

TANZANIA / JUDGMENT

yela makinda versus athumani ndibato 2024 tzhc 150 2 february 2024

COURT
TZHCDECIDED
2 February 2024

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MISC. CIVIL APPLICATION NO. 13 OF 2023 (Arising from Pc. Civil Appeal No 61/2022 in the High Court at Shinyanga from Civil Appeal No 18/2022 in Bariadi District Court Original Civil case no 23/2022 at Mkula Primary court) VELA MAKINDA I. II I ... I I APPLICANT VERSUS ATHUMANI NDIBATO RESPONDENT

RULING

24th Nav, 2023 & 2nd February, 2024 MASSAM, I.: The Applicant brought this application under section 5(2) (c) of the Appellate Jurisdiction Act. 1979 Cap 141 R. E 2019 seeking for a certificate on point of law against the decision of this court in PC Civil Appeal No 61 of 2022 that was pronounced on 28th April, 2023. The application is supported by an affidavit sworn by Yela Makinda, the Applicant herein. The Respondent contested the application through his counter affidavit. Page 1 of 7 The brief facts leading to this current application as may easily be gathered from the court record is such that, the Respondent sued the Applicant at the trial Primary court claiming a total of Tsh. 17,951,000/= being the expense incurred in defending suits in recovery of land since 2001 to 2020. The Primary court allowed the claim and granted the respondent the amount claimed. Dissatisfied with the said decision, the Appellant preferred an appeal to the District Court of Bariadi in Civil Appeal No. 18 of 2022 (the first Appellate Court) which the same dismissed the appeal. The Respondent being aggrieved by the first appellate court's decision, preferred a second appeal to this court vide PC Civil Appeal No. 61 of 2022 where as this court before Hon. Matuma, J. made a decision dismissing the Appellant's appeal with costs save for minor alteration in the award amount from Tsh 17,951,000/= to Tsh 12,000,000/= in favour of the Respondent. Dissatisfied with the decision of this court the Applicant desires to appeal to the Court of Appeal hence this application seeking for a certificate on point of law as required by the law. Page 2 of 7 Page 3 of 7 In contesting the application, the Respondent submitted that, the case before the Primary court was of civil nature and not land as claimed by the Applicant hence the point by the Applicant is not a point of law as the trial Primary court did not discuss land issues but compensation. On the second point of law, the respondent submitted that, in this case what was discussed by both lower courts was compensation of costs which incurred in different cases prosecuted by a wrong person hence the point by the applicant on limitation was not raised in the trial court, or at the 1st appellate court and the high court. The Respondent was of the view

that, in order of the same to be raised it must be in record and must be point of law for the Court of appeal to look at it. The Respondent went further and submitted that, the Primary court is not operated with the law of limitation Act rather the Magistrate Courts (limitation of proceedings in customary laws) rules Section 71 item 3 GN 311 of 1964, that even in the case of Magnus Simon Mulisa Vs. Wilson Simon Mulisa & 3 others, Probate Appeal No 11 of 2022 HC at Bukoba (Unreported) it was ruled out that the law of limitation act does not apply in the Primary Court. Basing on the submission made the Respondent prays that the application be struck out. Page 4 of 7 In his rejoinder submission, Mr. Deus Richard reiterated his submission in chief and insisted that the application be granted so that the Applicant can challenge the decision of this court as well as the subordinate court to the court of appeal. Having considered the application together with the submissions presented by both parties, It is the requirement of law that no appeal shall lie against the decision of the High Court originating from the Primary Court unless and until the High Court certifies on point of law that the matter is worth the determination by the Court of Appeal and this is by virtue of section 5(2) (c) of the Appellate Jurisdiction Act Cap 141 R.E 2019 which was referred by the Applicant in this application. I am alive of the requirement that the High Court must be satisfied that what is raised by the Applicant in his application fall within a point of law to be determined by the court of appeal. In Dorina N. Mkumwa vs Edwin David Hamis, Civil Appeal 4 No. 53 of 2017, CAT - Mwanza (unreported) the Court of Appeal held that, " when the High Court receives application to certify point of law. we expect the ruling showing serious evaluation of the question whether what is proposed as a point of law is worth to be certified to the Court of Appeal. This Court does not expect the certifying High Court to act as an uncritical conduit to allow Page 5 of 7 whatsoever the intending appellant proposes as point of law to be perfunctorily forwarded to the court as point of law. " It is well settled that, the application for certification on the point of law must undergo a proper scrutiny in determining the existence of point of law in the intended appeal to be dealt with by the Court of Appeal. The mere claim that there is point of law to me does not raise an automatic right for certification. I have examined the Applicant's application as well as his submission thereto, the Applicant claims that there exists points of law worthy the determination by the Court of Appeal on claim that, first, the trial primary court had no jurisdiction in awarding costs for prosecuting land cases in different courts, second, whether suits on compensation can be instituted, third, whether the law of limitation can be raised at any stage of the proceedings and fourth, whether the matter before the trial primary court was time barred. What is contained in Applicant's affidavit and submission in support of the application raises contentious points of law which requires determination by the Court of Appeal. The Applicant's argument is much based on first, the jurisdiction of the primary court to award costs where the matter originated in land cases where costs were not granted, also the claim on the jurisdiction of the trial primary court in determining the Page 6 of 7 matter that was time barred to be is a matter of importance that needs to be determined and dealt with by the court of appeal. It is also the requirement of law that leave is only granted where the grounds presented before the court raises issues of general importance or novel points of law or a prima facie or arguable appeal. Leave cannot be granted when the proposed grounds are frivolously, vexatious or hypothetical. In this application the Applicant intends to appeal on the issues of jurisdiction, competency of the suit instituted before

the trial court, whether the matter was time barred and on issues of time limitation which to me are a prima facie or arguable appeal to be determined by the Court of Appeal. In the upshot, I agree with the submission by the Applicant that she has adduced the grounds on point of law to be attended by the Court of Appeal. Consequently, this Court finds merit in this application and proceed to grant the same. Costs to follow the event. It so ordered R.B. Massam JUDGE 2/2/2024
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