

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

MISC. LAND APPLICATION NO. 434 OF 2020

(Arising from Miscellaneous Land Case Appeal No. 73 of 2018 of the High Court of Tanzania, Land Division at Dar es Salaam by Hon. Mgonya, J, Land Appeal No. 39 of 2017 Mkuranga District Land and Housing Tribunal, Original Land Application No. 14 of 2017 of Kisiju Ward Tribunal at Kisiju)

JOHN MLEKWA MKUPA APPLICANT

VERSUS

BAKARI MKONGO RESPONDENT

EXPARTE RULING

Date of Last Order:17/8/2021

Date of Ruling: 08/09/2021

A. MSAFIRI, J

This is an application for leave to appeal to the Court of Appeal and Certification for the points of law for determination thereof. The applicant is aggrieved by the judgment of Hon. Mgonya, J in Misc. Land Appeal No.73 of 2018. This Application has been made under Section 5(1) (c) of the Appellate Jurisdiction Act, Cap 141 R.E 2019, Section 47 (2) and (3) of the Land Disputes Courts Act, Cap 216 R.E 2019 and Order XLIII Rule 2 of the Civil Procedure Code, Cap 33 R.E. 2019.

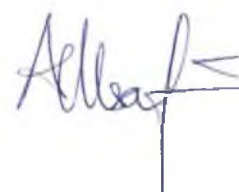


The application is supported by an affidavit of the applicant himself. This application was heard ex parte after all the efforts to serve the respondent proved futile and it was proved that the respondent's whereabouts is unknown.

In the ex parte hearing, the applicant was represented by Killey Mwitasi, learned Advocate. In his oral submission before the Court, Mr. Mwitasi prayed to adopt the whole affidavit of the applicant as part of his submissions.

Mr. Mwitasi submitted that, in the applicant's affidavit, they have enumerated the points of law to be certified by this Court for the purpose of the intended appeal to the Court of Appeal. He pointed that this matter originates from the Ward Tribunal hence it is requirement of the law that there must be a certification of points of law from the High Court which will form the memorandum of appeal. Mr. Mwitasi stated that, in the impugned judgment which the applicant is seeking the leave to appeal against, this court instead of determining the issue on whether the first appellate Court i.e. the Mkuranga District Land and Housing Tribunal was correct to nullify the proceedings and decision of Kisiju Ward Tribunal, the court discussed and determined the appeal on merit.

Mr. Mwitasi contended that, in doing so, this Court acted as a direct appellate court from the Ward Tribunal because the Land District and Housing Tribunal did not determine the appeal on merit.



Mr. Mwitasi argued further that, it was from this impugned judgement of this court which was delivered on 28/6/2019 which the applicant is seeking clarification from the Court of Appeal. The clarification sought is on whether the High Court could be a direct appellate Court from the decision of the Ward Tribunal, taking into consideration that the District and Housing Tribunal did not determine the appeal on merit but dispose it off on the grounds of technicalities. Mr. Mwitasi pointing another issue, he submitted that, whether there can be a judgment without description of the land as the description of the land in dispute was not well made at the Kisiju Ward Tribunal and the High Court confirmed that decision.

Another point of law is on whether the testimony of the opponent of the alleged admission of facts to pay by the other side could bind that other side which has not uttered the same or allow to comment on the same.

Mr. Mwitasi argued further that another point of law which suffices to be determined by the Court of Appeal is whether the Ward Tribunal sitting to decide over a land dispute without a proper coram as required by the law, is a curable defect.

To support his arguments, Mr. Mwitasi referred this Court to the cases of **Yakobo Magoiga Gichere vs. Penina Yusufu**, Civil Appeal No. 55 of 2017, CAT, Mwanza, at pages 7-8, and **Mdwati Filemoni Ole Saibul vs. Solomon Ole Saibul**, TLR 2000 at page 209.



He pointed that in the cited cases, it is provided that, where an applicant prays for the certificate of point of law, the leave to appeal is also inclusive. He concluded by praying for certification of point of law and leave to appeal to the Court of Appeal.

Before the determination of this application, the facts briefly are that; the applicant filed Land Appeal No. 39 of 2017 on 31/7/2017 at the District Land and Housing Tribunal for Mkuranga District. The appeal was emanating from Land Application No. 14 of 2017 at Kisiju Ward Tribunal, having been dissatisfied with the decision of the said Ward Tribunal dated 22/6/2017.

The Land Appeal No. 39 at the District and Land Housing Tribunal was not heard on merit but the trial Chairman suo motu found that the record of trial Tribunal did not show the names of members who sat to determine the matter (there was unclear involvement of members of trial Tribunal).

The appellate Tribunal proceeded to nullify the proceedings, Judgement and order of trial Tribunal and ordered a trial de novo.

Aggrieved with that decision, the now respondent appealed to this Court in Misc. Land Appeal Case No. 73 of 2018. Having heard the parties, this Court quashed and set aside the proceedings and decision of the appellate Tribunal, restored and upheld the trial Tribunal's proceedings, findings and decision.

A handwritten signature in blue ink, appearing to read 'A. K.', with a stylized flourish at the end.

The applicant (who was then the respondent) was aggrieved with the findings and decision of this Court and is intending to appeal to the Court of Appeal.

After that brief background, the issue for determination is whether this application has merit.

The applicant is seeking for leave to appeal to the Court of appeal and for certification on points of law. It is trite law that, for the Court to grant leave to the Court of Appeal, the applicant has to establish that the intended appeal involves serious points of law which requires the attention of the Court of Appeal.

This position has been cited in various cases among them being the case of **British Broadcasting Corporation vs. Erick Sikujua Ng'maryo**, Civil Application No. 135 of 2004, CAT at Dsm (unreported).

Furthermore, Section 47 (3) of the Land Disputes Court Act, Cap 216 R.E 2019 makes it mandatory for the appeals which originates from Ward Tribunal to seek from this Court, a certificate of points of law.

This mandatory condition was asserted by the Court of appeal in the case of **Yakobo Magoiga Gichere vs. Peninah Yusuph**, Civil Appeal No. 55 of 2017, CAT at Mwanza (unreported).

Basing on those requirements of the law, I went through the records and submission by the applicant through his advocate to satisfy myself on



whether this application has raised serious points of law which are necessary and important to require the attention of the Court of Appeal, and I am of the view that, there are serious points of law which can be determined on the intended appeal. The points of laws generally are as follows:

- (a) Whether the Kisiju Ward Tribunal was properly constituted;
- (b) Whether the High Court sitting as a second appellate Court can act as a direct appellate court from the Ward Tribunal.

Also, I have gone through the intended grounds of appeal which are pointed out in the applicant's affidavit and I am satisfied that they are within the certified herein above two points of law and they raise serious points of law which has to be determined by the Court of Appeal during the hearing of the intended appeal.

For those reasons, this application is hereby allowed. Costs will follow the events in the appeal.



A. MSAFIRI

JUDGE

08/09/2021