

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

MISC. LAND APPLICATION NO. 250 OF 2022

(Arising from judgment and decree of Land Appeal No. 115 of 2018 - Mango, J.)

HAMIDU PEMBE *(Administrator of estate of the late
MASOUD PEMBE)* **APPLICANT**

VERSUS

FILOMENA BURA **RESPONDENT**

Date of last order: 22/9/2022

Date of ruling: 7/10/2022

RULING

KADILU, J.

On the 19th day of May 2022, the applicant filed the present application, by chamber summons under Section 47 (3) of the Land Disputes Courts Act [Cap. 216 R.E. 2019], seeking for certification on the point of law to enable him to appeal to the Court of Appeal. The application is supported by an affidavit of the applicant and contains the following grounds:

- 1. On 5/7/2017, the applicant filed Land Case No. 08 of 2017 at Kiluvya Ward Tribunal claiming ownership of the disputed land whereby the case was decided in favour of the respondent.*
- 2. Aggrieved by that decision, he appealed to the District Land and Housing Tribunal for Kibaha and the decision of the Ward Tribunal was upheld.*

3. *Dissatisfied by the decision of Kibaha DLHT, the applicant appealed to the High Court, Land Division which on 27/4/2020, upheld the decision of the DLHT.*
4. *Still being dissatisfied, on 18/5/2020 he lodged notice of appeal indicating his intention to appeal to the Court of Appeal.*
5. *He intends to challenge judgment and decree of the High Court on the ground that in deciding the dispute, the court and the tribunals below it relied on the sale agreement of the respondent which did not bear any stamp duty.*
6. *The said sale agreement lacks ingredients of a valid contract and cannot be enforced in the eyes of the law as it purports to be entered into on 15/10/2001, but the seal of the local government authority shows that it was made on 09/7/2002.*
7. *The above points of law need to be certified by the High Court for the appellant to appeal because he has failed to develop his disputed land for about 10 years since the same has been trespassed by the respondent.*
8. *The applicant had once applied for the certificate on the point of law, but the same was struck out by the court on 22/4/2022 and he was granted leave to refile with a proper provision of the law.*

The Advocate for the respondent sworn an affidavit on behalf of his client and he stated that he disputes the matters being referred to by the applicant as points of law. He avers that the Ward Tribunal is not bound by the rules of procedure because the members of the tribunal are laypersons. The

learned Advocate states further that decisions of the High Court and the tribunals below were not solely based on the sale agreement, but on the respondent's evidence as a whole.

The Advocate argues that the concern of the applicant about lack of stamp duty on the sale agreement is a new ground which was never raised during the appeal in the High Court, so it cannot be raised now when seeking to appeal to the Court of Appeal. He maintained that the respondent acquired the disputed land legally by way of purchase and a trespasser as alleged by the applicant. As such, the applicant has failed to establish any point of law to be certified by the High Court.

Hearing of the application proceeded by way of written submissions whereby the applicant enjoyed the legal aid from Legal and Human Rights Centre while the respondent was represented by Mr. Nazario Michael learned advocate. Both parties lodged their written submissions pursuant to the order of the court dated 22nd September 2022 in respect of the submission in chief and reply thereof. The applicant opted not to file a rejoinder to the submission. Before considering the submissions in support and rival to the application, a brief background giving rise to the present application is important.

The applicant instituted land application No. 8 of 2017 against the respondent before Kiluvya Ward Tribunal alleging that the respondent had trespassed to his land measuring about three (3) acres. The applicant's claim was that, the land in dispute was previously owned by his late father. After hearing the parties, the ward tribunal decided in favour of the respondent. Being aggrieved by the trial tribunal's decision, the applicant lodged Land Appeal No. 150 of 2017 before the District Land and Housing Tribunal for Kibaha raising a total of five grounds.

Briefly the said grounds faulted the trial tribunal for relying on a sale agreement which had no stamp duty, also the agreement which had variation of dates on when it was executed. Similarly, the applicant faulted the trial tribunal for basing its decision on adverse possession while in fact there was no such proof. After hearing the parties, the DLHT dismissed the applicant's appeal and the decision of the ward tribunal was upheld. The respondent was further aggrieved with the decision of the DLHT hence, he preferred an appeal to the High Court.

After hearing the parties, the High Court dismissed the appeal and upheld the decisions of the ward tribunal and that of the DLHT. Now, the applicant intends to challenge the decision of the High Court before the Court of

Appeal. Having lodged the notice of appeal 18th May 2020, the applicant filed this application for the High Court to certify the matter involves a point of law calling for determination by the Court of Appeal. It is on record that the applicant had earlier on lodged application Misc. Land No. 272 of 2020, but the same was struck out for having been preferred under a wrong provision of the law and he was granted 30 days from 22nd April, 2022 to refile a fresh application. Hence as the present application was lodged in court on 19th May 2022, the same is well within time.

The applicant's submission was brief that this court sitting on the second appeal, erred in law in upholding the decisions of the ward tribunal and that of DHLT that were based on a sale agreement which did not bear any stamp duty. Likewise, the applicant contended that the said agreement seemed to have been entered on 15th October 2001, but it bore the seal of the local government dated 9th July, 2002. To fortify his stance, the applicant made reference to s. 47 (1) of the Stamp Duty Act [Cap. 189 R.E. 2019] which prohibits any instrument chargeable with duty from being admitted in evidence for any purpose if not dully stamped.

He also referred to the decision of the Court of Appeal in **Zakaria Barie Bura v Theresia Maria John Mubiru** [1995] TLR 211 in which it was held that a sale agreement without stamp duty is inadmissible as evidence unless the party concerned pays the stamp duty before the document is admitted as evidence. On further submission, the applicant claimed that the purported sale was illegal as it purported to have been entered into on 15th October 2001, but it bears the seal of local government dated 9th July 2002.

He is suspicious about the the genuineness of the said agreement. He therefore prays this court to certify on the point of law so that he can appeal to the Court of Appeal for it to determine the raised points of law. On reply, the respondent contended that the application is devoid of any merit. He avers that there is no justification for the High Court to certify a point of law on the ground which was not brought before it for determination during the appeal.

The respondent submitted that there was no issue raised by the applicant before this court on the genuineness of the sale agreement as well as the issue of stamp duty. The respondent submitted further that, the issue of stamp duty was dealt with by the DLHT and on further appeal to the High Court, the issue of stamp duty was not one of the grounds of appeal. This

shows that the applicant was satisfied by the decision of the DLHT on those points, hence he cannot complain at this stage on matters which he never raised before.

Having considered the submissions by the parties, the central issue for determination is whether the application has merit. It is a requirement of the law that, a party wishing to appeal to the Court of Appeal in the land matters which originated from the Ward Tribunal should obtain a certificate on the point of law. This is provided under section 47 (3) of the Land Disputes Courts Act. It is a mandatory procedure whereby the High Court has to certify that a point of law exists in the matter which needs to be determined by the Court of Appeal.

The position was underscored 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 to the Court of Appeal as it was held in the case of **Ali Vuai Ali v. Suwedi Mzee Suwedi** [2004] TLR 110 at page 120. The Court of Appeal in the said case stated as follows:

"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."

In another 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 held:

"... 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."

From the quoted decisions, it is imperative to note that the grant of certificate on point of law is not automatic, but conditional in that it can only be granted where the grounds of the intended appeal raise arguable issues in the appeal before the Court of Appeal.

In the instant application, the fundamental issue which the court is called to determine is whether there is any point of law to be considered by the Court of Appeal. Both the affidavit supporting this application and submission by

the applicant, the point of law expounded by the applicant is on the sale agreement which had no stamp duty as well as the issues of variations of dates on the said agreement. Rightly as submitted by the respondent, on the first appeal to the DLHT, the applicant raised those complaints as grounds of appeal.

The same were determined and found to have no merit by the DLHT. On the second appeal to the High Court, there was no complaint on the issue of stamp duty as well as variation of dates on the sale agreement. The respondent was of the view that this court cannot certify a point of law which was not before it for determination during the appeal. With respect, I am however of a different opinion. Where there is a point of law, the same can be determined by the Court of Appeal even if the same was not raised as a ground of appeal in the High Court.

The issue of admissibility of sale agreement without a stamp duty was raised before the DLHT. This is a point of law. Nevertheless, the allegation about variation of dates on the sale agreement is not by itself a point of law. It is a pure matter of fact which can be resolved through evidence.

Consequently, I find that the application has disclosed a point of law worthy of consideration by the Court of Appeal. I therefore certify the following point of law:

Whether the sale agreement without a stamp duty was properly admitted during the proceedings in the DLHT for Kibaha.

In the circumstances of this matter, I make no order as to the costs.

It is so ordered.



KADILU, M.J.,

JUDGE

07/10/2022

Ruling delivered on the 7th Day of October, 2022 in the presence of Mr. Hamidu M. Pembe, the Applicant appearing in person and Ms. Agness Nduyepo, Advocate for the Respondent.



KADILU, M. J.

JUDGE

07/10/2022.