IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPLICATION NO. 354/17 OF 2020

(CORAM: MWARIJA, J.A., KITUSI, J. A. And MAKUNGU, J.A.)

MATHEW MLAY.. APPLICANT

VERSUS

RASHID MAJID KASENGA .... RESPONDENT

[Application from the Proceedings, Ruling and Order of the High Court of Tanzania, Land Division at Dar es Salaam)

(Makani, J.)

dated the 29th day of June, 2020

in

Miscellaneous Land Application No. 573 of 2019

....

RULING OF THE COURT

19th & 31st August, 2022

KITUSI, J.A.:

The applicant has sought to invoke our powers of revision under section 4 (3) of the Appellate Jurisdiction Act (the AJA) and rule 65(1), (2) and (c) of the Court of Appeal Rules, 2009 (the Rules). He mainly argues that the decision of the High Court (Makani, J.) in Miscellaneous Land Application No. 573 of 2019, denying him certification of points of law for determination by this Court, is faulty but he is barred from appealing against it, hence the resort to revision.

By way of background, the matter commenced at Makuburi Ward Tribunal, where the parties litigated over a narrow parcel of land

forming a boundary between them. The suit land is located at Ubungo area in the city of Dar es Salaam.

Earlier, the applicant had had his piece of land surveyed and he erected a fence wall around it. At the Ward Tribunal, the respondent challenged the survey and the resultant boundaries on the ground that it was carried out without his knowledge and involvement. He claimed that as a consequence, the fence erected by the applicant blocked access to the piece of land held by him. The Ward Tribunal found for the respondent and ordered a fresh survey of the area. That was on 10th May, 2012. In the same year, the applicant filed Misc. Application No. 119 of 2012 at the District Land and Housing Tribunal (the DLHT) seeking directions by that Tribunal on how to execute the order of the Ward Tribunal.

However, the applicant seems to have become wiser and thought better of the situation 5 years later. For, in 2017 he filed Misc. Land Application No. 546 of 2017 at the DLHT praying for extension of time within which to appeal the decision of the Ward Tribunal, on five grounds including want of pecuniary jurisdiction on the part of the Ward Tribunal. The DLHT dismissed the application on two grounds; one the applicant failed to account for each day of delay and two, the DLHT was *functus officio* having dealt with Misc. Application No. 119 of 2012 by

giving directions as to how execution of the order of the Ward Tribunal should be carried out.

Dissatisfied, the applicant appealed to the High Court vide Land Appeal No. 51 of 2018 which was dismissed by Maige, J. (as he then was).

Relentless, through Misc. Land Application No. 573 of 2019 which we referred to earlier, the applicant applied for a certificate on points of law in that decision of the High Court, for consideration by this Court. The application was preferred mainly under section 47 (2) and (3) of the Land Disputes Courts Act (the Act) and rule 44(2) of the Rules. This is the application Hon. Makani, J. dismissed by a ruling which forms the subject of this revision.

Mr. Roman Masumbuko, learned advocate, argued the application before us, amplifying on the written submissions he had earlier filed. Counsel's trump card was that when an issue of illegality is raised and, in this case, he submitted that the Ward Tribunal had no jurisdiction, then the other factors such as length of the delay do not matter. Mr. Frederick Mwakinga, learned advocate, represented the respondent and he had also filed written submissions ahead of the date of hearing.

In his written and oral address, the applicant's counsel covered a wide landscape on illegality as being a good cause for granting

extension of time. He cited the common cases forming that jurisprudence including; **The Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** [1992] T.L.R. 182, and **Lyamuya Construction Company Ltd v. The Board of Trustees of Young Women Christian Association of Tanzania,** Civil Application No. 2 of 2010 (unreported).

Mr. Mwakinga simply distinguished those cases arguing that in the instant case, the Ward Tribunal addressed the fraudulent and unverified boundaries set by the applicant, a factor which was not raised in the cases cited. He further argued that the applicant should not be allowed to benefit from his own wrong.

However, this application is likely to turn on a totally different point. It has become necessary therefore for us to first interrogate whether the applicant took the correct step by seeking certification on a point or points of law. This is because access to the Court is governed by laid down procedures, often times not appreciated by the parties.

As alluded to earlier, the applicant sought to move the High Court (Makani, J.) under section 47 (2) and (3) of the Act. Sub section (2) of Section 47 relates to leave to appeal, while sub section (3) of that provision relates to certificate on point of law. This means that the applicant applied for both leave to appeal and a certificate on point of

law. We are aware that such combined applications are allowed in the High Court when the orders sought are compatible. See, **Tanzania Knitwear v. Shamsho Esmail** [1989] T.L.R. 48 and **Philemon Joseph Chacha & Others v. South African Airways (Prop) Ltd & Others** [2002] TLR 246.

We also note that in some cases such as **Mariam Abdallah v. Adolph Mwakanyuki,** Miscellaneous Land Application No. 116 of 2021 (unreported), the High Court has adopted a liberal approach aimed at speeding up matters before it. In that case, the applicant had filed an application for leave to appeal and for a certificate on a point of law but the High Court proceeded to decide only on the application for leave to appeal and ignored the application for a certificate on a point of law because it was not relevant.

We would have considered taking a look at that approach had the applicant here demonstrated his desire to pursue both the grant of leave to appeal and the certificate on a point of law. However, when we drew the attention of Mr. Masumbuko to this, he responded by submitting that the citing of sub section (2) of section 47 of the Act was inadvertent because he did not mean to apply for leave to appeal. He insisted that his was an application for certificate on point of law.

We cannot help concluding that the application before Makani, J. was for a certificate on point of law only. Not only because the learned counsel has so submitted, but even the tone of the Chamber Summons placed before the High Court is consistent with that submission because certification of a point of law was the only substantive prayer reflected in it:-

> *"1. That this Honourable Court be pleased to certify that there is a point of law involved in the decision of the High Court (Land Division) by Honourable I. Maige delivered on 28th August, 2019 in Land Appeal No. 51 of 2018.*
>
> *2. Any other relief this Honorable Court may deem fit to grant?"*

Apart from the foregoing, and in order to ward off misconceptions, we wish to seize this opportunity to reiterate the position of the law regarding applications for leave and for a certificate on a point of law. The law does not permit the riding of these two horses simultaneously as some parties tend to do. This was stated in the case of **Sembeke Notira v. Ngitiri Meng'oru,** Civil Appeal No. 9 of 1989 (unreported) cited in **Ndwaty Philemon Ole Saibull v. Solomon Ole Saibull** [2000] T.L.R. 209. After reproducing a passage from the former case the Court held:-

*"As we stated earlier, the present case is the reverse of the **Sambeke** case in that in the present case a certificate that a point of law was involved was issued but not Leave to Appeal. In the above case, this court stated that it is not necessary to make two applications in a situation where a certificate of law is required, because once a certificate has been issued, Leave to Appeal is not necessary as it is deemed to be included in the certificate. The reverse of course is not true, namely, that Leave to Appeal does not include a certificate that a point of law is involved for consideration by this court".*

Back to the procedures of accessing this Court. That appeals are a creature of the statute is settled, as we stated in **Tito Shumo & 49 Others v. Kiteto District Council**, Civil Application No. 170 of 2012 (unreported), among many other decisions. In some cases, appeals are automatic yet in others they are maintainable only upon fulfilling certain conditions, under the AJA. This is what was stated in **The Executive Secretary Wakf and Trust Commission Mambomsiige Zanzibar v. Saide Salum Ambar** [1991] TLR 198 at pg 200:-

"Appeals to this Court are governed by the Appellate Jurisdiction Act, 1979, section 5. Subsection (a) and (b) set out all the situations in which a party may appeal as of right ..."

It is common ground that appeals that do not automatically lie to the Court, may only be preferred with leave or certificate on point of law. The applicant believed that the decision of the High Court in Land Appeal No. 51 of 2018 denying him extension of time required a certificate on a point of law, and unsuccessfully made the application for certification. This application turns on the question whether the appellant's view was correct.

Certificate on a point of law becomes a requirement when a party intends to appeal to the Court for the third time. That is, where the matter originates from the Primary Court a certificate on a point of law is a legal prerequisite under section 5 (2) (c) of the AJA. The Court lucidly explained this procedure in the case of **Eustace Kubalyenda v Venance Daud**, Civil Appeal No. 70 of 2011 (unreported). It is also a requirement in land matters as per section 47 (2) of the Act where the appeal arises from a matter that commenced from the Ward Tribunal. See also the case of **Marco Kimiri & Another v. Naishoki Eliau Kimiri**, Civil Appeal No. 39 of 2012 (unreported).

We asked the learned counsel for the parties to address us on whether the decision that resulted in Land Appeal No. 51 of 2018 originated from the Ward Tribunal. Mr. Masumbuko maintained without blinking an eye, that it originated from the Ward Tribunal. With respect,

we agree with Mr. Mwakinga that while the dispute was first filed and decided by the Ward Tribunal, that decision has not been appealed against yet because time has not been extended by the DLHT as well as by the High Court, to enable the applicant appeal.

The situation at hand is almost in fours with what obtained in the case of **Mariam Nyangasa v. Shaban Ally Sembe**, Civil Appeal No. 17 of 2019 (unreported). [TZCA 294 (18 May 2022)], where the Court observed that the decision of the Ward Tribunal had not been challenged and that all subsequent applications were meant to challenge the decision of the DLHT that denied the appellant extension of time.

Similarly, in the present application, a distinction must be drawn between the fact that the matter was originally filed at the Ward Tribunal, which is not disputed, and the more relevant question of which decision is subject of the revision. What matters is whether the decision of the Ward Tribunal is the one that is instantly the subject of appeal or revision. The crux of the matter subsequent to the decision of the Ward Tribunal, is extension of time to appeal, on the ground of illegality. This pursuit commenced at the DLHT, not the Ward Tribunal, and went on appeal for the first time before Maige, J (as he then was) in Land Appeal No. 51 of 2018. If the applicant intended to appeal against the decision in Land Appeal No. 51 of 2018, all he needed was leave to appeal in

terms of section 47 (2) of the Act, as a certificate on a point of law was uncalled for.

As the application for a certificate on a point of law was misconceived as demonstrated above, this application calling upon us to examine the proceedings and ruling in that application, is, with respect, equally misconceived. We accordingly strike it out with costs.

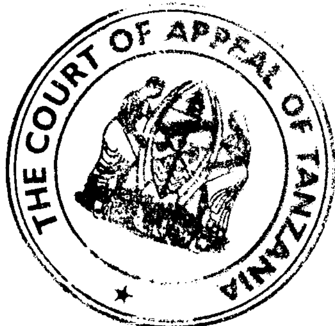
DATED at **DAR ES SALAAM** this 26th day of August, 2022.

A. G. MWARIJA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The Ruling delivered this 31st day of August, 2022 in the presence of Mr. Roman Masumbuko, learned counsel for the Applicant and Mr. Frederick Mwakinga, learned counsel for the Respondent, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL