depict;

7. That, in the said additional ground, the Appellant challenges the propriety of the proceedings and decision of the trial Ward Tribunal due to change and alternating quorum of members of the trial Ward Tribunal. Some of the members have even participated in writing decision of the Ward Tribunal despite the fact that they have not participated in hearing witnesses.

8. That, irregularity in respect change and alternating members of the trial is pure a matter of law that affects jurisdiction of the trial Ward Tribunal. In the same way it affects the decision of trial Tribunal and the rights of the parties.

9. That, the judgment of the Court in the impugned Misc. Land Appeal No. 30 of 2020 escaped discussing the irregularity in respect of change and alternating quorum as a matter of law



which touches jurisdiction of the trial Tribunal instead concentrated on concept that the High Court being the second appellate is debarred to deliberate on ground not raised and discussed in the first appellate Tribunal.

The Respondent, on the other side, is in disagreement with the Applicant's assertion thence, filed counter affidavit opposing the Application by stating that, he disputes the facts deponed by the Applicant. In response to paragraphs 7 and 8 of the Applicant's Affidavit, the Respondent stated in paragraph 4 of the Counter Affidavit as follows;

That, the contents of paragraphs 7 and 8 of the Affidavit are disputed and the Applicant is put to strict proof.

On 20th September, 2022 at 9.00 am, the parties appeared before me through their Advocates and the matter proceeded for hearing as per the schedule. Amplifying, what is stated in the Applicant's Affidavit, Mr. Bungaya Panga, Advocate for the Applicant submitted in nutshell that, the Applicant has through paragraphs 6, 7 and 8 of the Affidavit raised pure point of law warranting determination by the Court of Appeal. The point of law touches jurisdiction and has the effect of vitiating the Trial Ward tribunal decision and proceedings as changing or alternating the Members is legally untenable in law.

Finally, the Counsel prayed for certification of the raised point of law to enable the Applicant appeal to the Court of Appeal. As to the issue of cost, the counsel was of the view that, there is no need to grant costs as this was just an Application for determination of point of law.



In reply thereof, Mr. Bashir Mallya, Advocate for the Respondent, submitted that, there is no point of law which has been raised by the Applicant to warrant certification by this Court, thence, allow the Applicant appeal to the Court of Appeal. Further, he was of the view that, since the purported point was not raised at the first Appellate stage, then, it cannot be entertained in any way at the second appellate level.

To cement the argument he cited the case of ***Simon Godson Macha (Administrator of the Estate of the late Godson Macha) v. Mary Kimambo (Administrix of the Estate of the late Kesia Zebedayo Tenga)***, Civil Appeal No.393 of the 2019 (unreported) in which the Court of Appeal held that; *"as a second Appellate Court, we cannot adjudicate on the matter which was not raised as ground of appeal in the first Appellate Court"*. He also referred the court to the case of ***Abdul Athuman V. Republic*** (2004) TLR 151 bearing the same principle. Finally prayed for dismissal of the Application with costs.

In the first place, certification on the points of law on cases originating from the Ward Tribunal such as the present one is governed by Section 47(3) of the Land Disputes Courts Act. Cap.216 R.E.2019 which provides:

"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".

The above provision provides for mandatory procedure of obtaining certificate from the High Court that a point or points of law are involved in the matter for the determination by the Court of Appeal. In the case of ***Jerome Michael v. Joshua Okanda***, Civil Appeal No. 19 of 2014, Court of Appeal of Tanzania



at Mwanza, (unreported) principled inter alia that, the purpose of certificate on a point of law is to ensure that deserving cases only reaches the Court of Appeal. The same principle was propounded by the Court of Appeal in the case of ***Ali Vuai Ali v. Suwedi Mzee Suwedi*** [2004] TLR 110, where it held that;

"The exercise is therefore a screening process which would leave for the attention of the Court only those matters of legal significance and public importance."

Lastly, in the case of ***Mohamed Mohamed and Another v. Omar Khatibu, Civil Appeal No. 68 of 2011, Court of Appeal of Tanzania at Zanzibar***, (Unreported), the Court of Appeal cemented that: -

".....A point of law worthy being certified for our decision would be, for instance, where there is novel point, where the point sought to be certified has not been pronounced by this Court before and is significant or goes to the root of the decision, where the Court below misinterpreted the law, etc. In this sense a mere error of law will not be a good point worthy the certificate."

From the above cited cases, it is with no iota of doubt that, among the issues to be taken into consideration by the High Court includes; matters of legal significance and public importance, existence of a novel point; where point sought to be certified has not been pronounced by this Court before and is significant or goes to the root of the decision or where there is complaint that this Court misinterpreted the law.

It is pertinent, to say that, the legal duty of certifying the existence of point of law fall within the exclusive domain of the High Court. This position was well articulated by the Court of Appeal in the case of ***Eustace Kubalyenda v. Venancia Daudi***, Civil Application No.70 of 2011 where it held, *inter alia*, that;

".....But it is the High Court only which has been granted exclusive jurisdiction to certify to the Court that a point or points of law is or are involved in the impugned decision or order...."

In the present case, the Applicant has demonstrated in paragraphs 6, 7, 8 and 9 of the Affidavit, the existence of point of law worth determination by the Court of Appeal. Having considered the Affidavits and rival submissions from both sides, it is clear that, ***first***, the Respondent failed to evidentially counter the Applicant's facts on existence of point of law but simply stated that, the Applicant to strict put to proof, ***second***, the referred Judgement by Respondent has bearing in a situation where the issue at hand is not rooted from a point of law as opposed to the one at hand, ***third***, the Applicant's position was evidentially and legally unchallenged by the Respondent.

Notwithstanding the afore stated shortfalls, this Court has duty of ascertaining, on whether there is a point of law raised by the Applicant calling for determination by the Court of Appeal in compliance with Section 47(3) of the Land Disputes Courts Act, Cap. 216 [R.E 2019]. The answer is in affirmative. This Court is satisfied beyond sane of doubt that, the Applicant has established a point of law worth determination by the Court of Appeal,



that is to say, *whether the absence of continuity and alternating members from the commencement of the trial was fatal to the proceedings.*


It is decided, therefore, that, the Applicant's point of law raised in paragraphs 6,7, 8 and 9 of the Affidavit is accordingly certified for determination by the Court of Appeal in terms of Section 47(3) of the Land Disputes Courts Act, Cap. 216 [R.E 2019].

Since, this Application is for certificate on point of law to appeal to the Court of Appeal, this Court rules that, each party bears its own costs.

It is so ordered.

DATED at ARUSHA this 20th September,2022




G. P. MALATA
JUDGE
20/9/2022