IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA-SUB REGISRTY
AT ARUSHA

MISC. LAND CASE APPLICATION NO. 55 OF 2023

(C/f High Court of Tanzania at Arusha, Misc. Land Appeal No.23 of 2022, Originated from District Land and Housing Tribunal for Arusha, Execution Application No.59 of 2011, Originated from Moivo Ward Tribunal, Application No. 15 of 2009.)

CHRISTINA JONH

(Administratrix of the estate of late John Korduni) _____ APPLICANT

VERSUS

ASNATH EMMANUEL (Administratrix of the

estate of the late Emmanuel Korduni _____ RESPONDENT

RULING

13/02/2024 **&** *05/04/2024*

BADE, J.

The Applicant brought this Application under section 47 (3) of the Land Disputes Courts Act [Cap 216 R.E 2019], seeking for certification of points of law to enable her to appeal against the decision of this court (Kamuzora, J.) in Misc. Land Appeal No. 23 of 2022 delivered on 25/04/2023.

Her Application is supported by an affidavit sworn by the Applicant. On the other hand, the Respondent sworn and filed a counter affidavit in opposition.

Before considering the parties' arguments, let us give context to the same by looking briefly at the background leading to the Application.

According to the court's record, the contesting parties are both representing estates of deceased persons who were previously contesting against each other, the late John Korduni who was unsuccessfully sued by the late Emmanuel Korduni over a parcel of land before Moivo Ward Tribunal. Late Emmanuel Korduni was aggrieved by the decision and decided to appeal to the Arusha District Land and Housing Tribunal. After hearing both sides, the Tribunal overturned the decision of the Ward Tribunal and ordered that the Applicant be evicted from the land in dispute. The Applicant had appealed against the said execution in this court (Kamuzora, J.), who nevertheless found the appeal meritless dismissing it with cost, hence the instant application.

The Applicant is enjoying the legal services of Ombeni C. Kimaro, Advocate while the Respondent appeared in person, unrepresented, and had her Reply Submission drafted by learned Counsel Sara S. Lawena.

Mr. Kimaro submitted that the points of laws that they intend to argue before the Court of Appeal are reflected in paragraph 1 items i to iii of the chamber summons; and paragraphs 5 (i) (ii) (iii) and (iv) of the Affidavit in support of the Application.

The first argument hinged on whether it was proper for the High Court to uphold the decision to proceed with execution while the suit land was not described. Mr. Kimaro submitted that the provision of regulation 3 (2) (b) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 states that an Application to the Tribunal shall be made in the form prescribed in the second schedule to the regulations and shall contain among others the address of the suit premises or location of the land involved in the dispute to which the Application relates.

Mr. Kimaro contends that the judgment of the trial Ward Tribunal did not describe the suit land in terms of its location and its address. He firmly maintained that since the judgment and decree are the only documents used in the Application for Execution, then it was necessary to have a judgment that had a clear description of the suit land, which was not the case in the Appeal, arguing that it was legally wrong for the High Court to upheld the execution order resulted from the judgment which did not

describe the suit land. Mr. Kimaro reasoned in his quest that the main concern is how a court broker then identifies the land in respect of the execution if the same was not described as required by the law.

In further argument, Mr. Kimaro submitted that on page 9 of the High Court's judgment in Misc. Land Appeal No. 23 of 2022 it is admitted that the Ward Tribunal did not describe the suit land in its judgment and acknowledges it to be an error, contending that the High Court went further and stated what was the remedy to the said error which was to have such error corrected by ordering a retrial for the ward tribunal to have the parties apply to describe the suit land. In his dismay, he found the court unjustified in its failure to so order as it reasoned. To support his position, he cited the case of **Peter Q. M. Sulle vs Rozalia Leo Musenya,** Misc. Land Application No. 11 of 2019**.** In his view, he argues that had the court directed its mind on the above legal requirement, it would have nullified the proceedings and judgment of the Ward Tribunal and ordered the parties to return to the Ward Tribunal to institute a proper complaint in compliance with the law.

The counsel further argues that another point of law worth considering by the Court of Appeal is listed under paragraph 5 items (i), (iii) and (iv) of the affidavit which is a lack of Ward Tribunal's record. To cement his

position, he referred the case of **Christina John (Administratrix of the Estate of late John Korduni vs Asnath Emmanuel (Administratrix of the estate of the late Emmanuel Korduni)** Misc. Land Application No 56 of 2022.

