

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

**[IN THE DISTRICT REGISTRY OF ARUSHA]**

**AT ARUSHA**

**MISC LAND APPLICATION NO. 84 OF 2022**

*(C/F High Court Misc Land Appeal Case No. 35 of 2020, originating from District Land and Housing Tribunal for Mbulu Land Appeal No. 95 of 2017 and Application No. 24 of 2017 from Bargish Ward Tribunal)*

**MARTINA JOAKIM DUKHO.....APPLICANT**

**VERSUS**

**BAHATI TLUWAY.....RESPONDENT**

**RULING**

28 & 29 September, 2022

**KOMBA, J**

This is a ruling in respect of an application for certificate that there is point law to be considered by the Court of Appeal of Tanzania. Martina Joakim Dukho is an applicant who was represented by Advocate Victor Bernard and Bahati Tluway, respondent enjoyed the service of Mr. Omary Gyunda.

Applicant who was the respondent in Bargish Ward Tribunal (Application No. 24 of 2017) successfully recovered a piece of land which was in dispute. Being dissatisfied, Applicant appeal to District Land and Housing Tribunal for Mbulu, at Ndongobeshi (Land Appeal No. 95 of 2017) where lost the appeal and decide to appeal to High Court Arusha Registry where the appeal was

found to have no merit hence this application seeking the way to Court of Appeal.

The application by chamber summons was made under Section 47(2) and (3) of the Land Disputes Courts Act, [Cap 216 R. E. 2019] and supported by affidavit of Martina Joakim Dukho. In chamber Summons the applicant is asking for the following orders;

- a) That this Honourable Court be pleased to certify that there is a point of law worth consideration by the Court of Appeal of Tanzania against decision of this Court in Misc Land Appeal Case No. 35 of 2020 on 3<sup>rd</sup> June, 2022 before M.G. Mzuna, J.*
- b) That, this Honourable Court be pleased to leave to the applicant to file an Appeal Court of Appeal of Tanzania against decision of this court in Misc. Land Appeal Case No. 35 of 2020 delivered on 3<sup>rd</sup> June, 2022 before M.G. Mzuna, Judge.*
- c) Costs of this application be provided for.*

Gist of the complaint is that, the High Court erred in upholding decision of trial court which was erroneously arrived following the failure to evaluate evidence, fail to observe the composition of Ward Tribunal and the position of the applicant over the disputed piece of land. This is rebounded from the applicant's affidavit supporting the prayer for certification of existence of

point of law. The same was adopted during submission when the application was called for hearing.

Mr. Victor when seeking the intervention of Court of appeal said there was a contradictory in the judgement of Ward tribunal as applicant in claim sheet declared that respondent invaded the disputed land in 2008 while during hearing one witness said respondent started the dispute in 2013 and that respondent did not testify in Ward tribunal and the disputed area has no demarcation. On the second ground about composition of the tribunal while making decision, that he has no problem with the composition rather a quorum while making decision and refer this court to S. 14 of CAP 216 and the **case of Mwita Wiranga V. Pilly Sincha**, Msc Land Appeal No. 70 of 202 at page 3 that the issue of composition is important as it goes to the root of the case. The tribunal include secretary in making decision who is not a member but employee. He refers again the case of **Akonaay Tsere V. Martin Qamara**, Misc land Appeal No. 89 of 2017 which discussed whether the secretary is a member of the tribunal and concluded that he was not a member. He said for this reason it was his prayer that this court certify existence of point of law.

On the last ground Mr. Victor said apart from the respondent failure to make appearance during hearing, she failed to show her position over the disputed land as she said the property belongs to her father who now is deceased. He said the heir does not have automatic right and refers the case **of Benson Elikama Mafuwe V. CRDB and Others**, Land case No. 66 of 2018 in which it was said if the owner died the heir cannot have locus if the probate is not opened and appointed.

