

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

**IN THE DISTRICT REGISTRY**

**AT MWANZA**

**MISC. LAND APPLICATION NO. 99 OF 2021**

*(Arising from ruling and extract Order of High Court of Tanzania at Mwanza in Misc. land application No. 30 of 2021. Originating from the District Land and Housing Tribunal for Mwanza at Mwanza in Misc. Application No. 54 of 2009 and Misc. Application No. 241B of 2019.)*

**HASSAN KAPULI..... APPLICANT**

**VERSUS**

**ASHA MAGOTI MAGERE**

**(Administratrix of the estate of the late Hamis Asilio) ..... 1<sup>st</sup> RESPONDENT**

**KARAMA SALEHE MANSOOR.....2<sup>nd</sup> RESPONDENT**

**ROCK CITY TAKERS LTD.....3<sup>rd</sup> RESPONDENT**

**RULING**

*3<sup>rd</sup> August & 4<sup>th</sup> November, 2022*

**ITEMBA, J.**

The applicant herein intends to move the Court to certify that points of law, worth a consideration by the Court of Appeal of Tanzania, exist in the appeal that he intends to file. The impending appeal is against the decision of this court (Hon. Rumanyika, J.) that nullified the proceedings of the lower Tribunals and ordered the 1<sup>st</sup> respondent if still interested to pursue the matter to institute a case before the lower court with competent jurisdiction. In the applicant's thinking, the decision by the court is faulty. The application has been preferred under the provisions of ***Section 47 (3) of the Land Disputes Courts Act***, Cap. 216 R.E. 2019.

It is supported by an affidavit of Mr. Hassan Kapuli, the applicant, and it sets out grounds on which the application is based.

Opposing the application is the 1<sup>st</sup> respondent through a counter-affidavit, by Ms. Asha Magoti Magere, while Karama Salehe Mansoor, the 2<sup>nd</sup> respondent is supporting the application.

Facts constituting the basis for this application are gathered from the supporting affidavit and proceedings, briefly are as follows: -

In 2009 at Pasiansi Ward Tribunal, Mr. Hassan Kapuli, the applicant herein was declared a winner against Hamisi Asilio (the then respondent), in land application No. 30 of 2009. The record reveals further that, the genesis of the dispute began when respondent while constructing a pit latrine damaged the applicant's house which is adjacent to the said toilet. The applicant has reaped the fruits of his decree through auction. On 8<sup>th</sup> May 2019 the 1<sup>st</sup> respondent passed away something which necessitated Ms. Asha Magoti Magere to step in as administratrix of the estate of her late husband, through a number of different applications in the District Land and Housing Tribunal, she has tried to challenge the validity of her eviction from her matrimonial house which is in vain. She never gave up, through application for revision No. 30 of 2021 in the High court, the proceedings of the both Ward and the District Tribunals were nullified and

quashed. The applicant is unhappy he is still determined to pursue his right in the Court of Appeal, he is now before this court seeking certificate on point of law.

When the matter came up for hearing, Mr. Emmanuel John the learned advocate appeared for the applicant while the 1<sup>st</sup> respondent enjoyed professional representation of Mr. Victor Karununa and Mr. Steven Makwega counsel appeared for the 2<sup>nd</sup> respondent. Mr. Emmanuel, told this court that the applicant applies for a certificate on point of law against the decision of this court, Rumanyika, J, in Miscellaneous Land Application No. 30 of 2021. He referred this court to paragraph six of the supporting affidavit which contains the grounds upon which this application is rested.

Mr. Emmanuel was brief and focused in the grounds of application with regard to the first ground, he submitted that the Miscellaneous Application No. 30 of 2021 was omnibus whereby the applicant had applied for both extension of time and revision. That the Honourable Judge started determining the merits of the application without first extending time. It was counsel's opinion that the Judge ought to have extended time first before determining the merits of the application.

On the second ground, the learned Advocate for the applicant referred this court to page five of the impugned decision contending that

the Judge extended time without assigning any reason as to why he did so. The learned Counsel is of the strong view that in granting such an application, the court needs to explain the grounds for extension.

In the third ground, it was his submission that it was not proper for the court to adjudicate the application as execution had already been done a long time ago.

The fourth ground contains a complaint that it was not legally possible to challenge auction and sale of the house in revision. That if a party is aggrieved by auction and sale, the remedy is to set aside the said sale and auction as provided under the Civil Procedure Code, Rule 21(9).

On the fifth ground, he faults the Judge for terming the dispute as tort which was not an issue determined by the lower courts.

Submitting on the sixth ground, counsel stated that it was not legally correct to discuss evaluation report which was not produced in executing court. Revision goes in proceedings and not in lower courts exhibits which were not tendered. He lastly prayed that the application be granted with costs.

In his reply, the first respondent stated right on the outset that he sees no point of law to be certified to the Court of Appeal of Tanzania as the court properly revised the District Land and Housing Tribunal decision and rightly nullified and quashed the two tribunals' proceedings.

Replying to the first ground of application, he stated that the Judge was right to start with the merit of the application. That since the main issue was whether the District Land and Housing Tribunal was proper, with or without the extension of time, merit of the application was important.

