

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**MISC. LAND APPLICATION NO. 155 OF 2022**

*(Appeal from the judgment of the High Court of Tanzania dated 24<sup>th</sup> February 2022 in Misc. Land Appeal No. 108 of 2021, Originating from Land Appeal No. 134 of 2018 of the District Land and Housing Tribunal for Kibaha at Kibaha in Original Application No. 30 of 2017 from Kiromo Ward Tribunal)*

**HOSSENI RAJABU ..... APPLICANT**

**VERSUS**

**MALIKI SAIDI ..... RESPONDENT**

*Date of Last Order: 21/09/2022*

*Date of Ruling: 13/10/2022*

**RULING**

**I. ARUFANI, J**

Before me is an application filed in this court by the applicant urging the court to certify there is a point of law in the decision delivered by this court in Land Appeal No. 108 of 2021 which deserves to be considered by the Court of Appeal. The Applicant moved the court under section 47 (2) and (3) of the Land Disputes Courts Act, Cap 216, [R.E 2019], section 5 (2).(c) of the Appellate Jurisdiction Act, Cap 141, [R.E 2002], Rule 45 (1)

and 47 of the Tanzania Court of Appeal Rules, 2009 as amended from time to time and any other enabling provision of the law.

The application is supported by an Affidavit of the applicant and is opposed by the counter affidavit of the respondent. While the applicant was represented in the matter by Mr. Yusuph M. Mkanyali, learned advocate the respondent appeared in the court in person and unrepresented. When the matter was placed before me for hearing the counsel for the applicant prayed the application be disposed of by way of written submission and as the prayer was not objected by the respondent, the court granted the same.

In support of the application the counsel for the applicant prayed the applicant's affidavit be adopted to form part of his submission and continued to submit that, the applicant filed a suit before Kiromo Ward Tribunal at Bagamoyo (henceforth the Ward Tribunal) which was registered as Land Dispute No. 30 of 2017. The applicant claim against the respondent was trespass on his land which he averred he purchased in 2005 from Mzee Pondelo who was his grandfather.

The Ward Tribunal declared the applicant is the lawful owner of the land in dispute. The respondent was dissatisfied by the decision of the Ward Tribunal and lodged Land Appeal No. 134 of 2018 at the District

Land and Housing Tribunal for Kibaha at Kibaha (henceforth District Tribunal). The District Tribunal upheld the decision of the Ward Tribunal and decided the appeal in favour of the applicant. Being aggrieved by the decision of the District Tribunal, the respondent filed in this court the Land appeal No. 108 of 2021 which quashed both decisions of the Ward and District Tribunals on the ground that the applicant failed to prove his case on balance of probabilities as his evidence was weak and he did not tender documentary evidence as proof for his acquisition of the land in dispute.

The counsel for the applicant submitted that, guidance on how to determine application of this nature was stated in the case of **Agness Severin V. Mussa Mdoe** [1989] TLR 164. He went on submitting that, under the guidance stated in the afore cited case, he has decided to consolidated the three points of law stated at paragraph 7 of the affidavit supporting the application to form one important issue of point of law which is whether it is necessary that an agreement should be in a written form. He argued that, the applicant is seeking for certificate on point of law to challenge the decision of this court which quashed the decision of both Tribunals for failure to recognise evidence adduced by the applicant basing on oral contract between him and Mzee Pondelo.

He referred the court to the case of **Edwin Simon Mamuya V Adam Jonas Mbala**, [1983] TLR 410, **Zaidi Mohamed Rasool & Another V. Anneth Joachim Mushi**, Civil Case No. 21 of 2020, HC at DSM (unreported) where it was stated that, in law it is not necessary that an agreement should be in a written form. He concluded his submission by stating that, failure to recognize the oral agreement made between the applicant and Mzee Pondela was a valid contract for the purchase of the land in dispute as testified before the Ward Tribunal is a point of law worth to be certified to the Court of Appeal. Finally, he prayed the application be granted with costs.

On his side the respondent submitted that, the argument fronted to the court by the counsel for the applicant are baseless, hopeless and carries no weight to be regarded. He argued that, the sale agreement between the applicant and the late Mzee Pondelo as well as receipt for payment of stamp duty at Tanzania Revenue Authority which is mandatory for the sale agreement to be valid and admissible in court were not tendered before the Ward Tribunal. To buttress his argument, he referred the court to the case of **Zakaria Bariebura and Maria John Mabiru**, [1995] TLR 211 where it was held that, the sale documents

which did not bear any stamp duty were inadmissible in evidence. At the end he prayed the application be dismissed with costs.

In his rejoinder the counsel for the applicant reiterated what he argued in his submission in chief and added that, the agreement which was entered between the applicant and Mzee Pondelo who was the owner of the land in dispute was not reduced into writing as it was testified before the Ward Tribunal. He stated even the respondent admitted to have been employed by the applicant in construction of his house on the land in disputed. He stated it was testified before the Ward Tribunal that the agreement entered between the applicant and Mzee Pondelo was not reduced into writing due to illness which attacked him until when he died.

He went on arguing that, the oral agreement as stated in the case of **Edwin Simon Mamuya V. Adam Jonas Mbala**, [1983] TLR 410 is a valid agreement. He argued that, the requirement of obtaining stamp duty on oral agreement like the one stated by the applicant is not covered by the law. He argued the case of **Zakaria Bariebura** (supra) is not relevant in the present application because there was no document prepared to attract requirement of obtaining stamp duty. He submitted that, failure to recognize oral agreement as a valid agreement is a point of law worth to

be certified for determination by the Court of Appeal. Finally, he prayed the application be granted with costs.

