

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(BUKOKA DISTRICT REGISTRY)**

AT BUKOKA

MISC. LAND APPLICATION NO. 81 OF 2021

(Arising from Land Appeal No. 83 of 2020 in the High Court of Tanzania at Bukoba; Appeal No. 152 of 2016 in the Bukoba District Land and Housing Tribunal and Originating from Civil Case No. 01 of 2016 in Ibwera Ward Tribunal)

ALOIS BENEDICTO RUTAIHWA.....APPLICANT

VERSUS

JOACHIM THADEO.....1ST RESPONDENT

JULIANA JOACHIM THADEO.....2ND RESPONDENT

EDITHA JOACHIM THADEO.....3RD RESPONDENT

ARISTIDES JOACHIM THADEO.....4TH RESPONDENT

FORTUNATUS JOACHIM THADEO.....5TH RESPONDENT

PRISEUS JOACHIM THADEO.....6TH RESPONDENT

VEDASTINA JOACHIM THADEO.....7TH RESPONDENT

RULING

Date of Last Order: 22/03/2022

Date of Ruling: 22/04/2022

A.E. Mwipopo, J.

This is an application for certification on the point of law and grant of leave to appeal to the Court of Appeal against the decision of this Court dated 16th July, 2021 in Misc. Land Case Appeal No. 83 of 2020. The application was filed by Chamber Summons supported with Affidavit sworn by the applicant namely Alois

Benedicto Rutaihwa. In the said Chamber Summons, the applicant is praying for the following orders:-

- i. That, the Hon. Court be pleased to grant the applicant leave to appeal to the Court of Appeal of Tanzania against the whole judgment and decree of the High Court of Tanzania (N.N. Kilekamajenga, J.) dated 16th July, 2021 in Misc. Land Appeal No. 83 of 2020;*
- ii. That, the Hon. Court be pleased to certify that point of law are involved in the decision delivered at Bukoba by Hon. N.N. Kilekamajenga, J. on 16th July, 2021 in Misc. Land Appeal No. 83 of 2020 which require to be considered and put right by Hon. Court of Appeal of Tanzania.*
- iii. Cost of the application be provided for; and*
- iv. Any other reliefs as the Hon. Court may deem just to grant.*

This matter originates from the decision of the Ibwera Ward Tribunal in Civil Case No. 01 of 2016, where the applicant namely Aloys Benedicto Rutaihwa, who is the executor of the estates of the late Benedicto Joseph Rutaihwa, filed in the Iberwa Ward Tribunal application for the right of way (Eilembo) against the respondents namely Joachim Thadeo, Juliana Hoachim Thadeo, Editha Joachim Thadeo, Aristides Joachim Thadeo, Fortunatus Joachim Thadeo, Priscius Joachim Thadeo and Vedastina Joachim Thadeo. The applicant alleged that the respondents eliminated and closed the pathway [Eilembo] which is the entrance to the applicant's residence. The trial Ward Tribunal delivered its decision in favour of the respondents. The applicant unsuccessfully appealed to Bukoba District Land and Housing Tribunal which dismissed the appeal. The applicant was aggrieved by

the decision of the District Land and Housing Tribunal decision and appealed to this Court in Misc. Land Appeal No. 83 of 2020. The High Court did find the appeal devoid of merits and dismissed it with cost. The appellant was not satisfied with the decision of the High Court and filed Notice of Appeal, a letter applying for a copy of proceedings and this application for certificate on point of law and leave to appeal to the Court of Appeal.

On the hearing date the applicant appeared in person and was represented by Mr. Bernard Mbakileki, Advocate. The Court received information that the 1st, 2nd and 4th respondents are deceased, whereas, the 3rd, 5th, 6th and 7th respondents were present in person. As the heirs of the deceased lands, which is the suit land in this matter, are present as respondents in this case, the Court decided to proceed with hearing of the application.

The counsel for the applicant submitted that the High Court and other tribunals erred to hold that the applicant failed to prove his right over the Pathway ("eilembo"). There is sufficient evidence to prove the presence of the right of pathway and there was case law in support of the position. The pathway has been there for more than 20 years and all courts did not consider this. This is point of law which need to be certified for the purpose of appeal to the Court of Appeal.

The counsel added that the composition of the Ward Tribunal was not proper as the quorum was not met. He said this is another point of law to be certified. He

cited the case of **Suleiman Mihabi v. Sunny Autoworks**, Misc. Civil Application No. 89 of 2019, High Court at Arusha, (unreported), at page 7, to support his argument.

The 3rd, 5th, 6th and 7th respondents said that they have no objection to the application.

In the present matter the issue for determination is whether this application for certification of point of law and leave to appeal to the Court of Appeal has merits.

As a general law, the party who appeal to the Court of Appeal on land matters which originates from Ward Tribunal must obtain the certificate on point of law and leave to appeal in the High Court. This is provided under section 47 (1) and (2) of the Land Disputes Courts Act [CAP. 216 R.E.2019]. The said section provides as follows hereunder:

"47 (1) Any person, who is aggrieved by the decision of the High Court (Land Division) in the exercise of its original, revisional or appellate jurisdiction, may with the leave from the High Court (Land Division) appeal to the Court of Appeal in accordance with the Appellate Jurisdiction Act.

(2) 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 (Land Division) certifying that there is a point of law involved in the appeal."

The above cited provision provides for mandatory procedures to be followed by the person aggrieved by the decision of the High Court to access the Court of Appeal for a third appeal in land disputes which originates from the Ward Tribunal. The said procedures is to obtain certificate from the High Court that a point or points of law are involved in the matter and the leave to appeal to the Court of Appeal. The Court of Appeal was of similar position in the case of **Jerome Michael v. Joshua Okanda**, Civil Appeal No. 19 of 2014, Court of Appeal of Tanzania at Mwanza, (unreported).

The purpose of certificate on a point of law is to ensure that deserving cases only reaches the Court of Appeal. This was stated by the Court of Appeal in the case of **Ali Vuai Ali v. Suwedi Mzee Suwedi [2004] TLR 110** at page 120. It was held that, I quote;

"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."

From the above cited case, the Court of Appeal said that point of law to be certified in the screening process are those matters of legal significance and public importance.

Other matters which qualifies to be point of law to be certified includes matters of legal significance and public importance, the novel point of law, 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 and where the Court below misinterpreted the law. These matters were stated by the Court of Appeal 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 in the above cited case held 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."

In the present case, the applicant have two points of law as they are envisaged in his affidavit. The applicant first points of law is that the 2nd appellate Court (High Court) failed to correctly adjudicate on trespass committed by the respondents into appellant's late father's "eilembo" as per weighty evidence adduced by applicant and his witnesses, though uneven-handedly recorded in the record of proceedings of the trial Tribunal vis-à-vis the respondents side by which the appellate Tribunal and the second appellate Court ought to have quashed and set aside incorrect decision of the trial Tribunal but failed to do so and the two

appellate Courts have wrongly made concurrent findings that the applicant failed to prove his case against the respondents. The second point of law to be certified is that first two appellate Courts failed to nullify the decision of trial Ward Tribunal (Ibwera Ward Tribunal) due to its failure to meet the quorum at some of the sessions during hearing and reliance on hearsay evidence. The said points of law are found in paragraph 11 and 12 of the applicant's affidavit.

On the first point of law to be certified for the intended appeal to Court of Appeal, the counsel for the applicant said that the High Court and other tribunal erred to hold that the applicant failed to prove his right over the Pathway ("eilembo"). That there is sufficient evidence to prove the presence of the right of pathway and there was case law in support of the position as the pathway has been there for more than 20 years and all courts did not consider this. Upon perusal of the record of this case, I found that all land Courts in this matters considered the issue of the presence of alleged eilembo in the suit land. Their conclusion was that the respondents' evidence is heavier than that of the applicant as result they find that the applicant failed to prove his claims. Thus, it is not true that the issue was not considered by the land Courts including this Court.

Further, the said first point of law to be certified appears to be matter of facts and not point of law as it is alleged by the applicant. This is seen in paragraph 11 and 12 of the applicant's affidavit where he clearly states that he was aggrieved

by the failure of both Courts to adjudicate on the trespass as per weighty evidence adduced by the applicant and his witnesses vis – a - vis respondents side. It is a trite law that the access to appeal to the Court of Appeal in the matter originating from Ward Tribunal is on point of law only and not on points of facts. Thus, the Court finds this first point to be certified for intended appeal to the Court of Appeal is a matter of facts not worthy for certification of this court and for that reason it is not certified.

The applicant's second point to be certified as it is found in paragraph 11 of his affidavit is that the composition of the Ward Tribunal was not proper as the quorum was not met and that all Courts in this dispute relied on hearsay evidence. Even though the said improper composition of the trial Ward Tribunal was not mentioned in the applicant's affidavit or the submission, I find it in the applicant's submission before first appellate Tribunal and in the decision of the appellate Tribunal. The applicant alleged in his appeal before District Land and Housing Tribunal that the composition of trial Ward Tribunal did not meet the quorum on several dates during trial. He said that on 24.02.2016 only three members of the trial Ward Tribunal were present, on 30.03.2016 the record does not show the members who were present, on 27.04.2016 three members were present, on 01.06.2016 only two members were present and on 25.08.2016 only two members were present.

I have perused the said proceedings of the Ibwera Ward Tribunal. The record show that on 24.02.2016 there is no quorum recorded and only the applicant appeared before the trial Ward Tribunal. For that reason the matter was adjourned to 30.03.2016 in order for both parties to be notified. Thus, nothing proceeded on 24.02.2016. On 30.03.2016 the quorum shows that 4 members of the trial Tribunal were present namely Leoncia Leonard, Rashid Hamis, Christina Paskale and Scalion John (Chairman) and the hearing of the case commenced. The same members were present when hearing proceeded on 27.04.2016 and on 01.06.2016 when trial Ward Tribunal visited the locus in quo. The record shows that the same members drafted the judgment delivered on 25.08.2016. Thus, the quorum of the trial Ward Tribunal was proper as four (4) members of the Tribunal were present throughout during trial and the same members composed the Judgment.

On the issue that there is hearsay evidence which all land Courts in this case relied in reaching its decisions, the said hearsay evidence was not mentioned for the Court to be in position to weigh if the alleged hearsay evidence relied by Courts in this matter is point of law worthy of being certified for the Court of Appeal decision. The absence of the alleged hearsay evidence means that this Court is not in position to weigh if the said point is worth to be certified. Thus, this point is not sufficient to be certified for appeal purpose to the Court of Appeal.

Therefore, I find that the applicant has failed to satisfy this Court that he has a **point of law** worth to be certified for the purpose of intended appeal to the Court of Appeal. As there is no point of law worth for certification, the court could not grant leave for the application to appeal to the Court of Appeal. Consequently, the application is dismissed for wants of merits with cost. It is so ordered accordingly.



A handwritten signature in black ink, appearing to be "A. E. Mwipopo", written over a horizontal line.

A. E. Mwipopo

Judge

22/04/2022

The ruling was delivered today, this 22.04.02022 in chamber under the seal of this court in the presence of the applicant, counsel for the applicant, the 2nd, 5th, 6th, and 7th respondents.



A handwritten signature in black ink, appearing to be "A. E. Mwipopo", written over a horizontal line.

A. E. Mwipopo

Judge

22/04/2022