In rebuttal, Ms. Lawena responded to the contention that paragraph 5 (i) of the applicant's affidavit stated that the appellate court erred in law in upholding the decision of the executing tribunal while the suit land was not described as not a point of law worth its name but rather a mixed law and fact which had already been determined in depth by the appellate court. She referred to this court on pages 7 to 9 of the appellate court's typed judgment. Ms. Lawena further submitted that the applicant has misconstrued the application of Regulation 3 (2) (b) of the Land Disputed Courts (The District Land and Housing Tribunal) Regulations 2003 as the provision is binding as to the Application filed before the District Land and Housing Tribunal and not the Ward Tribunal. She argues the Ward Tribunals are governed by the Ward Tribunals Act, Cap 206 in whose section 11 (1) directs that the complainant shall institute a proceeding by lodging a complaint either in writing or orally, which must later be reduced to writing. She added that the provision

does not make it mandatory for a description of the suit land, defending the appellate court's decision that it was made clearly as per the law.

Moreover, Ms. Lawena submitted that the failure of the Ward Tribunal to describe the suit land did not vitiate the validity of the judgment, arguing that the court had the chance to peruse through the proceedings of the Ward Tribunal and was satisfied that the suit land was well described to the extent of enabling the execution of the decree. In her view, this point does not qualify as a pure point of law worth to be considered by the Court of Appeal.

On the contentions concerning the purported point of law in paragraph 5 (i) (iii) and (iv) of the Applicant's affidavit, she declares this court to be functus officio to be able to rule otherwise as it had already ruled that there are points of law in Misc. Application no. 56 of 2022, maintaining in firmness that the contention is utterly misconceived as the said Application was an Application for Leave to Appeal, while this is an Application for Certification of Points of Law. In her view, what the Applicant is trying to insinuate is that this court is bound by the decision in Misc. Land Application no. 56 of 2022, a fact that is untrue since leave to appeal could have been granted as long as the Applicant has shown that there is a prima facie case or a novel point of importance not

necessarily a pure point of law. On the other hand, she maintains that an Application for a Certificate on Point of Law under section 47 (3) of the Land Disputes Courts Act, Cap 216 R.E 2019 is to maintain a boundary that the High Court is the last court on question of facts. Ms. Lawena insisted that the applicant's claims that this court is bound by the decision that granted leave to appeal to the court of appeal is misplaced. Rather she castigates, that the applicant has failed to show how the remaining points of law are worth to be considered by the Court of Appeal.

The counsel contends further that the allegations that the court was wrong to receive proceedings from the Respondent in the appeal is also not a pure point of law. This is due to the reason that courts are not forbidden to gather records of the lower court from the parties if the same are missing from the court's record, and the courts have stated on several occasions that parties are duty-bound to participate in the reconstruction of the court record for it to be able to give its decision, as was the case in **Petro Robert Myavilwa vs Zera Myavilwa and Another,** Probate Appeal No. 1 of 2019**,** where the court was faced with the situation of missing documents of the lower court, it readily obtained some of the documents from the Appellant and proceeded to determine

the Appeal. It is Ms. Lawena's contention that the Applicant could have been said to be prejudiced by the said decision as she has never appealed against the main suit. Also in the case of **Mohamed and Hamis Mselem vs Omar Khatib,** Civil Appeal No. 68 of 2011 the Court of Appeal of Tanzania sitting in Zanzibar enumerates several principles before certification of points of law as a novel point i) where the issue raised is unprecedented, ii) where the point sought to be certified has not been pronounced by the court before and is significant or goes to the root of the decision, iii) where the issue at stake involves jurisdiction, and iv) where the courts below misinterpreted the law. Ms. Lawena further submitted that the Applicant has not demonstrated enough material to warrant the conclusion that the courts below did, in fact, misinterpret the law. To support her position, she cited the case of **Dorina N. Mkumbwa vs Edwin David Hamis,** Civil Appeal No. 53 of 2017**.** She firmly maintains that the point that is to be certified must be a pure point of law that is very significant, not a mere fact that a party was not satisfied or simply thinks that the lower court was wrong in its decision, cementing her position with the case of **Magige Nyamoyo Kisinja vs Merinia Mapambo Machiwa,** Civil Appeal No. 87 of 2018.