After considering the submission from both sides the court has found the issue to determine in this application is whether the applicant has managed to satisfy the court there is a point of law worth to be certified by this court that deserves to be taken to the Court of Appeal for consideration and determination. In determine this application the court is required to evaluate the issue raised as point of law to be certified for being determined by the Court of Appeal before granting the application. The stated requirement was emphasized by the Court of Appeal in the case of **Dorina N. Mkumwa V. Edwin David Hamis**, Civil Appeal No. 53 of 2017, CAT at Mwanza where it was stated that: -

*"... applications for certificates of the High Court on points of law are serious applications. Therefore, when the High Court receives applications to certify 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 High Court to act as an uncritical conduit to allow whatsoever the intending appellant proposes as point of law to be perfunctorily forwarded to the Court as a point of law."*

The question is what constitutes point of law required to be certified for<sup>3</sup> determination by the Court of Appeal. The answer to the raised question can be seen in the case of **Mohamed Mohamed and Another V. Omari Hatibu**, Civil Appeal No. 68 of 2011, (unreported) where the Court of Appeal stated it includes among others an unprecedented issue, jurisdiction and misinterpretation of law. It was stated in the cited case that the issue to be considered includes: -

*"... for instance, where there is a novel point, where the issue raised is unprecedented, where the point sought to be certified has not been pronounced by the Court before and is significant and goes to the root of the decision, where the issue at stake involves jurisdiction, where the court (s) below misinterpreted the law etc ...".*

The court has also found it was stated by the Court of Appeal in the case of **Magige Nyamoyo Kisima V. Merania Mapamba Machiwa**, Civil Appeal No. 87 of 2018 CAT (unreported) that, matters of law which the court is required to determine must transcend the interest of the immediate parties in the intended appeal. It was stated further in the same case that, in some cases matters of law placed before the Court for determination are of public importance especially when an interpretation of the law is involved.

While being guided by the position of the law stated hereinabove the court has found the points of law raised by the applicant for being certified to the Court of Appeal for determination as stated at paragraph seven of the affidavit supporting the application were as follows: -

- 1. That, the High Court Judge erred in law by failure to consider oral contract as a valid type of contract recognized by the law which was entered between the applicant and Mzee Pondelo over the disputed subject matter.*
- 2. That, the High Court erred in law by holding that the applicant failed to prove his allegations on balance of probability while not.*
- 3. That, the High Court Judge erred in law by failure to evaluate evidences adduced by the applicant hence reached in erroneous decision in favour of the respondent.*

However, the counsel for the applicant consolidated the above quoted three points of law into a single point which states whether it is necessary that an agreement should be in a written form. The court has considered what is stated in the three points of law quoted hereinabove from the affidavit of the applicant together with the point of law formulated after consolidation of the stated three points of law and find that, claim of the applicant before the Ward Tribunal was trespass to his land he alleged was committed by the respondent.



As stated earlier in this ruling the Ward Tribunal held the land in dispute was lawfully purchased by the applicant from Mzee Pondelo and the respondent who was the son of the late Mzee Pondelo was required to issue a written document to the applicant to show the applicant purchased the land in dispute from Mzee Pondelo. As stated further in this ruling the stated finding of the Ward Tribunal and the decision of the District Tribunal which confirmed the applicant is the lawful purchaser of the land in dispute were quashed by this court after the court found the applicant's evidence was weak and did not prove his allegation to the required standard.

The court has found the argument by the counsel for the applicant as can be seen in his submission in chief and rejoinder to the submission of the respondent is that, there was no written agreement which would have been tendered before the Ward Tribunal because the agreement entered by the applicant and the late Mzee Pondelo was not reduced into writing. The court has found before arriving to the stated finding the court stated at page 7 of the judgment of the court which the applicant wants to appeal against to the Court of Appeal as follows: -

*"... the respondent who lodged his claim at the tribunal was duty bound to prove his case on the balance of probability but the respondent in his testimony, only mentioned that he entered into*

*an agreement with Mzee Pondela without tendering any documentary evidence. Apart from plain words, the respondent produced nothing to exhibit the allegations”.*

That being the position of the matter the court has found the points of law raised by the applicant which were consolidated into a single point and states whether it is necessary that an agreement should be in a written form while the applicant argued the agreement, he entered with Mzee Pondelo was not reduced into writing is a point of law worth to be certified for determination by the Court of Appeal. The court has arrived to the stated finding after seeing that, as stated in the case of **Mohamed Mohamed** (supra) the stated point of law can fall into the category of novel point or misinterpretation of the law in relation to the status of oral agreement where the oral agreement has not been reduced into writing.

Basing on what I have stated hereinabove the court has found the applicant has managed to establish he has a point of law worth to be certified for consideration and determination by the court of appeal. The point of law certified for determination by the Court of Appeal is whether it is necessary that an agreement should be in a written form to prove a case where it has not been reduced into writing. Consequently, the application is granted to the stated extent and no order as to costs. It is so ordered.

Dated at Dar es Salaam this 13<sup>th</sup> day of October, 2022



*I. Arufani*

I. Arufani

**JUDGE**

13/10/2022

Ruling delivered today 13<sup>th</sup> day of October, 2022 in the presence of the applicant in person and in the absence of the respondent. Right of appeal to the Court of Appeal is fully explained.



*I. Arufani*

I. Arufani

**JUDGE**

13/10/2022

