THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

MISCELLANEOUS LAND APPLICATION NO. 105 OF 2021

(Originating from Land Revision No. 03 of 2021, Mbeya District Land and Housing Tribunal Appeal No. 03 of 2011, Originating from Tunduma Ward Tribunal Land Case No. 03 of 2011)

ANYEGILE MWAMALUKWA ..... APPLICANT

VERSUS

FELISTA NDOTELA SENYE (suing as administratix of the estate of the late Tabu Senye) ..... RESPONDENT

RULING

Date of last order: 22/03/2022
Date of Ruling: 22/04/2022

NGUNYALE, J.

The applicant ANYEGILE MWAMALUKWA is before the Court under section 47 (2) of the Land Disputes Courts Act Cap 216 R. E 2019 and section 5 (1) (c) of the Appellate Jurisdiction Act Cap 141 R. E 2019 seeking the following orders against the respondent one FELISTA NDOTELA SENYE:

1. *That the Court be pleased to grant to the applicant a certificate that there are points of law for determination by the Court of Appeal.*
2. *Costs of the application be provided for and*
3. *Any other order(s) or reliefs the Court may be pleased to grant.*

The application has been supported by an affidavit dully sworn by the applicant ANYEGILE MWAMALUKWA. In her affidavit she deponed the

background giving rise to this application and he raised about eight issues he suggested that they are worth of being considered by the Court of Appeal of Tanzania against the decision of this Court (Ndunguru, J) in Land Revision No. 03 of 2021 dated 28th October 2021. Those grounds per paragraph 25 of the affidavit are; -

(a) Whether the High Court had jurisdiction to entertain Land Revision No. 03 of 2021 on matters which were already decided previously by two different judges of the High Court as well as the Court of Appeal of Tanzania.

(b) Whether the applicant having gone all the way to the Court of Appeal of Tanzania on appeal could go back to the High Court and re-open the matter on a purported revision.

(c) Whether the High Court had powers to exercise revisional powers on a matter which is clearly appealable, taking revision as an alternative to appeal.

(d) Whether it was in order for the High Court to revise proceedings and orders of the lower Tribunal in the absence of original records before him.

(e) Whether it was proper for the High Court to determine Land Revision No. 03 of 2021 on basis of submission by one side only, ignoring all arguments and submissions by Counsel for the respondent.

(f) Whether it was proper for the learned High Court Judge to proceed with the matter after receiving a letter of complaint against him, with a request for him to disqualify from hearing the case, without any comment on the complaints raised against him.

(g) Whether Land Revision No. 03 of 2011 for an execution concluded 9 years earlier was properly before the High Court.

(h) Whether the learned judge was justified to take into account as basis for his decision, matters which were not at all placed before Mbeya District Land and Housing Tribunal and not part of the evidence or record of proceedings sought to be revised.

The background to this matter may simply be traced back to Land Case No. 3 of 2011 where by the applicant filed the same seeking order of the Tribunal to open the shops which were locked by the respondents alleging claiming rent from the applicant. The Ward Tribunal heard the matter and decided in favour of the applicant. It ordered the shops to be opened and valuation to be done to ascertain loss occasioned. The respondents preferred Land Appeal No. 24 of 2011. The appeal was dismissed but the Tribunal ordered the respondent Tabu Senye to pay the applicant 1,000,000/= per day as loss of business during the whole period of closure of the shops. The applicants filed Application No. 24 of 2011 before the District Land and Housing Tribunal for Mbeya at Mbeya efforts to execute the order of the Tribunal about payments. The Tribunal ordered Tabu Senye to pay Tshs 30,750,000/= to the applicants.

Around April 2021 the respondents preferred Land Revision No. 3 of 2021 before this Court whereby the Court nullified proceedings, judgement and orders in respect of Land Appeal No. 24 of 2011 and Application No. 24 of 2011 before the District Land and Housing Tribunal for Mbeya at Mbeya, the aggrieved party was advised to start afresh. Hence the present application. The application was resisted by the counter affidavit dully sworn by the respondent FELISTA NDOTELA SENYE that the applicant has not raised any point of law worth for consideration by the Court of Appeal on appeal.

