IN THE HIGH COURT OF TANZANIA

AT DODOMA

MISC. LAND CASE APPLICATION NO. 22 OF 2016

(From the decision of the High Court of Tanzania at Dodoma (Hon. A. Mohamed, J.) dated 15th March, 2016 in Land Appeal No. 37 of 203 arising from decision of the District Land and Housing Tribunal of Dodoma at Dodoma in Misc. Land Application No. 74 of 2013 and Original Land Case from Kizota Ward Tribunal)

1. LUCIA BEATUS	.....	1st APPLICANT
2. SEVERINE MAIRE	.....	2nd APPLICANT
	VERSUS	
SAID RAJABU	.....	RESPONDENT

08/11/2016 & 06/12/2016

RULING

SEHEL, J.

This is a ruling on application for a certificate that there is a point of law involved in the decision of the High Court emanating from Kizota Ward Tribunal. The application is made under Section 47 (2) of the Land Disputes Courts Act, Cap. 216 and it is supported by an affidavit sworn by Paul B.S.M Nyangarika, advocate for the applicant. According to Paragraph 3 of the

sworn affidavit, the points of law which the applicant wished for the Court of Appeal of Tanzania to consider are:

a) Whether it was proper in law for the High Court to hold that the claim by the applicants that they were not informed. of the date of judgment by the trial Ward Tribunal of Kizota, Dodoma was a new ground in the circumstances of the case which was adjourned on 18th December, 2012 on a consensus of the parties and members of the Tribunal that it was to be referred to the District Land and Housing Tribunal without mentioning the date of judgment and in the circumstances whereby record shows clearly that on 20/12/2012 when the purported decision was made the parties were not in attendance.

b) Whether it was proper in law for the High Court to dismiss the application for extension of time to appeal by the applicants but failing to exercise its supervisory powers to quash the decisions of the Tribunals below and set right the glaring errors on the record of the proceedings of the Tribunal below like:-

   i) Trial Tribunal having not properly constituted itself required by the law;

   ii) Members of the trial Tribunal having not signed the judgment and having not stamped with the trial Tribunal stamp; and

iii) The value of the land having not been estimated for the purpose of pecuniary jurisdiction prior to the trial.

The respondent through his legal counsel Mr. Issac Josephat Mwaipopo filed a counter affidavit to oppose the application. The application was heard by way of written submissions whereby both parties duly complied with the filing schedule.

In expounding the reasons stated in the affidavit as to why this court should grant an order certifying that there is point of law involved, Mr. Nyangarika reiterated as to what was stated in the affidavit. He therefore prayed for the application to be granted in the interest of justice.

Counsel for the respondent replied that the issue that the applicants were not informed of the date of judgment was correctly adjudicated upon by the High Court by overruling the plea since it was not raised in the lower Tribunal. He argued that the issue was properly rejected as it complied with the holding of the Court of Appeal of Tanzania in the case of **Melita Naikiminjal & Loishilaari Nakiminjal Sailevoloiba [1998] T.L.R 121** where it held: "an issue not raised before the first appellate court cannot for the first time be raised and entertained by the second appellate court". Mr. Mwaipopo further submitted that even the issues raised in Paragraph 3 (b) of the affidavit are new issues all along and they were never raised before as such they are an afterthought. He therefore prayed for the application to be dismissed with costs.

The issue here is whether there is/are point(s) of law that needs the attention of the Court of Appeal of Tanzania.

The applicant raised two issues. The first issue is the failure of the High Court to determine a new issue raised for the first time at the second appellant Court. I think it is salutary that I put the legal position first. In the case of **Tanganyika Farmers Association V. Unyamwezini Development Corporation [1960] EA 620** Gould, A. V-P, when dealing with an objection raised for the first time at the appellant stage, at page 626 said:

> *"The objection to the submission is that, it raises a question which was never in the contemplation of the parties in the court below. It was not argued there, nor was it ever mentioned in the correspondences between the parties. An appeal court has a discretion to allow a new point to be taken on appeal but it will permit such a course only when it is assured that full justice can be done to the parties".*

In the instant case, it is acknowledged by both parties that the issue was raised for the first time at the second appellate stage. The issue was neither canvassed during the trial nor at the first appellate stage. It follows then that the appellate court has discretion to allow it or not. Upon perusal of the High Court decision it is evident that despite for it being raised for the first time the High Court did consider it and ruled out the complaint. This is gathered at page 6 of the judgment which reads in part as follows:

"On the first ground of appeal, I find that indeed this was a new ground that was not raised in Misc. Application No. 74 of 2013 at the District Land and Housing Tribunal of Dodoma. Not a word was mentioned of the Ward Tribunal's failure to notify the appellants of the judgment date in their affidavit. It is apparent, the ground was raised as an afterthought. Aside from this reason, it is clear the appellants were served with summons to defend themselves in the application for execution on 28/12/2012 and further the matter was heard back to back in the Ward Tribunal as is gleaned from the proceedings..."

From the above, it is crystal that my brother Honourable Mohamed, J did not only find that the issue was new issue but also considered it on merit. He went through the records and found as a fact that the applicants were served with summons. Therefore, the issue as to whether the applicants were informed on the judgement date or not was fully considered and determined and it is purely a matter of fact and not law. Therefore, I do not see any point of law that is worth for consideration by the Court of Appeal.

Let me turn now to the second issue raised. The issue is the failure of the High Court to exercise its revisional power on patent irregularities in the lower Tribunal.

It has to be noted here that the High Court was sitting as the second appellate court against the appeal lodged by the

applicants herein. Any court of law cannot base its decision on a ground that was not raised by parties. As lucidly stated by Court of Appeal in the case of **Melita Naikiminjal (Supra)** the applicants cannot be heard to complain against the second appellate judge as he was not bound to decide on issues or matters not raised by parties. The two grounds ought not, to in any case, be taken on board since it will be grossly unfair to the respondent. The points were never in issue at the second appellate Court hence they were never investigated. Further the applicants were represented at the second appellate Court by, a counsel of known experience and ability. It is difficult to suppose that he would not have raised so obvious a matter unless he was satisfied there was a good defence to it. (See: **Alwi A Saggaf Vs. Abed A. Algeredi [1961] E.A. 777).**

All said I find the application is lacking merit as there are no points of law involved for consideration by the Court of Appeal of Tanzania. The application is dismissed with costs for lacking merit. It is so ordered.

DATED at **Dodoma** this 06th day of December, 2016.

B.M.A Sehel

JUDGE

Ruling delivered at Dodoma, under my hand and seal of the court, this 06th day of December, 2016 in the presence of Ms.

Gabriel, advocate holding brief for Mr. Nyangarika, advocate for the applicant and Mr. Kalonga, advocate for the respondent.

B.M.A Sehel

JUDGE

06th December, 2016.