

TANZANIA / JUDGMENT

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22 October 2024

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THE UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA MBEYA SUB - REGISTRY AT MBEYA MISC. CRIMINAL APPLICATION NO. 22508 OF 2024 (Originating from the High Court of Tanzania at Mbeya in PC. Criminal Appeal No. 40669 of 2023, the District Court of Kyela at Kyela in Criminal Appeal No. 14 of 2023, Originated from Criminal Case No. 143 of 2023 of Kyela Urban Primary Court) PHELISTER/ FELISTER KIFULUGA.....APPLICANT VERSUS DAUDI HEZRON MWAKANYIKA..... RESPONDENT

RULING

Date: 22 October 2024 & 29 November 2024 SINDA, J.: This is an application for a certificate of point of law under section 6 (b) of the Appellate Jurisdiction Act, Cap 141, R.E 2019 for this court to certify that there is a point of law which need determination by the Court of Appeal. 1 The application is made by way of chamber summons supported with an affidavit of Phelister Kifuluga which includes five grounds to be certified as point of law as follows:

- (i) Whether it is proper for the High Court of Tanzania to uphold lower court decisions on the ground that it is the dispute originated from land matter hence the court lack jurisdiction as land Tribunal is concerned. (ii) Whether the High Court of Tanzania erred in law to uphold the decisions of the lower courts in disregarding the committed crime with view of dispute in ownership of land while disregarding that the respondent was not party to the land in dispute entertained at Ipande Ward Tribunal. (iii) Whether it is proper to acquit the respondent on a Criminal case on the ground that evidence proved that there was a land dispute no decision to solve land dispute held by the land dispute court. (iv) Whether the high court of Tanzania erred in law to expunge from the evidence the records of documentary exhibit as admitted by the Kyela urban primary court. 2
- (v) Whether the honourable judge of the high court properly analysed the adduced evidence. At the hearing of the application, the applicant appeared in person unrepresented. The respondent was represented by Ms. Jenifa Biko, learned counsel. The application was argued by way of written submission. The applicant submitted the first, second and third grounds together that the Primary Court wrongly denied its jurisdiction when it held that the matter be brought to the ward tribunal to determine who is the owner of the disputed land. He argued that the matter is a pure criminal offence and that the Primary Court was

vested with jurisdiction to hear and determine Criminal Case No. 143 of 2023. That, there was no land ownership dispute between the applicant and the respondent. He added that there was a dispute between the applicant and the father of respondent one Hezron Mwakanyika where he was declared the lawful owner of the disputed land. On the issue of whether the High Court of Tanzania erred in law to expunge from evidence the record of the documentary exhibit as admitted by the Kyela Urban Primary Court. He submitted that there were copies of the Order of the District Land and Housing Tribunal for 3 Kyela, Application No. 52/2021 and Ipande Ward Tribunal No. 38/2021 tendered at the Primary Court as evidence that the land dispute was already determined, although the appellate court expunged the judgment of the ward tribunal and order of district land and housing tribunal from record. The applicant tendered a copy of judgment of the ward tribunal which was received by the Primary Court as Exhibit "A" and a copy of Order for application of execution of the District Land and Housing Tribunal for Mbeya as Exhibit "B". Therefore, he argued it is not true that the documents were not admitted as alleged by the District Court and the High Court. On the issue of whether the High Court properly analysed the adduced evidence. She submitted that the adduced evidence at the Primary Court from both sides clearly demonstrated that the respondent violently entered in the applicant land with the intent to commit the crime. The respondent did not deny to have committed the offence but defended himself that the applicant had a boundary dispute with the respondent's father. He referred to article 13(6) (a) of the Constitutional of United Republic of Tanzania, 1977 as amended regarding the right to appeal 4 and prayed this honourable court to grant leave to appeal to the Court of Appeal with costs. In reply, the respondent also submitted first, second and third issue together that the lower courts were right to states that, the trial court had no jurisdiction to determined criminal trespass while the issue of ownership was yet to be resolved. The respondent further argued that that it is undisputed fact that, since there is an issue of ownership of land, then the lower courts were right to dismiss the applicant's case as they had no jurisdiction to determine land disputes. It's trite position of the law that, the issue of criminal trespass cannot stand while the issue of ownership of land has not resolved. She referred to the case of Kusekwa Nyanza versus. Christopher Mkangala, Criminal appeal No. 233 of 2016, at page 9-10. On the issue of whether the lower courts were right to expunge Exhibits A and B. She submitted that she is joining hands with lower court's decision on the issue of expunging those exhibits as they were not read before the trial court to let the respondent know the contents of the documents tendered against him as far as the fair trial is concerned and consequently lead to be expunged. 5 She further submitted that the lower courts well analysed the evidence of trial court that is the reason that they reached to a fair decision. Meanwhile, the respondent cannot trespass the suit land while the issue for ownership is yet to be determined. She prayed that this application be dismissed as there is no point of law to be certified by the Court of Appeal basing to the cited Court of Appeal decision cited herein above. In rejoinder the applicant reiterated his submission in chief. In the case of Harban Hajimosi and Another vs Omari Hilal Seif and Another [2001] TLR 409 at page 412 it was stated that; "Therefore, according to subsection (2) (c), a certificate on point of law is necessary with appeal relating to matter originating from primary courts. The

practice of the High court is to frame such a point or to approve or to adopt one framed by the intending appellant to certify it to the court of appeal” The issue is whether the applicant in his affidavit raised a point of law which need to be determined by the Court of Appeal. I will start with the point raised by the applicant that the High Court erred to expunge from the evidence the records of documentary exhibit admitted by the Kyela Urban Primary Court because they were not read. It is a position of law 6 that failure to read out the documentary exhibits after their admission renders the said evidence contained in that documents, improperly admitted and should be expunged from records. This was stated in the case of Mbagga Julias vs Republic, Criminal Appeal No. 131/215 CAT Mwanza and the case of Rashid Kazimoto & Another vs Republic, Criminal Appeal No. 458/2016. As such, I find that it was correct for the second appellate court to expunge exhibit A, B and C from the court records because the same were admitted at the trial court without being read. Therefore, I find that this point does not need the intervention of the Court of Appeal. The applicant further claimed that the trial court was vested with jurisdiction to hear and determine Criminal Case No. 143 of 2023 because the matter was on criminal trespass and not dispute on ownership of a landed property. It is a position of law that a charge of criminal trespass can not succeed where a matter involves a land dispute which has not been determined to finality in a court of law. This was stated in the case of Sylivery Nkanga vs Raphael Albertho [1992] TLR 110. In this matter, since documentary evidence which was admitted as exhibit A, B and C by the trial court which show that the applicant won the case were expunged 7 from records by the High Court. I find that the remaining evidence did not prove that the applicant was the owner of disputed land. Therefore, I find that the trial court has no jurisdiction to determine the case of criminal trespass until the issue which prove that applicant was the owner of the disputed land is settled. As such, this point also does not need the to be determined by the Court of Appeal. The applicant also complained that the High Court did not properly analyse the adduced evidence. I will not determine this point because it involve the evaluation of evidence on records. This is not a point of law. In conclusion, I find that the applicant has not raised any point of law which need the intervention of the Court of Appeal. The application is hereby dismissed. Right to appeal is explained. DATED at MBEYA on this 29 day of November 2024. A. A. SINDA JUDGE 8

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Prepared on 13 October 2026 · Esheria