The application was heard by written submissions. The applicants under the service of Mr. Kamru Habibu learned Advocate submitted that the issues under paragraph (a), (b), (c) and (d) above as quoted in paragraph 25 of the affidavit are similar. They are concerned with the competency of the revision application before the High Court. It was argued that the

revision was conclusively decided by two previous judges per paragraphs 10 and 12 of the applicant's affidavit. The matter ended in the Court of Appeal of Tanzania per paragraph 13 of the applicant's affidavit. They submitted that the High Court was *functus officio*. Paragraph (c) in about the principle that revision is not an alternative to appeal as it was held in the case of **Halais Pro-CHemie v. Wella A. G** [1996] TLR 269. They abandoned paragraph (d) that it does not qualify to be a point of law. Likewise, paragraph (e) was abandoned on the same argument that it is mixed with point of law and fact. They prayed the same to be disregarded.

The applicant went on submitting that the Court of Appeal will be invited to determine whether the Judge was right to proceed determining the revision without deciding on whether he shall recurse himself or not. This is because once impartiality of a Judge or Magistrate is raised, it must be decided after the parties were afforded an opportunity to be heard. Paragraph (g) is also a point of law. The Court of Appeal is invited to determine whether it was correct to reopen execution which was done 9 years ago. This point lies on the principle of interest *reipublicae ut sit finis litium* which means it is in the interest of the state that there should be an end to litigation.

Finally, the applicant submitted that paragraph (h) is on whether the Judge may take into account extraneous matters and decide the revision. It is settled law that decision of the court should base on what is provided in the record per the principle of sanctity of court records. The Judge or Magistrate is not allowed to take consideration extraneous matters not depicted from the records. It was the wish of the applicant that the Court of Appeal to decide the legal issue whether it was correct for the High

Court to introduce extraneous matters contrary to what is on the Court records.

The respondents with equal force under the service of Baraka H. Mbwilo learned Counsel submitted that it is a trite law that the law does not fix specific factors to be considered by this Court in granting applications of this nature. However, he was settled in his mind that, the major factor for granting application of this nature is that, the point of law raised by the applicant must be worth for consideration by the Court of Appeal on appeal. The aim is not to allow appeal which are not necessary or superfluous to go to the Court of Appeal. He referred the Court to the case of **Dorina N. Mkumwa vs. Edwin David Hamis** as cited by the applicant where it was said;-

> *"Therefore, when high court receives applications to certify point of law, we expect ruling 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 conduit to allow whatsoever the intending appellant proposes as point of law to be perfunctorily forwarded to the Court as point of law."*

From the above quotation the applicant was of the view that the High Court must act critically to scrutinize the asked points of law to see whether they are real points of law. The aim is not to allow every point to go to the Court of Appeal. The Main issue before the Court is whether or not the issues raised by the applicant constitute points of law worth for consideration by the Court of Appeal of Tanzania on appeal. from the outset, the respondent stated that the raised points are not points of law worth for consideration by the Court of Appeal on appeal on the following grounds; -

One, the points raised under paragraph 25 (a), (b) and (c) of the affidavit are baseless because revision *suo motu* can be done at any time whether there are decision or pending matters or pending appeal. The Court of Appeal of Tanzania in 2021 faced with the at kin situation with this case at hand and overruled the objection by ruling that revision *suo motu* can be done at any time and that *suo motu* mandate which is the courts' inherent power is crucial so as to avoid perpetrating illegalities and errors by way of correction. He referred the Court to the case of **The Registered Trustees of Masjid Mwinyi vs. Pius Kilpengele AND 5 Others**, Civil Revision No. 2 of 2020 Court of Appeal at Dar es Salaam (unreported). He also referred the case of Bi. Asha Rashid Ikaji vs. Khalifa Mohamed Noti on the same position.

He submitted that the cited case above the Court of Appeal discussed about revision *suo motu* by the Court of Appeal over matters of the High Court under section 4 of the Appellate Jurisdiction Act which is similar to section 43 (1) (a) (b) of the Land Disputes Courts over matters of the District Land and Housing Tribunal which can be done at any time even after execution. Therefore, this is not a point of law worth to be certified as point of law worth to be decided by the Court of Appeal on appeal.

The respondent was of the view that the case of **Halais Pro-Chemie VS. Wella AG** [1996] TLR 269 is distinguishable to the facts of this case on the aspect that, one, in the case of Halais the revision was not done *suo motu* unlike in our case where the revision was *suo motu*. Second the case of Halis was decided in 1995 and the case of **The Registered Trustee of Masjid Mwinyi vs. Pius Kipengele** supra was decided on 6th August 2021. The recent case must prevail per case of **Zahara Kitindi**

& Another vs. Juma Swalehe & 9 Others Civil Application No. 4/05/2017, Court of Appeal of Tanzania at Arusha (unreported).