On the second ground of application, his reply was simply that the Court was justified to extend time.

On the third ground it was his reply that even if execution was done but it was based on illegalities, it was proper to determine it as the case was on tort not civil.

Responding to the fourth ground, counsel stated that it was correct to challenge auction and sale because they originated from tort case which sale and auction must have been nullified.

On the fifth ground, the counsel insisted that it was proper to term the dispute as tort as the Ward Tribunal case was based on tort, thus the Judge was justified. With regard to the respondent act of building of a toilet, he stated that the same was a tort cause of action.

As for the sixth ground, it was the reply by the first respondent that the appellate Judge was justified as he needed to check the jurisdiction of the court. The value of the case was Tshs 50,000,000/= according to

page five of the judgment. He lastly prayed for the application to be found without merit.

Mr. Makwega, counsel for the second respondent was supported the application by the applicant.

On the first ground he was of the opinion that for the court to entertain revision in an omnibus application, it should have extended time first and then it would have jurisdiction to hear revision. That as the appellate Judge started with hearing the merit first, it was not proper in the eyes of the law. He referred to the Application No. 30 of 2021 in which the applicant had applied for extension of time but at page five of impugned ruling the paragraph was very brief in respect of granting the extension of time. He made it clear that he is aware that the court had discretion but the applicant had not shown grounds for the delay. He insisted that extension of time is not a gift. He stated further that as there were no grounds given, even the opponent is limited with an avenue to challenge that decision as there are no grounds to challenge.

In the third ground, the learned counsel submitted that the decision by Hon. Rumanyika, J, was given on 30/09/2021 and by then the ownership of the dispute land had already passed hands from the deceased Hassan Kapuli to Karama Mansoor (2<sup>nd</sup> Respondent) through an auction done by the third respondent. That a long time had passed from

the sale and the dispute is now between strangers, who are, 2<sup>nd</sup> and 3<sup>rd</sup> respondents.

He submitted further that since execution was already done and there was no challenge on the sale, then the said sale was absolute and it was not proper to challenge the same through revision application.

On the fifth ground, he replied that it is clear from the pleadings from the ward tribunal, District Land and Housing Tribunal to the High Court, that the dispute was on borders between Hassan Kapuli and the family of Hamis Yashi that one person built a toilet after trespass. It was his opinion that there were two options either to sue for tort or land dispute. That as the parties chose to institute a land dispute, they filed the same before the ward tribunal which later issued a decision which was not appealed against with regard to the competency of the tribunal.

He added further that what was instituted before the DLHT was execution and not appeal and the District Land and Housing Tribunal ordered the sale of the house in question. He was of the view that as the matter of whether or not the dispute was tortious or land was not conversed in the lower tribunals, it was not right for the Appellate Judge to raise the issue at the level of second appeal. He stated that principally the trial court mislead itself and thus there is a need for attention of the Court of Appeal.

On the last ground, he submitted that the sale price is determined by the market price. That the price issued by the 2<sup>nd</sup> respondent was the market price. He was of the view that had the 1<sup>st</sup> respondent complained about the legality of the auction, then the court could have determined on the procedure. It was his conclusion therefore that the 1<sup>st</sup> respondent was satisfied with the sale.

In the end, he did not raise a prayer for costs as he admitted knowing the financial status of the applicant.

The applicant had no any rejoinder but he waived his prayer for costs that he had made earlier.

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, in respect of matters originating from either the Ward Tribunal or Primary Court, must undergo a scrutinizing process that involves ascertaining if the intended appeal by the losing party 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 is 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 instant application, while the 2<sup>nd</sup> respondent supports the application that the court went overboard in giving out orders which were never pleaded or submitted on by the parties, the 1<sup>st</sup> respondent contends that everything was quite clear. Without going into details on which party, between the parties is right, my duty at this stage is to determine whether the application has raised serious issues of legal significance which constitute a point of law, eligible for consideration by the Court of Appeal, through the impending appeal.

Starting with the first ground, according to the chamber summons filed at this court in Land Application No. 30/2021 indeed, the respondent had applied for both extension of time and Revision. According to the impugned ruling, the court granted both extension of time and Revision. I find it a valuable point of law for the court to determine which application should have been dealt with first between the two. In second ground, the

case laws have provided for the procedure to grant extension of time, whether the trial court complied with or not is also an issue which is worth certifying as a point of law.

Thirdly, it is in records that at the Ward Tribunal and District Land and Housing Tribunal, there was a land dispute between the parties but at the High Court it was termed as Tort liability. I find this is also a point of law worth to be certified. Regarding the remaining grounds, I find them requiring evidence which might have led the trial court to a different opinion. Accordingly, I certify the following as points of law to be determined by the Court of Appeal of Tanzania.

- 1. Whether in an omnibus application, it was proper to adjudicate the merits of application for Revision without first determining the application for extension of time.*
- 2. Whether it was lawful to grant extension of time without stating the grounds, thereof.*
- 3. Whether it was lawful to term the dispute between the parties as tort.*

Consequently, I find merit in the application and I grant it as prayed.

Costs to be in the cause.

It is so ordered.

DATED at **MWANZA** this 4<sup>th</sup> day of November, 2022.

