IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: LILA. J.A., GALEBA. J.A., And MGEYEKWA, J.A.)

CIVIL APPEAL NO. 521 OF 2020

PASKALI TSERE (Administrator of the Estates of the Late Tsere Sely) .....APPELLANT

VERSUS

SERIKARI YA KIJIJI CHA CHEMCHEM.....RESPONDENT

(Appeal from the Judgement and decree of the High Court of Tanzania at Arusha)

(Massengi, J.)

dated the 20th day of December, 2012

in

Civil Appeal No. 44 of 2006

.....

JUDGMENT OF THE COURT

13th & 23rd February, 2024

GALEBA, J.A.:

This appeal has its genesis in the decision of the Customary Land Tribunal at Karatu, where the respondent Village lodged Land Application No. 50 of 2002 against the appellant's father, one Tsere Sely, now deceased. Upon a formal application to this Court, the present appellant was made a party to the present appeal following the demise of his father. The subject matter of the dispute was trespass over a parcel of land measuring about 50 acres (the land in dispute), located at

Chemchem Village within Karatu District. Consequent to hearing of the case before the Customary Land Tribunal, the appellant lost the contest to the respondent village, which was declared the lawful owner of the said land.

The decision of the Customary Land Tribunal aggrieved the appellant, who lodged Land Appeal No. 15 of 2005 before the Customary Land Appeals Tribunal to contest his first defeat. However, the latter Appeals Tribunal upheld the decision of the trial Customary Land Tribunal and dismissed the appeal. The appellant was aggrieved by that dismissal, and preferred Civil Appeal No. 44 of 2006, to the High Court of Tanzania at Arusha. However, like in the first two instances, the appellant's appeal at the High Court was dismissed with costs on 20th December, 2012.

Still determined to exercise his right of access to justice, the appellant has approached this Court to challenge the decision of the High Court. The appeal is predicated on six grounds of appeal, but for reasons to become obvious in the course of this judgment, we will not refer to them at this stage.

Initially, on 5th February, 2024, the Office of the Solicitor General representing the respondent had lodged in Court a notice of preliminary

objection on two points of law; **one,** that the appeal was incompetent for non-compliance with section 47 (3) of the Land Disputes Courts Act, (the LDCA), for failure to seek and obtain a certificate from the High Court certifying that there is a point of law involved in the appeal, and; **two**, that the appeal was incompetent for contravening the provisions of Rule 97 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules), for failure by the appellant to serve the memorandum of appeal and the record of appeal to them.

When the appeal was placed before us for hearing on 13th February, 2024, the appellant was represented by Messrs. Emmanuel Safari and Qamara Aloyce Peter, both learned advocates, whereas the respondent had the services of Mr. Francis Rogers learned Principal State Attorney.

Before hearing commenced, upon learning that the matter did not originate from the Ward Tribunal, in which case it would not have offended section 47 (3) (now 47 (2)) of the LDC, and that the record of appeal had been served directly on the respondent village, Mr. Rogers prayed to withdraw both preliminary points of objection, which prayer not being objected was readily granted by the Court. Nonetheless, on our own motion we required learned counsel for the parties to address

us on the competence of the appeal, considering that there was no certificate of the High Court certifying that there was a point of law in the appeal meriting attention of the Court.

Mr. Safari's position on the matter was that, the certificate is required in respect of matters originating from the Ward Tribunal and those which originate from the Primary Court referred to under head (c) of Part III of the Magistrates' Courts Act, (the MCA). He submitted in this case, that the requirement was leave to appeal, which they sought and obtained as required by section 5 (1) (c) of the Appellate Jurisdiction Act (the AJA).

Elaborating further in support of the position he maintained, Mr. Safari referred us to section 33 (1) (a) of the LDCA, which provides that the District Land and Housing Tribunal (the DLHT) shall have original jurisdiction, among others, in all proceedings under the Customary Leaseholds (Enfranchisement) Act, 1968, and submitted that the import of the section was to place the Customary Land Tribunal at the same plane in the court hierarchy as the DLHT. To him, that implied that an appeal from the Customary Land Tribunal was the same as an appeal from the DHLT to the High Court, in which case, only leave is required,

which was sought and obtained in due compliance with section 47 (2) of the LDCA, obviously, before its repeal on 1st December, 2023.

On the other hand, he maintained that, if the law required for a certificate on a point of law for appeals originating from the Customary Land Tribunals, it could have specifically provided so, just as it does for matters originating from Primary Courts and Ward Tribunals. In a further probe by the Court, on whether the present appeal is a third appeal or not, he contended that the appeal is a second appeal because the law places the DLHT in the same level as the Customary Land Tribunal as indicated earlier on.

In reply, Mr. Rogers submitted that the appeal before us is a third appeal and a certificate on a point of law is required in terms of section 5 (2) (c) of the AJA and rule 96 (2) of the Rules. He contended that the dispute in this appeal having originated from the Customary Land Tribunal, the appeal that was preferred to the Appeals Tribunal which was presided over by Hon. Ngwala, Chairman, was the first appeal. He added that an appeal to the High Court, which Massengi J. dismissed was the second, and the present appeal before us, is a third appeal. He submitted that this Court in third appeals, can only determine points of law certified by the High Court. The learned Principal State Attorney

referred us to observations by the Court in the cases of **Mathew Mlay v. Rashid Majid Kasenga** Civil Appeal No. 354 of 2020 and; **Shangwe Mjema v. Frida Salvatory & Another** Criminal Appeal No. 103 of 2017 (both unreported). Learned counsel finally prayed that this appeal ought to be struck out for being incompetent.

In rejoinder submission, Mr. Safari pressed the Court to note that, the two cases provided by the respondent's counsel are distinguishable because, they relate to proceedings that had originated from Primary Courts and Ward Tribunals. As for rule 96 (2) of the Rules, Mr. Safari pressed the Court not to interpret the said rule in isolation with the AJA, because it is from that Act, where that rule derives its mandate. So, he remained unmoved maintaining his former position that this appeal is competent before us.

After learned counsel had closed their arguments in respect of the above point which had been raised by the Court on its own motion, we permitted them to argue the appeal, which they did. We did so because, in case we find that indeed, the certificate on a point of law was unnecessary, we would then determine the appeal on merits. So, before we get to the appeal itself, it is instructive to first determine the point we raised.

The issue in the point we raised is whether, this appeal required a certificate of the High Court certifying that there are points of law in the decision of the High Court, fit for determination by this Court. This issue will be disposed of in the context of the jurisdiction of the tribunals and courts that dealt with the dispute before it was to come to this Court on appeal. Before we get any further, we must confess at the outset that, our efforts have not enabled us to lie our hands on any statutory provision, or a decided case expressly providing that matters originating from the Customary Land Tribunal, need a certificate of the High Court certifying that a point of law is involved in the decision or order from which the appeal is preferred. That is, unlike in matters originating from the Ward Tribunals and the Primary Courts, where there are specific provisions for that requirement which are sections 47 (3) (now 47 (2)) of the LDCA and 5 (2) (c) of the AJA, respectively, there is no express provision making it mandatory for any other intended appellant to first seek for a certificate before he can lodge his appeal to this Court. But that, in our considered view, does not mean that we are also unable to identify common attributes obtaining in both sets of matters; those originating from the Ward Tribunals and the Primary Courts, on one hand, and those originating from Customary Land Tribunals, on the other.

As its name goes, the Court of Appeal, as established by Article 117 (1) of the Constitution of the United Republic of Tanzania, (the Constitution), is the Court of Appeal and it is the final and apex court in this country's court system. The primary jurisdiction of the Court in terms of Article 117 (3) of the Constitution as restated in section 4 (1) of the AJA, is to determine appeals from decisions of the High Court and of a Resident Magistrate exercising extended jurisdiction.

Before getting to the real issue, in the interest of a simplified comprehension of the premise upon which this judgment is based, we think it is appropriate to digress a bit from the main discussion, in order to achieve that objective. The point we want to bring up is that, in terms of the court structure and jurisdiction, not all complaints come as far us this Court. There are complaints, which by their nature, are strictly barred by law from getting to this Court. Such matters, in the majority of the cases are matters of evidence and those of facts. For instance, in the field of employment and labour relations, it has been made express under section 57 of the Labour Institutions Act, that unless a complaint is a pure point of law, no labour related complaint may be brought to the Court of Appeal from the High Court. Similarly, in matters of tax and tax administration, by the provisions of section 25 (2) of the Tax

Revenue Appeals Act, this Court can entertain only pure points of law. That is to say, factual complaints in labour matters and tax issues cannot, under the law as established, get to this Court. That is not to demean the importance of matters of fact, rather it is to indicate that the highest court to deal with such matters is the High Court and in tax and revenue issues, the highest judicial organ is the Tax Appeals Tribunal.

Likewise, in all matters originating from Primary Courts and from Ward Tribunals, the highest and the final court on issues of fact is the High Court. The rationale is that, if any issue of fact was not properly considered, determined and resolved by the Ward Tribunal or the Primary Court itself, then the DLHT or the District Court respectively, is deemed to have considered it on first appeal and resolved it. If for some reason, the issue of fact escaped the DLHT or the District Court on a first appeal, it must have been brought to the attention of the High Court for determination. The court system is like an inverted conical filtration system, where many matters are supposed to be sorted out and resolved at lower levels of the system and fewer are permitted to penetrate upwards.

Therefore, we are of the decided position that, this Court entertains matters of law only from the Ward Tribunals and the Primary Courts, for the sole reason that such appeals are third appeals. At this point, we wish to make our position resolutely clear that, irrespective of the judicial forum in which original jurisdiction might have been exercised in respect of a particular dispute, if that matter is to come to this Court on a third appeal, such appeal shall require a certificate on a point of law issued by the High Court. And that, is the heart of this judgment. Our decision in this appeal will therefore depend on whether, this appeal is a third appeal or it is not. It is that very point, to which we are now crossing over.