Two, the point raised under paragraph 25 (f) of the affidavit is not worth of being considered on appeal. This point does not qualify to be a point of law but a point of fact because we are not sure if there was an application before the Judge to recurse himself. There is no proof that there was such an application.

Three, the point raised under paragraph 25 (g) of the affidavit is not a point of law because there was no revision No. 03/2011 for execution. The respondents did not know where the applicant took this fact. Also, whatever the case, *suo motu* revisional powers can be exercised at any time as explained on point 1 above and per the cited case of The **Registered Trustee of Masjid Mwinyi vs. Pius Kipengele and 5 Others** (supra).

Four, the point raised under paragraph 25 (h) of the affidavit is not a point of law worth to be decided by the Court of Appeal. The respondent was of the view that in the affidavit supporting the application and in the submission in chief the Counsel for the applicant failed to mention even a single extraneous matter taken by the Judge in revision. So, the applicant is moving the Court to certify a point which is not known. So, this point must also fail.

Having in mind the averments of both parties and the rival submissions, at this juncture the Court is to rule out as to whether or not the issues raised by the applicant are worth of being considered by the Court of appeal. The applicant dropped points raised in paragraph 25 (d) and (e) of her affidavit. Therefore, the points of law sought to be certified to

warrant the attention of the Court of Appeal as stated in the supporting applicant's affidavit are points number (a), (b), (c), (f), (g), and (h).

The applicant argued together issues under paragraph 25 (a), (b) and (c) of the contents of the affidavit that they are concerning with competence of the revision application before the High Court. He was of the view that the same was conclusively determined by previous Judges and it ended to the Court of Appeal, thus, the High Court was *functus officio*. In the other hand revision was not an alternative to appeal. The respondent was of the firm view that the High Court was justified to revise the proceedings of the subordinate Court.

Having examined the complaints by the applicant I find that they are not worth of detaining the Court long because they carry no substance to make the Court to decide otherwise. In his affidavit paragraph 13 he stated that the Notice of Appeal to the Court of Appeal was struck out on 20th November 2020, Miscellaneous Application No. 35 of 2013 was struck out by Chocha, J (as he then was). It is obvious that nothing was conclusively determined, so the argument that the Court was *functus officio* is an afterthought. After thorough perusal of the records, I am in agreement with the respondent that the Court had obvious jurisdiction under section 43 (1) (a) (b) of the Land Disputes Courts Act Cap 216 RE 2019. Therefore, there is no point of law of sufficient important which exist for the Court of Appeals' intervention.

From the outset, I think the complaint about disqualifying from hearing the revision is not the point of law because there is no proof that there was a formal application for the same. The Court records are silent about the complaint. I find difficult to capture the applicants' grievance about

recurse or self-disqualification to warrant the Court of Appeals' attention. The applicant has not laid foundation to establish that the Court skipped to hear and determine the issue of recurse.

The complaint about whether Land Revision No. 03 of 2011 for an execution concluded 9 years earlier was properly before the High Court. The records are silent about Land Revision No. 03 of 2011. It is very difficult to capture the complaint in this point because in the records there is nothing about land Revision No. 03 of 2011 as raised by the applicant in paragraph 25 (g) of the affidavit. The fact that it has not been properly elaborated I end up to rule out that no point of law has been established. Be it as it may, still the High Court had jurisdiction to revise proceedings of the subordinate Tribunal as rightly submitted by the respondent.

In the last point the applicant has complained that the High Court in determining the Land Revision No. 03 of 2021 involved extraneous matters. In his submission the applicant could not go into detail as to which are the extraneous matters. The fact that he did not go into detail to establish the extraneous matters was also doubted by the respondent in his submission. The respondent submitted that even a single extraneous matter has not been mentioned. He was of the view that in this point there is no point of law worth for consideration by the Court of Appeal. I am settled that this point has not been established. The applicant was expected to lay foundation as to why he believed that there is a point of law worth for consideration by the highest Court of the land. Failure to do so means there is no point of law because existence of extraneous matters has not been established.

In the upshot, all of the applicants' issues bears no point of law of **sufficient importance** to be certified by the Court for Court of Appeals' attention. The application is hereby dismissed for want of merit with costs.

Dated at Mbeya this 22nd day of April 2022.

D. P. Ngunyale
Judge
22/04/2022

Ruling delivered this 22nd day of April 2022 in presence of the applicant represented by Felix Kapinga learned Counsel who also held brief for Baraka Mbwiro for the respondent.

D. P. Ngunyale
Judge
22/04/2022