IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND CASE APPLICATION NO. 393 OF 2021

(Arising from Land Appeal No. 133 of 2020)

JAMES MWISHAGOLI ..... APPLICANT

VERSUS

SUDI MUNDU ..... RESPONDENT

RULING

Date of Last Order: 18/01/2022 &
Date of Ruling: 21/01/2022

S.M KALUNDE, J: -

In this application the applicant, **JAMES MWISHAGOLI** has moved the Court under section 47 (3) and (4) of **the Land Disputes Courts Act, Cap. 216 R.E. 2019** ("the Act") for a certificate indicating that there is a point of law worth of consideration by the Court of Appeal of Tanzania ("the CAT"). The application is supported by an affidavit deponed by the applicant.

The dispute between the parties begun at the Mngeta Ward Tribunal ("the trial tribunal") in **Land Application No. 17 of 2020** wherein the respondent herein sued the applicant for trespass into a piece of land measuring 10 acres located at Ilole Kiwalani, Mkangawalo Village, Mlimba District in Morogoro

Region ("the suit property"). At the trial tribunal, the respondent asserted to have purchased the property from Mkangawalo Village Government on the 01st April, 2010 upon deposit of the consideration into the village government account. On the other hand, the applicant herein, and the respondent at the trial tribunal, claimed to be the lawful owner of the suit property having purchased it from the former owner, Saidi Abdallah, for a consideration of Tshs. 1,800,000.00 in September, 2012. In furtherance of his claim, the applicant contended that the transaction to purchase the suit property was approved and witnessed by members of the village land allocation committee.

During trial each party called their witnesses and evidence was produced in support of each party's claims. Upon hearing of witness's testimonies and evaluation of the evidence on record the trial tribunal was satisfied that the applicant's case (now respondent) was weightier than that of the respondent (now applicant). In the end the trial tribunal declared SUDI MUNDU, the respondent herein, to be the lawful owner of the suit property. In addition to that, the trial tribunal ordered the applicant to yield up vacant possession to the respondent. In the final, the applicant was permanently restrained from dealing with the suit property in whichever manner.

The applicant, JAMES MWISHAGOLI, was not happy with the trial tribunal's decision. He lodged an appeal with District Land and Housing Tribunal for Kilombero/Kilosa District at

Ifakara ("the DLHT"). The appeal was registered as **Land Appeal No. 111 of 2020**. In his appeal at the DLHT the applicant raised three complaints; **one**, that the trial tribunal's decision was misconceived and bad in law for failure to consider that in terms of **the Village Land Act, Cap. 114 R.E. 2002**, the village council had no mandate to allocate 100 acres of land. **Two**, that the trial tribunal erred in failing to properly analyze and evaluate evidence tendered at the trial; and **three**, that the decision of the trial tribunal was bad in law for accommodating contradictory evidence of the respondents' witness testimonies.

In the end the DLHT overturned the decision of the trial tribunal. It allowed the appeal and went on to quash the proceedings before the trial tribunal and set aside the resultant judgment and decree. In its re-evaluation of the evidence on record the DLHT was satisfied that the applicant was the lawful owner of the suit property. In arriving at its decision, the DLHT reasoned that the trial tribunal had failed to consider that the respondent herein had failed to parade any member of the Mkangwalo village land allocation committee who witnessed the sale of land to him. It also concluded that the respondent had failed to establish how he came into possession of the suit property.

When the matter was placed for a second appeal before High Court the respondent raised three complaints. In the first place he contended that the DLHT erred in resolving the appeal

without joining the person who sold the land to the applicant. In the second and third ground of appeal the respondent cumulatively complained that the DLHT failed to properly evaluate the evidence tendered before the trial tribunal.

In resolving the appeal, the High Court refrained to entertain the first ground of appeal for being a new ground, that is, it was not raised before the trial tribunal or decided upon by the DLHT. Upon weighing the evidence on record, the second appellate court was convinced that both parties had managed to establish their ownership over the suit property on the balance of probabilities. The court reasoned that the case presented a case of double allocation by the village council. Relying on the above findings the Court applied the principle of priority of allocation as applied to double allocation; and awarded the suit property to the respondent. In the end, as an outcome of the second appeal, the appeal was allowed. The Court quashed the decision of the DLHT thereby upholding the decision of the trial tribunal.

The decision of this Court did not go well with the applicant. He intends to appeal to the CAT. He has, therefore, approached this Court in terms of section 47 (3) and (4) of the Act seeking for certification that some fundamental points of law are involved worth of consideration of the CAT. The points of law proposed for the CAT consideration contained under paragraph 12 of the affidavit filed in support of the application. They include:

"(i) *Whether the 2nd appellate Court was entitled to invoke the principle of double allocation in a land where there was evidence that allocation of the suit land to the respondent was procured fraudulently.*

(ii) *Whether the 2nd Appellate Court, after settling that the applicant legally purchased the suit land from Said Abdallah and not from the date Saidi Abdalla was allocated the suit land by the village Council.*

(iii) *Whether the 2nd Appellate Court was entitled to hold that the question of illegality and impropriety of village Land Council to allocate on hundred (100) or fifty (50) acres of Village Land to the respondent without the consent of the commissioner for lands as required by the village land regulations was irrelevant and immaterial for payment of purchase price.*

(iv) *Whether the 2nd Appellate Court was entitled to consider Kikao cha Serikali ya Kijiji to be the same as Village Assembly with authority to allocate suit Land to the respondent under the village Land Act Cap and Village Land Regulations.*