Section 9 (1) of the Regulation of Land Tenure (Established Villages) Act No. 22 of 1992, applicable at the time, provided that any person who would be aggrieved by the decision of the Customary Land Tribunal would appeal to the Customary Land Appeals Tribunal, also called the Appeals Tribunal. That section was to the effect that:-

> *"9 (1) Any person who is dissatisfied with any decision of the Tribunal may appeal to the Appeals Tribunal having jurisdiction over the area in which the dispute arose."*

In this case the appellant was aggrieved by the decision of the Customary Land Tribunal in Land Case No. 50 of 2002 and in abiding with the above procedure, he lodged Land Appeal No. 15 of 2005 before the Customary Land Appeals Tribunal. This was the first appeal.

According to section 9 (2) of the above Regulation of Land Tenure (Established Villages) Act, as amended by Written Laws (Miscellaneous Amendments) Act, No. 18 of 1995, a person aggrieved by the decision of the Customary Land Appeals Tribunal, was supposed to appeal to the High Court. That section provided:-

> *"9 (2) Any person who is dissatisfied with the decision of the Appeals Tribunal may further appeal to the High Court."*

As indicated earlier on, the appellant was aggrieved by the decision of the Customary Land Appeals Tribunal. In compliance with the above provision, he lodged Civil Appeal No. 44 of 2006 in the High Court. In our firm view, this was the second appeal. It is worthy to note the common term employed by the above provisions when referring to the matter to be lodged in a higher forum for challenging the decision one is aggrieved with. Both subsections (1) and (2) of section 9 refer to the proceeding to be an appeal, in case one is aggrieved. That is why we are confident that the proceedings before the Customary Land

Appeals Tribunal and the High Court were both appeals; one being the first and the other, the second, respectively. Unlike the Customary Land Tribunal, which was exercising original jurisdiction on the dispute, the Land Appeals Tribunal and the High Court, were exercising appellate jurisdictions.

All that means, this appeal is a third appeal, and before it could be lodged, the appellant ought to have applied for a certificate of the High Court certifying that a point of law was involved in the judgment to be challenged. We also do not agree with Mr. Safari that rule 96 (2) of the Rules has any relation with the AJA in terms of matters to which it applies. That is because in the AJA, only matters under head (c) of Part III of the MCA are referred to at section 5 (2) (c), but section 47 (2) of the LDCA is not mentioned in the AJA, but still the said rule 96 (2) of the Rules requires a certificate in land matters. In other words, rule 96 (2) requires that a certificate on a point of law must be part of the record of appeal, if that appeal is to this Court, and is a third appeal, irrespective of where the matter originated.

It is also worthy taking note that at page 125 of the record of appeal, the appellant filed Miscellaneous Civil Application No. 2 of 2013 which was a requisite application for a certificate. In that application the

points for certification are listed at paragraph 10 of the affidavit of the appellant in that application. However, on 24th September, 2013, one advocate Thiofilo holding brief of Mr. Emmanuel Safari learned advocate, prayed to withdraw the application with leave to refile it. That prayer was granted, at page 146 of the record of appeal. The appellant refiled Miscellaneous Civil Application No. 214 of 2013, but the same was struck out on 11th July, 2014, for being instituted out of time, as may be noted at page 254 of the record of appeal. From then nothing is heard on any application for the requisite certificate up to the date of hearing when we raised it. We are of the view that, had the appellant persistently pursued the application in that respect, the issue we raised would not have been of any material relevance.

Thus, we do not agree with Mr. Safari that this appeal does not require a certification by the High Court that there is a point or points of law in the decision challenged. This appeal being a third appeal, that certificate was mandatory.

Since the certificate certifying that any point of law is involved in the impugned decision is not only missing in the record of appeal, but the same was not sought and obtained, this appeal is incompetent and we hereby strike it out. Notably, as the issue raised has led to the

striking out of the appeal, it is nugatory to tackle the substantive grounds of appeal and consider submissions of counsel because technically, there is no appeal before the Court.

Finally, we make no order as to costs because the issue that has led to the termination of these proceedings was raised by the Court on its own motion.

It is so ordered.

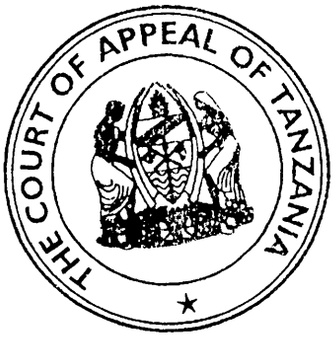
DATED at **ARUSHA** this 23rd day of February, 2024.

S. A. LILA
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

A. Z. MGEYEKWA
JUSTICE OF APPEAL

The Judgment delivered this 23rd day of February, 2024 in the presence of Mr. Qamara Aloyce Peter, learned counsel for the Appellant and Mr. Leyani Mbise, learned State Attorney for the Respondent, is hereby certified as a true copy of the original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL