

TANZANIA / JUDGMENT

ally nyabwala vs emmanuel warioba 2021 tzhc 4189 23 july 2021

COURT
TZHCDECIDED
23 July 2021

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN DISTRICT REGISTRY OF
MUSOMA AT MUSOMA MISC. LAND APPLICATION NO. 7 OF 2021 ALLY
NYABWALA.....APPLICANT VERSUS EMMANUEL
WARIOBA..... RESPONDENT {Arising from the decision of this Court in
Land Appeal No. 109 of 2020)

RULING

1st June and 23rd July, 2021 KISANYA, J.: In this application, the Court is called upon to certify a point of law involved in the decision of this Court (Hon. Z.N. Galeba, J., as he then was) in Land Appeal No. 109 of 2020. In that decision, this Court upheld the decisions of the Nyamtinga Ward Tribunal and the District Land and Housing Tribunal for Tarime, in which the respondent was declared the lawful owner of the disputed land. Briefly, the respondent lodged a land complaint before the Nyamtinga Ward Tribunal (trial tribunal). He claimed that the latter had trespassed into his piece of land. The applicant disputed the respondent's claim. He accounted to have inherited the disputed land from his father way back in 1972. At the end, the ward tribunal decided i the matter in favour of Emmanuel Warioba. The applicant unsuccessfully appealed to the District Land and Housing Tribunal for Tarime at Tarime (first appellate tribunal) and this Court. In order for the applicant to appeal to the Court of Appeal, he has moved the Court seeking for the above named order. The .application was made by way of chambers summons and supported by the applicant's affidavit. The respondent contested the application. He filed a counter-affidavit to such effect. When the matter came up for hearing, the applicant enjoyed the legal services of Mr. Emmanuel Gervas, learned advocate while the respondent was present in person and unrepresented. Noteworthy, the applicant had, through his supporting affidavit, asked the Court to certify the following, as points of law:-

1. Whether the ward tribunals are excluded to observe the principle of justice when determining the land dispute.
2. Whether the ward tribunals are not bound with the procedure of visiting locus quo.

3. Whether the High court have (sic) no jurisdiction to determine the issue which violate the principle of justice if not raised in the 1st Appeal tribunal.
4. Whether the principle of *functus officio* cannot apply when the court order hearing an appeal orally and once one party completed 2 submitted (sic) the other party have a right to demand written submission instead of oral submission as reply. However, when invited to argue the application, Mr. Gervas dropped the 2nd and 4th grounds. He also merged the 1st and 3rd points into one grounds which reads: "Whether the court or tribunal cannot determine a point of law which was not raised during the first appeal." The learned counsel went on to contend that the applicant was denied the right to cross-examine the witness (the hamlet chairperson in particular), who testified during the trial tribunal's visit at the locus in quo. He submitted further that the applicant was prejudiced because the evidence of the hamlet chairman gathered during the visit at the locus in quo was considered in the decisions of the trial tribunal and first appellate tribunal. Mr. Gervas conceded that the said issue pertaining to irregularities during the visit at the locus in quo was not raised during the first appeal. However, he was of the view that, it was a point of law which ought to have been considered during the second appeal before this Court. He referred the Court to section 16(a) and (b) of the Ward Tribunal Act, Cap. 206, R.E 2002 and the case of Nizar M.H. vs Gulamali Fazal Mohamed (1980) TLR 29. 3 In view of the above submission, the learned counsel asked the Court to grant the application by certifying the above stated points. He also prayed for costs of this application. In rebuttal, the respondent contended that the hamlet chairman was not cross-examined by the applicant during the visit at the locus in quo because he was neither called by any of the party. He submitted that the chairperson was called by the trial tribunal to clarify issues related to ownership of land and that he was not a witness. For that reason, the applicant urged me to consider that there is no point of law to be certified to the Court of Appeal. He prayed the application to be dismissed with costs. * Re-joining, Mr. Gervas submitted that even if the witnesses were called by the trial tribunal, the parties were entitled to cross examine or ask them questions. In the light of the submissions by both sides, the issue whether this application is meritorious or otherwise. Since the decision subject to this application originated from the ward tribunal, the applicant's appeal to the Court of Appeal stands upon this Court certifying the point(s) of law involved in the intended appeal. The law is settled that the court certifying the point of law has to evaluate the proposed points of law 4 and satisfy itself whether they are worth to be certified to the Court of Appeal. See *Dorina N. Mkumwa vs. Edwin David Hamis*, Civil Appeal No.53 of 2017) [2018] TZCA 221. In our case, the applicant's contention implies that there are irregularities in the proceedings of the trial tribunal during the visit at the locus in quo. To be specific, it is claimed that, the applicant was denied the right to cross examine or ask question to the chairman who testified during the visit to the locus in quo. Yet, his evidence was considered by the trial and first appellate tribunals. It is common ground that the said issue was raised during the second appeal to this Court. However, this Court did not consider the said ground on the reasons it was not raised and determined during the first appeal to the District Land and Housing Tribunal. I am alive of the trite law that a ground of

appeal not raised in the first appeal cannot be raised in a second appeal unless it is related to point of law. (See Bihani Nyankongo and Another vs Republic, Criminal Appeal No.182 of 2011 (unreported)). Now, in view of the decision of the Court of Appeal in Sikuzani Saidi Magambo and Ktrioni Richard Vs Mohamed Roble, Civil Appeal No.197 of 2018, irregularities on a visit at the locus in quo may render the proceedings a s nullity. And one of the procedure during the visit at the locus in quo is for the witness to testify on the matter. In so doing parties are expected to ask questions to the witness called to testify or comment on his evidence. Thus, it appears that the applicant had raised a point of law during the second appeal. Therefore, I am of the humble view that, there is a point of law worth to be certified to the Court of Appeal. For the foresaid reason, I find merit in this application and hereby certify the following point of law:

1. That High Court erred in law by failing to consider that the appellant was denied the right to cross examine or put question to witnesses called during the visit at the locus in quo. In circumstances of this case, I order the costs to follow event. Ordered accordingly. DATfJat MUSOMA this 23rd July, 2021. 6

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