(v) *Whether the 2nd Appellate Court was entitled to decide rights of the parties based on documents to wit payment receipt of 2,000,000/= and minutes of the meeting of Serikali ya Kijiji which it had not seen and was absent from the original record of the case, and disputed in the trial and the 1st appellate Court without ordering for the reconstruction of the Court file.*

(vi) *Whether the 2nd Appellate Court, where a ground of appeal dictated on the failure of the 1st Appellate Court to evaluate properly the entire adduced evidence, was entitled to not considered the evidence on the illegality of the allocation of 100 acres to the respondent by Serikali ya Kijiji ya Mkangawalo.*

(vii) *Whether the 2nd appellate court was entitled to ignore the evidence on the existence of fraud and abuse of power by a public office for reasons that it was not a ground of appeal though was deliberated in submissions of the parties, among the issues disputed in the trial court and the 1st appellate court.*

(viii) *Whether the 2nd appellate Court was entitled to ignore and discredit the weight and credibility of the testimonies of the defence witnesses namely Enoki Mtemele, Gilius Magombeka, and Jazino Mkuni who faulted the minutes of the meeting of Serikali ya Kijiji of Mkangawalo occurred on the 16/02/2010 which allocated 100 acres of land to the respondent, and whole of the allocation of suit land to the respondent, and whole of the allocation of suit land to respondent.*

(ix) *Whether the 2nd Appellate Court was entitled to apply the principle of double allocation by considering the first developer of the suit land while ownership of the suit land by applicant and respondent was though purchase and location respectively.*

(x) *Whether the 2nd appellate Court was entitled to disregard the respondent's reply to memorandum of appeal and submission is support thereof lodged in the 1st appellate court that he was allocated only 50 acres which contradicted with the evidence in the trial tribunal that he was allocated 100 acres but upon visiting and measuring the land he only discovered to be allocated less than 50 acres."*

Following a prayer by the counsel for the applicant, which was also supported by the respondent, leave was granted for the application to be disposed by way of written submissions. Submissions of the applicant were drafted and filed by **Mr. Francsi Munuo** learned advocate. Unrepresented, the respondent drew and filed his own submissions.

Having considered the pleadings and submissions I gather that the main question for my determination is whether the application is merited. My starting point would be to examine the law governing applications of the present nature. As pointed out above the instant application is premised on section 47 (3) of the Act. The section provides as follows:

"47.- (3) Where an appeal to the Court of Appeal originates from the Ward Tribunal, the appellant shall be required to seek for the Certificate from the High Court certifying that there is point of law involved in the appeal."

The wording of the above section clearly indicates that the right to appeal to the CAT in matters arising from the Ward Tribunal is conditional upon application and grant of a certificate that a point or points of law are involved. In terms of what was stated in the case of **Dorina N. Mkumwa vs Edwin David Hamis** (Civil Appeal No.53 of 2017) [2018] TZCA 221; (10 October 2018), my duty is conduct:

> *"... serious evaluation of the question* ***whether what is proposed as a point of law, is worth to be certified*** *to the Court of Appeal ..."*
>
> *[Emphasis is mine]*

However, before delving deep in considering the substantive application and the parties' written arguments, I think something needs to be said about the applicants' submissions. As pointed out above the applicant had listed a staggering 10 points through which he sought the indulgence of this Court to certify them as being worth of consideration by the CAT. However, despite having adopted his affidavit filed in support of the application as part of his submissions, the applicant written submissions went on to include a different set of six freshly formulated points some of which were not included in the supporting affidavit. The respondent invited us to ignore the additional grounds as they were not included in the pleadings. To support his position, he cited the decision of this Court in **Yara Tanzania Limited vs. Charles Aloyce**

Msemwa & 2 Others, Commercial Case No. 5 of 2013 (unreported).

On my part I have examined the points of law highlighted in the affidavit in relation to those expounded in the submissions, and I am satisfied that the applicant has to a great extent departed from the points of law included in his affidavit. It is trite law that parties are bound by their own pleadings and that Courts cannot grant or entertain anything other than what is pleaded. I am also alive with the position that submissions, as distinct from affidavits, are not evidence. For that reason, I will not deliberate on those points of law which were not canvassed in the affidavit.

I have also had an opportunity to examine the substance of the points of law contained under paragraphs (ii), (iii), (v), (vi), (vii) and (x) and I am satisfied that the points proposed therein raises matters of facts which do not qualify for certification by this Court to the CAT.

However, something interesting appears to feature in both the affidavit and submissions. This relates to the complaint that the second appellate court considered evidence which was not on record to arrive at a conclusion that both the applicant and the respondent had been allocated the suit property by the Mkangawalo Village Assembly; and thereby wrongly making a find that there was double allocation. This grievance is raised through points (i), (iv), (viii) and (ix) wherein the applicant alleges that as natural flow from a wrong conclusion that there

was double allocation, the second appellate court wrongly applied the doctrine of priority of allocation hence awarding the suit property to the respondent.

I am aware that at this stage, I am not the appropriate forum to make any details comment on the subject, relying on the above findings I think the intended appeal is neither frivolous nor vexatious. By the look of it, it raises an important point which deserves the attention and consideration of the Court of Appeal. I think that the question *whether the High Court, was justified to or properly invoked the principle of double allocation* is a point worth of consideration by the Court of Appeal.

All said and done, I do certify that a point of law is involved in the decision of this Court dated 02nd July, 2021. In the final analysis and for the foregoing reasons, the present application succeeds. In the circumstances, each party is to bear his own cost.

It is so ordered.

DATED at **MOROGORO** this **21st** day of **January, 2022**.

S.M. KALUNDE

JUDGE