

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

**(SUMBAWANGA DISTRICT REGISTRY)**

**AT SUMBAWANGA**

**MISC. LAND APPLICATION NO. 13 OF 2021**

(Arising from High Court Misc. Land Appeal No. 19/2018 C/O from DLHT for Rukwa

District Land appeal no. 21/2017 originating from Case No. 30/2016,

Kipeta Ward Tribunal)

**VALENTINO KAYOLA ..... APPLICANT**

**VERSUS**

**BARNABAS CHIWANGA ..... RESPONDENT**

**RULING**

Date: 18/03 & 14/04/2022

**NKWABI, J.:**

The applicant is invoking this court to grant him leave to appeal to the Court of Appeal. He is also entreating the court to certify points of law in respect of Misc. Land Appeal No. 19 of 2018, the decision of this court. Those pleas are apart from his conjuration for costs and any other reliefs I may deem fit to grant. Evidently, the applicant was unsuccessful in the High Court in Misc. Land appeal No. 19 of 2018. The application is brought under section 47(2) of the Land Disputes Courts Act, 2002 [R.E. 2019], section 5(1) (c) of the Appellate Jurisdiction Act, 1979 and Rule 45 (a) of the Court of Appeal

Rules, 2009 as amended by Rule 6 of Tanzania Court of Appeal Rules (Amendments) Rules, 2017 GN No. 362 of 2017.

The land dispute has its origin from the Kipeta Ward Tribunal. Hence the requirement to seek a certificate on point of law or leave, which either of them, is a requirement for him to approach the Court of Appeal of Tanzania. The chamber summons was supported by the affidavit duly sworn by Mr. Deogratius Phailod Sanga, learned counsel for the applicant.

It is in paragraph 5 that Mr. Sanga declares that without leave and certification of points of law the applicant cannot approach the Court of Appeal of Tanzania for justice. He calls upon me to certify the following points of law:

- i. Legality of raising and determining an issue *sou motu* in respect of locus standi of the applicant without parties being afforded a right to a hearing.
- ii. The implication of the respondent instituting the land matter without locus standi.
- iii. The jurisdiction of the trial tribunal was at question as it had none.

- iv. Upholding the decision of the 1<sup>st</sup> appellate tribunal that failed to read and accommodate opinions of assessors by the 1<sup>st</sup> appellate tribunal.

The applicant is of the view that the intended appeal has an overwhelming chance to succeed for illegalities tainting the decisions of the lower tribunals.

The respondent, in his counter-affidavit, vigorously opposed the application and averred that the application is lacking in merits. The matter was ordered to be argued by way of written submissions. The applicant is represented by Mr. Deogratius Phailod Sanga, learned advocate, who argued the application. The respondent seems to appear in person, also filed submission in reply. There was no rejoinder submission on the part of the applicant.

I should confess outright here that I have to be guided by the decision of the Court of Appeal in **Magige Nyamoyo Kisinja v Merania Mapambo Machiwa**, Civil Appeal No. 87 of 2018, (unreported):

*"... it is no wonder, in our settled opinion that, before us both the appellant and the respondent conceded that what was certified by the High Court is not a point of law at all.*

*In the circumstances, we are settled that in the present appeal there is no point of law which has been certified by the High Court to deserve the attention of this Court.*

*We must emphasize that the point to be certified by the High Court must be that of legal nature and significant to warrant the decision of the Court. It is not enough for a party in a third appeal, like in the instant appeal, to simply think the lower court is wrong in its decision to have his case heard by the Court of Appeal."*

Further, the seriousness of the applications for certificate on point of law was clearly underscored by the Court of Appeal in **Dorina N. Mkumwa v Edwin David Hamis**, Civil Appeal No. 53 of 2017, CAT (unreported):

*"In land disputes, the High Court is the final court on matters of fact. The Legislature has taken this finality so seriously that it*

*has, under subsections (1) and (2) of section 47 of Cap. 216 [as amended by the Written Laws (Miscellaneous Amendments) (No.3) Act, 2018 Act No. 8 of 2018] imposed on the intending appellant the statutory duty to obtain either leave or certificate on point of law before appealing to this Court. It is therefore self-evident that applications for Certificate of the High Court on points of law are serious applications.*

*We are prepared to reiterate that certificates on points of law for appeals originating from Ward Tribunal mark a point of finality of land disputes that are predicated on matters of fact. Certificates are designed to ensure that land disputes originating from Ward Tribunal come to an expeditious end, preferably in the High Court. On this stance, we abide with our earlier unreported decision in **TIMOTH ALVIN KAHOMO V. SALUM ADAM MFIKIRWA**, CIVIL APPLICATION NO. 215 OF 2013 where we restated that a decision of the High Court refusing to grant a certificate on point of law under section 47(2) of Land*

*Disputes Courts Act, is final and no appeal against it lies to this Court."*

In the submission, Mr. Sanga adopted the whole contents of the affidavit as their submission while insisting that the intended appeal has an overwhelming chance of success for irregularities and illegalities found in both decisions of the lower tribunals.

Justifying the prayer for certification by this court on the legality of raising and determining an issue *sou motu* in respect of locus standi of the applicant without parties being afforded a right to a hearing, Mr. Sanga ventured that failure to avail parties a hearing on the locus standi of the applicant in this application in Misc. Land Appeal No. 19 of 2018 renders the decision invalid citing **Raza Somji v Amina Salum [1992] TLR 208:**

*"The point raised sou motu and determined without affording parties chance to be heard such an issue or ground is invalid."*

He added that it was the respondent who initiated the suit in the trial tribunal but this court condemned him to have no locus standi while he did not initiate

the suit. He then urged me to certify this as a point of law for determination by the Court of Appeal.

The respondent replied maintaining that the applicant reply at the District Land and housing Tribunal was that the respondent had no locus standi to sue as he is not the administrator of estate of his late father. It was not raised at the trial tribunal nor at the 1<sup>st</sup> appellate tribunal, therefore it was correct for this Court to determine the issue of locus standi it was not a new fact raised to both camps. He prayed this ground be dismissed.

On this point, this is what the learned Judge had to say:

*"However, if one look at the records at both the Ward Tribunal and District Land and Housing Tribunal one may find that at one point the appellant admitted that the suit land was being used by their father after being temporarily given by the respondent's father. This show that that the appellants' father was using the suit land as an invitee and so even the appellants were using the land as invitees. In other words if the appellant were just invitees they had locus stand or capacity to sue. ... There is no doubt that*

*the appellants at the Trial Tribunal had no locus stand since they were neither the owners of the land nor proper parties to institute the action."*

If one closely looks at what the learned Judge decided as quoted above, one will not only find that that was not a new matter raised *sou motu*, he was dealing with Invitees' status and equated it with having no locus standi but it had been discussed and he merely called it by its name. Further, that is not a pure point of law. It contains matters of fact. I refuse to certify this as a point of law worth for the determination by the Court of Appeal.

On the jurisdiction of the trial tribunal, the same was at question as it had none, in the view of Mr. Sanga. Mr. Sanga hassled that the respondent had no locus standi to institute the suit as the disputed land was the property of his family or father without a power of attorney or letters of administration. He argued, the court has no jurisdiction to determine issues of general interest. Specific interest refers to a specific owner whose interest has been interfered while general interest refers to e.g., family properties, relative properties as per **Lujuna Shubi Balonzi, Seniour v The Registered Trustees of Chama Cha Mapinduzi [1996] TLR 203**. Mr. Sanga



implored me to certify lack of jurisdiction by the trial tribunal as a point of law for the determination by the Court of Appeal.

I have rejected certifying the issue of locus standi as a legal point worth of determination by the Court of Appeal, as the 2<sup>nd</sup> point on jurisdiction hinges on locus standi I have already decided the same not to be on pure point of law. I reject the same for it is not a pure point of law concerning locus standi as it involves facts in respect of being invitee or not invitee. It also involves to decide on factual evidence as to whether the piece of land was a family or personal land. This second basis on lack of jurisdiction for certification a point of law for determination by the Court of Appeal too crumbles to the ground.

Mr. Sanga asserted that upholding the decision of the 1<sup>st</sup> appellate tribunal that failed to read and accommodate opinions of assessors by the 1<sup>st</sup> appellate tribunal constitute an illegality worthy certification as a point of law for determination by the Court of Appeal. It is trite requirement of the law under section 23(1) and (2) of the Land Disputes Courts Act, Cap 216 R.E.

2019 read together with Regulation No. 19 (1) and (2) of the Land Disputes Courts (The Land and Housing Tribunal) Regulations, 2003, that the District Land and Housing Tribunal in deciding cases before it must preside with a Chairman and two assessors and the Chairman before composing the judgment must require the assessors to give their opinion in writing. The clear position violated, Mr. Sanga argued, could be seen in **Sikuzani Saidi Magambo & Another v Mohamed Roble, Civil Appeal No. 197 of 2018** CAT at Dodoma (unreported). The proceedings in the first appellate tribunal does not indicate that assessors' opinions were availed to parties and read over to the parties, Mr. Sanga elaborated. He then urged me to certify as a point of law that assessor's opinion was not properly accommodated at all in the proceedings.

On his part, the respondent replied that, *"however, these are new issues to be determined by this court considering that the applicant had already filed an appeal to this court with three grounds of appeal whereby the appeal was dismissed."*

I accede to the view of the respondent. The view of the respondent is given legal force by the decision of the Court of Appeal in **George Claud Kasanda v The DPP**, Criminal Appeal No. 376 of 2017 stated that:

*"In view of that legal setting, a ground of appeal not heard and determined by the High Court or a subordinate court with extended jurisdiction cannot be entertained by the Court."*

In the circumstances, I cannot certify as a point of law fit for determination of the Court of Appeal while actually the same cannot be determined by the Court of Appeal. In short, a party to proceedings cannot pick and choose which points to raise at a certain stage of the proceedings and what points to raise at another stage.

As to the alleged legal point that the respondent had no locus standi, the decision on this point depends on factual evidence. So, it is not a pure point of law worth of certification for the same to be determined by the Court of Appeal.

Finally, Mr. Sanga's exhortation to this court to certify points of law as indicated in paragraph 8 of the applicant's affidavit for the determination by the Court of Appeal does not find purchase with me. It is rejected.

In fine, this application lacks merits, it is dismissed. I make no orders as to costs in view of the fact that the respondent did not pray for one.

It is so ordered.

**DATED at SUMBAWANGA** this 14<sup>th</sup> day of April, 2022



  
J. F. NKWABI

**JUDGE**