THE UNITED REPUBLIC OF TANZANIA

(JUDICIARY)

THE HIGH COURT

(MUSOMA SUB REGISTRY)

AT MUSOMA

Misc. CIVIL APPLICATION No. 43 OF 2022

(Arising from the High Court [Musoma Sub Registry] in (PC) Civil Appeal No. 25 of 2022; determined at the District Court of Tarime at Tarime in Civil Appeal No. 14 of 2021; and originating from Shirati Primary Court in Civil Case No. 50 of 2021)

GODFREY ORANGO ..... **APPLICANT**

Versus

DANI LISUBI ..... **RESPONDENT**

RULING

15.06.2023 & 16.06.2023

Mtulya, J.:

This court on the 4th day of November 2022 had resolved a contest lodged in **(PC) Civil Appeal No. 25 of 2022** (the appeal) between **Mr. Godfrey Orango** (the applicant) and **Mr. Dani Lisubi** (the respondent) on: *whether the primary court has jurisdiction to hear and determine land disputes*.

With the aid of: sections 2 & 3 of the **Land Disputes Courts Act** [Cap. 216 R.E. 2019; section 31 (1) & (2) of the **Magistrates' Courts Act** [Cap. 11 R.E. 2019]; and precedents in **Mwanaisha Rashid v. Meri Dede & Another** (PC) Civil Appeal No. 14 of 2021, **Fanuel Mantini Ng'unda v. Herman M. Ng'unda,** Civil Appeal No.

8 of 1995, and **Shyam Thanki & Others v. New Palace Hotel** [1972] HCD 97, this court held that: *parties in land matter cannot, by consent, give primary court jurisdiction which it does not possess*.

The parties and their learned counsels in the appeal had appreciated the findings of this court. However, the order to costs aggrieved the applicant and prays to take the matter to our superior court, the Court of Appeal (the Court). The final phrasings of this court are displayed at page 8 of the judgment, that:

> *By the powers bestowed to this court under s. 31 of the Magistrates' Courts Act, I hereby nullify proceedings of both lower courts, quash all decisions originating from those proceedings and order that a party who believes to have interest over the piece of land concerned to institute legal proceedings in a proper forum. Costs to be borne by the appellant.*

It is these words and the last order on costs which had brought the applicant in the present application seeking leave to access the Court to ask whether: *the appellate judge was lawful*

and right to award costs to the respondent basing on the nullity proceedings. Being aware the issue concerns legal point, the applicant had hired legal services of learned counsel **Mr. Evance Njau** to produce necessary materials in support of the point, whereas the respondent had marshalled **Mr. Paul Obwana,** learned counsel, to resist the application.

According to Mr. Njau, the error on the record was caused by **Shirati Primary Court** (the primary court) in **Civil Case No. 50 of 2021** (the case) and blessed by the decision of the **District Court of Tarime at Tarime** (the district court) in **Civil Appeal No. 14 of 2021** (the civil appeal) and the two (2) decisions were protested by the applicant in this court hence the proceedings and decisions were nullified for want of jurisdiction of the primary court in land matters.

In his submission, Mr. Njau was surprised in a situation where the appeal was marked successful, and proceedings declared a nullity, but costs were awarded to the respondent. In his opinion, if that was the case, then this court ought to have recorded reasons in deciding so, even if the mandate is discretionary. In substantiating his submission, Mr. Njau cited the precedent of the Court in **Ahmed Mabrouk & Another v. Mrs.**

Rafikihawa Mohamed Sadik & Another, Civil Reference No. 11 of 2020.

Replying the submission, Mr. Obwana contended that it was the applicant who initiated wrong proceedings at the primary court and lost the case both at the primary and district courts. According to Mr. Obwana, after being defeated at the lower courts, the applicant approached this court protesting his own wrongs. In Mr. Obwana's opinion, the applicant cannot benefit from his own wrongs hence condemning him to costs was proper course. Mr. Obwana contended further that awarding costs is a discretionary mandate of this court and cannot be questioned by officers of the court.

I have scanned the indicated precedent in **Ahmed Mabrouk & Another v. Mrs. Rafikihawa Mohamed Sadik & Another** (supra) and found, at page 15 & 16 of the Ruling, statements relating to the current dispute. The statements display the following:

> *It is a settled principle of law that costs of and incidental to all civil matters are awardable by the court in its discretion...and are awarded to a successful party on the principle that costs are to follow the event...However, the court may on*

discretion, upon justifiable reasons, withhold costs to the successful party...much as we are aware of the settled principle that costs normally follow the event, we are also mindful that awarding of costs is discretional, but it has to be judicially exercised. Assigning reasons for the grant of costs would lead to an assurance that the discretion was exercised judicially.

This thinking of our superior court remains undisturbed to date. If this court borrows the words as a standard practice and insert it in the present application, there would be a bunch of questions to be resolved, some are whether: *this court assigned reasons of awarding costs in the appeal*; *the applicant is the party to blame as he initiated land proceedings at the primary court*; or *the successful party in the appeal at this court can pay costs of the dispute*. These questions cannot be replied in this application by this court. Replies to the indicated questions have to be placed and resolved in the appropriate territory.

I am very well aware that this court is restrained from considering and determining raised points of law in the application at this stage of this court (see: **Jireys Nestory Mutalemwa v.**

Ngorongoro Conservation Area Authority, Civil Application No. 154 of 2016; **The Regional Manager-TANROADS Lindi v. DB Shapriya & Company Ltd**, Civil Application No. 29 of 2012).

The reason of avoiding determination of the questions is obvious that to decline prejudging the merit of the appeal at the appropriate authority. The duty of resolving the indicated matters is reserved to the Court (see: **Murtaza Mohamed Viran v. Mehboob Hassanali Versi**, Civil Application No. 168 of 2014 and **Victoria Real Estate Development Limited v. Tanzania Investment Bank & Three Others**, Civil Application No. 225 of 2014).

The law regulating applications like the present one shows that reasons of certification in leave to access the Court must raise issues of general importance or novel point of law or *prima facie* case or arguable appeal or where proceedings as a whole reveal disturbing features as to require the guidance of the Court. There are multiple decisions in the Court in support of the thinking (see: **Murtaza Mohamed Viran v. Mehboob Hassanali Versi**, Civil Application No. 168 of 2014; **Victoria Real Estate Development Limited v. Tanzania Investment Bank & Three Others**, Civil Application No. 225 of 2014; and **Hamisi Mdida &**

Said Mbogo v. The Registered Trustees of Islamic Foundation, Civil Appeal No. 232 of 2018.

This court has been cherishing the move without any reservations (see: **Shaban Said Mganda v. FINCA Tanzania Ltd,** Misc. Civil Application No. 21 of 2022; **Joseph Kasawa Benson v. Mary Charles Thomas,** Misc. Criminal Application No. 60 of 2022; and **George Miyawa v. Sasura John** (PC) Civil Appeal No. 38 of 2022).

The record of the present application shows that the issue brought in this court for certification invites more issues before resolving it to its finality. As I indicated in this Ruling, when there is a point of law or relevant materials that reveal arguable appeal at the Court, the practice is always in favor of applicants who are asking for certification on points of law.

It is the materials that are produced by applicants which persuade this court to exercise its discretionary mandate to grant the application in favor of applicants (see: **Rutagatina C.L. v. The Advocates Committee & Another,** Civil Application No. 98 of 2010; **British Broadcasting Corporation v. Eric Sikujua Ng'maryo,** Civil Application No. 138 of 2004; and **Buckle v. Holmes** (1926) All E.R. 90).

The applicant in the instant application has raised one issue, and I have learned that it raises great concern to be resolved at the Court. I am aware that during the application hearing proceedings yesterday, Mr. Obwana raised up and complained on three (3) issues, that: first, want of existing nexus between the chamber summons and affidavit; second, the order of costs is not appealable; finally, absence of the complaint regarding reasons of awarding costs on the record.

It was unfortunate that the learned officer of this court cited the three (3) complaints without any aid of provisions of the law to assist this court in arriving to justice. This court cannot be detained in a situation where points of law are raised without clarification or backing by use of legal provisions. It was astonishing that Mr. Obwana had also declined to state a word or two on the indicated precedent of the Court in **Ahmed Mabrouk & Another v. Mrs. Rafikihawa Mohamed Sadik & Another** (supra), which has the words on resolving costs issues.

In the end, and for interest of searching proper record of the court, and of course cherishing the right to access the Court enacted under article 13 (6) (a) of the **Constitution of the United Republic of Tanzania** [Cap. 2 R.E. 2002], I am moved to grant the

application. The applicant has to access the Court in accordance to the laws regulating appeals from this court to the Court. I award no costs in the present application. The reason is obvious that the contest is still on the course in search of the rights of the parties at the final court of appeal in our State.

Ordered accordingly.

F. H. Mtulya

Judge

16.06. 2023

This Ruling was delivered in Chambers under the Seal of this court in the presence of the applicant, **Mr. Evance Njau,** learned counsel for the applicant and in the presence of **Mr. Paul Obwana,** learned counsel for the respondent.

F. H. Mtulya

Judge

16.06. 2023