Rejoining, Mr. Kimaro while reiterating his submission in chief, added that Application No. 59 of 2011 was originally filed in the District Land and Housing Tribunal of Arusha so the Tribunal was the original forum to deal with the said execution, making the provision of Reg 3 (2) (b) of the Regulations applicable. Further, he referred to section 11 (1) of the Ward Tribunal Act, Cap 206 maintaining that the same is not applicable when it comes to the application for execution before District Land and Housing Tribunal. Mr. Kimaro insisted that failure to describe the suit land is a pure point of law worth to be considered by the Court of Appeal.

His further stance is that in Misc. Application No. 56 of 2022 the court had already declared grounds no. (i) (iii) and (iv) to be novel points of law, hence this court is also invited to take the same stance to avoid having two conflicting decisions from the same registry regarding the same issue. To support his position, he cited section 59 (1) (a) of the Evidence Act, Cap 6 R.E 2019, and the case of **Rutagatina C.I vs The Advocates Committee & Another,** Civil Application No. 98 of 2010.

Moreover, Mr. Kimaro submitted that citing Misc. Application No. 56 of 2022 is not bringing in evidence or introducing new facts but rather it is referring to a decision of the court of law which is legally allowed to be

attached to the submission. To buttress his position, he cited the case of **Tanzania Union of Industrial and Commercial Workers (TUICO) at Mbeya Cement Company Ltd vs Mbeya Cement Company Ltd and National Insurance Corporation (T) Limited** [2005] TLR 41. Mr. Kimaro further submitted that the procedure to create duplicate records is known. That, the registrar of the High Court is the one with the duty to collect the missing records from the parties and certify them to be true copies. He further added that in Misc. Land Application no. 23 of 2022 the Registrar was not involved when the proceedings were collected from the Respondent. Worse enough, the said proceedings were not certified by the Registrar and it is not known if they were the exact proceedings from the Ward Tribunal because the Applicant has never received the said proceedings from the Ward Tribunal. In his view, it goes to the procedural requirements of receiving documents from the parties and it affects the Applicant because the same were received after parties had filed their submissions so it qualifies to be certified as a point of law since it is on the root of the Appeal, cross-referring the case of **Mohamed Mohamed and Hamis Mselem vs Omar Khatib,** Civil Appeal No. 68 of 2011. In his view, the High Court had no jurisdiction to receive uncertified proceedings from the Respondent and relied on them

for a decision because the lower court record could not be found. He insisted that the procedure adopted by the court was illegal which illegality goes to the root of the case, and that the points raised in this Application are not simple facts, but rather procedural points of law which can also be described as pure points of law. To support his position, he cited the case of **Magige Nyamoyo Kisinja** (supra), **Dorine N. Mkubwa (supra) and Elirehema Jons** (supra).

Now having considered the rival submissions by the parties and the court's record, the task before me is to determine whether the Applicant sufficiently managed to pinpoint points of law involved in Misc. Land Appeal No. 23 of 2022 which is worth considering by the Court of Appeal.

I am well aware of the requirement of the law that no appeal shall lie against the decision of this court originating from the Ward Tribunal unless and until this court certifies the existence of a point of law worth determination by the Court of Appeal. This is the subject of the provision of section 47 (3) of the Land Disputes Courts Act, Cap 216 R.E 219, which reads:

> *"(3) where an appeal to the Court of Appeal originates from the Ward Tribunal, the appellant shall be required to seek for the*

Certification from High Court certifying that there is point of law involved in the appeal".

From the above-cited provision, the right of appeal in land disputes originating from Ward Tribunals to the Court of Appeal is conditional upon the grant of a Certificate of this Court.

In the cited case of ***Dorina N. Mkumwa vs Edwin David Hamis,*** Civil Appeal No. 53 of 2017, it was succinctly held:

"Therefore, when the High Court receives applications to certify a 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 conduct to allow whatsoever the intending appellant proposes as point of law to be perfunctorily forwarded to the Court as point of law".

Applicant in her affidavit under paragraph 5 listed what she believes to be points of law worth being considered by the Court of Appeal, to wit;

(a) Whether it was proper for the appellate court to receive the proceedings from the respondent in the appellate stage and rely on them without ascertaining its legality.

(b) Whether it was proper for the appellate court to uphold the decision of the execution while the suit land was not described.

(c) Whether reception of the document purported to be the trial tribunal proceedings by the Hon. Judge from the Respondent was procedurally and legally correct.

(d) Whether after the court was satisfied that there was no trial court record by the time of execution it was legally correct to receive some of the documents from the Respondent and relied on them in upholding the decision of DLHT in Execution No. 59 of 2011.

On the issue no. a, c, and d the Applicant is challenging this court (Kamuzora, J.) for receiving proceedings of the Ward Tribunal from the Respondent after finding out that those records were missing from the file.

In the Indian case of **Marakkarutti and Ors. vs T.P.M. Veeran Kutty and Ors.** 73 Ind Cas 1050, (1923) 44 MLJ 673, the Court of Appeal of India in Madras held in persuasion:

"It may be that, in reconstructing the record, the Court will have to go very near to rehearing, *but the Court will always have to apply*

its mind to ascertain not what the rights of the parties were, but what the destroyed record of the suit was and on that record, when reconstructed, it will have to act on the ordinary principles on which it would have acted if the original record had been before it.

It will be for the Judge to whom the application is made to decide how the reconstruction of the record is to be attempted - affidavits, counter-affidavits, the hearing of witnesses and the admission of copies are all methods which he can in a proper case allow."

While to me this sounds like a reasonably acceptable position, in the case at hand the reconstruction process was insufficiently transparent as lamented by the Applicant herein in paragraphs 5 (i), (iii), and (iv) of the applicant's affidavit. The Respondent admits this fact through paragraph 3 of the counter affidavit, making it a non-issue of the contest. So in my mind, I think what is amiss is the process over which the record was received for reconstruction. Rather than unilaterally reconstruct the record, I would say, the appellate Judge should have had the High Court Registrar arrange a date for the parties to either reassemble in court and jointly undertake the reconstruction or some other practical but

transparent mode of ensuring the reconstructed record received the much-needed legitimacy.

Granted there is no law that is prescriptive on how the record should have been reconstructed as argued by the Respondent's counsel, but I think it is high time there is guidance on the same as practical methodologies on how the records are reconstructed might differ, such as inviting the parties to reconstruct a record in open court, or the court to reconstruct a record based on filed documents, affidavits from parties and witnesses present at trial and then obtain a confirmatory affidavit from the parties and the court registrar; but the underlying principle and processes should be seen to be sufficiently transparent, involving the court and the parties.

In that regard and by implication, I think these are important points of law as contended by the Applicant despite the fact that there is no specific law that can be said to have been contravened in the sense that there is no law that prohibits a Judge or a Magistrate to receive a document from either party if in his/her opinion that document will help to achieve a just decision. I understand that in this case, the said document was shown to the parties and none amongst them questioned its genuineness as obtaining record of the trial ward tribunal, but one

can not say there was no irregularity apparent on the way the said record was obtained.

I would thus certify those issues as points of law worth to be considered by the Court of Appeal.

Now, coming to the issue of allowing execution basing on the judgment which does not describe the suit land. It is clear from the record that the Ward Tribunal's judgment which application for execution was sought did not describe the boundaries of the suit land. It is also on the record that DLHT issued its execution order based on the description of the suit land made in the submissions of the parties. It is trite law that execution comes from the decree and the decree comes from the judgment, hence, if the judgment does not properly describe the suit land, conversely, the description cannot be reflected on the decree meaning it will be difficult to execute the said decree. So the question then is whether it was proper for this court to uphold the decision of the District Land & Housing Tribunal which ordered execution based on the judgment that did not have a proper description of the suit land.

So in my considered view, the points of law worth the consideration of the Court of Appeal are

i) **whether it was proper for the appellate court to receive the proceedings from the respondent in the appellate stage and rely on them without ascertaining its legality, or argued in the alternative, whether reception of the document purported to be the trial tribunal proceedings by the Hon. Judge from the Respondent was procedurally and legally correct.**

ii) **whether this court was legally right in upholding the decision of the DLHT which ordered the execution of the Ward Tribunal's judgment that did not contain a proper description of the disputed property.**

Having certified the said points of law, I find this Application worth granting. In the event thereof the certification on points of law is hereby granted as presented above.

I order no costs at this stage.

It is so ordered.

DATED at **ARUSHA** this **05th** day of **April 2024**

A. Z. Bade
Judge
05/04/2024

Ruling delivered in the presence of the Parties in chambers on the **05th** day of **April 2024.**

A. Z. BADE
JUDGE
05/04/2024