Resisting certification as requested, Mr Omary was of the argument that application has two prayers. What he knows is that certificate and leave to appeal are two different things which cannot be sought in a single application as it was in the case of **Mlay V. Rashid Majid Kasenga, Civil App No. 354/17 of 2020 Court of Appeal of Tanzania**

He proceeds to submit on whether grounds raised qualify to be point of law starting with the first ground which is about contradictory evidence and is purely not point of law to be determined by the Court of Appeal as the judgement of Ward tribunal is not contradictory. The left two grounds were submitted jointly that they were not determined by the High court in Misc Civil Land case appeal No.35 of 2020 which is the subject of these appeal. At paragraph 2 of page 2 of the judgement it is clear that was made in

exclusion of ground (b) and (c ) he said applicant was not supposed to claim this as was not determined by the High Court. Mr. Omary was of the view that applicant ought to ask whether the High Court to reject this ground was proper instead of sending them as if they were determined.

Mr. Omary had further submission just in case the court finds the two grounds to be correctly. I will narrate his submission over two grounds later and rejoinder from Mr. Bernard; let me first analyze what has been presented.

The applicant filed the application under section 47 (2) and (3) of Cap.216 R.E.], which requires him to obtain a certificate that a point of law is involved in the intended appeal. It stipulates that-

*"47 (2) A person who is aggrieved by the decision of the High Court in the exercise of its revisional or appellate jurisdiction may, with leave of the High Court or Court of Appeal, appeal to the Court of Appeal.*

*(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."*

The duty of this Court under above cited law is to scrutinize or critically consider whether there are issues or points of law to be dealt by the Court

of Appeal. In essence, applications on certification on points of law are serious applications. It is not expected there to be a certification on points of law worth of determination by the Court of Appeal in the absence of serious deliberation of the same.

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, emphasized 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. "*

Having heard both submissions, the vital question now is whether this application is meritorious as per law. Ground of application as narrated in sworn affidavit of Martina Joakim Dukho at paragraph 7 was;-

*a) Whether, the second Appellate court was justified to declare that the first Appellate tribunal was correct to hold that the trial tribunal did not*

- error in law and in fact for failing to evaluate evidence hence erroneously appreciate the contradictory evidence of the trial tribunal.*
- b) Whether, the second appellate court was correct to hold that the first Appellate tribunal did not error in law for failing to appreciate that the trial Ward Tribunal was not properly constituted when determining Application No. 24 of 2017 and included the tribunal secretary in the decision making.*
- c) Whether, the second appellate court was correct to hold that the first Appellate tribunal was right to establish that the trial tribunal did not error in law and in fact for failing to understand that the Respondent herein had no locus stand to claim for disputed land.*

Starting with the first ground which in Paragraph 7 (a) of affidavit, about the alleged contradictory evidence from the judgement of ward tribunal. Mr. Omary said the applicant has failed to show how the judgement of Ward tribunal is contradictory. The issue that respondent did not raise claim in 2008 and claimed the same in 2013, the determination of validity of respondent claim does not amount to contradiction and is not point of law. I am joining hands with Mr. Omary that failure to evaluate evidence is not a point of law to be certified, is purely a matter of evidence, which need not be considered.

On the second issue, Mr Omary said the issue was not determined in merit because it was raised at second appellate stage. This is clear from page 2 of the judgement of this court in Land Case appeal No. 35 of 2020 that the issue involvement of the Secretary of Ward tribunal was not raise at the appellate stage hence is not possible to be entertained at the second appeal and therefore it cannot be certified worth to be determined by Court of Appeal. Whereof, I find no merit in this ground.

The last issue on *locus stand* of the respondent over the disputed land, as observed by this court while entertaining the second appeal that, so far as the same was not raised in the first appeal, the applicant is bared from raising it during the second bite appeal hence worthless to be forwarder for further consideration.

In the case of **Magige Nyamoyo Kisinja v. Merania Mapambo Machiwa** Civ. Appeal No. 87/2018. Court of Appel had this to say-

*"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.*

From the above analysis, I find not point of law in this application worth certified for determination by the Court of Appeal. For that reason, I dismiss the entire application with costs.

Right of appeal explained.

  
**M. L. KOMBA**

**JUDGE**

**29/09/2022**

Ruling delivered in this 29<sup>th</sup> the September, 2022 in chamber in the presence of parties.



  
**M. L. KOMBA**

**JUDGE**

**29/09/2022**

