IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KIGOMA

APPELLATE JURISDICTION

MISC. CIVIL APPLICATION NO. 14 OF 2020

(Arising from (Pc) Civil Appeal No. 08/2020 in the High Court of Tanzania at Kigoma Before: Hon. Mr. justice I. C. Mugeta J. emanating from the Judgment of the District Court of Kasulu Civil Appeal no. 13/2019 before Hon. I.D. Batenzi - RM and Originating from Civil Case No. 105/2019 from Kasulu Urban Primary Court Before: Hon. H.H. Nyumbamkali - RM)

NEEMA GODFREY.....APPLICANT

VERSUS

ASIA ONESMO MLANZI .....RESPONDENT

RULING

4/11/2020 & 18/11/2020

A. MATUMA, J

The Applicant Neema Godfrey stood charged in the District Court of Kasulu at Kasulu for an offence of Obtaining goods by cheating contrary to section 304 of the Penal Code [Cap. 16 R.E 2002]. That was Criminal Case No. 157 of 2018.

She was alleged to have on the 13th day of February, 2018 obtained from the Respondent Asia Onesmo herein a total of seventy-seven (77) bags of maize valued at Tshs 5,390,000/= by fraudulent trick.

After a full trial, the trial District Court was satisfied that she was guilty of the offence, convicted her and sentenced her to serve a custodial sentence of two years in jail.

The applicant was aggrieved for the conviction and sentence. She thus appealed in this Court vice (DC) Criminal Appeal No. 27/2019. This Court on 15/10/2019 dismissed the applicant's appeal for having been found to have been preferred without sufficient cause.

It seems the Applicant after the decision of this Court was satisfied and decided to serve her sentence without any further challenge to the highest Court of the land.

On the other hand, the victim in that Criminal Case now the respondent commenced Civil Suit No. 105/2019 in the Primary Court of Kasulu against the Applicant claiming to be paid **Tshs 5,390,000/=** which was alleged value of the 77 bags of maize established in a criminal charge (supra) to have been fraudulently taken and or obtained by the Applicant.

The trial Primary Court ignored completely the Criminal verdict and ruled out that there was no evidence to establish that the Applicant really took the 77 bags of maize as it was alleged before it. It thus adjudged for the Applicant against the Respondent.

The Respondent was aggrieved, she appealed to the District Court of Kasulu which again held that a conviction in a Criminal trial is not conclusive proof of liability of the convict in a Civil Suit. It thus upheld the decision of the Primary Court to the effect that the respondent had not proved to the required standard that the applicant really took the said bags of maize.

The Respondent was further aggrieved and preferred an appeal to this Court (PC) Civil Appeal No. 8 of 2020 in which my leaned brother Mugeta Judge faulted the concurrent findings of the two Courts below and adjudged for the Respondent;

> *"I am of the settled view that where a person is convicted of an offence and the offence for which he is convicted becomes relevant in Civil Proceedings, the conviction is prima facie evidence on the existence of that fact in issue, that the respondent obtained goods from her and has not paid for them".*

My leaned brother Justice Mugeta further found that the fact that the Applicant had indeed obtained the stated bags of maize from the respondent was already determined in a criminal case, the findings of which should not be re-determined by any Court in a Civil suit unless set aside by the Higher Court in the Criminal process.

He thus allowed the appeal and condemned the Applicant to pay the respondent **Tshs 5,390,000/=** as the value of the stated maize which was claimed in a Civil Suit. The applicant was as well condemned interests and costs.

It is from such findings of this Court; the Applicant is aggrieved. She wants to knock the doors of the Court of Appeal of Tanzania, the notice of which has already been filed.

She is now seeking before me leave under the provisions of rule 45 (a) of the Tanzania Court of Appeal Rules, 2009 to appeal to the Court of Appeal of Tanzania.

At first on the 21st day of October,2020 I heard the parties for and against the application. I then scheduled the same for ruling on 18/11/2020.

When I was composing the ruling, it transpired before me that this application suffered some legal implications rendering the same incompetent. To satisfy myself and heading to the requirements of the law that a party should not be condemned unheard, I ordered the parties to be summoned and address the Court on the transpired legal issues;

i. *Whether in the circumstances of this matter it isn't a certificate on point of law which ought to have been sought instead of leave to appeal.*
ii. *Whether the Court of Appeal Rules applies to the High Court in an application for leave or certificate on point of law.*

The parties were dully summoned and entered appearance whereas the applicant was represented by Mr. Silvester Damas Sogomba learned advocate while the respondent appeared in person unrepresented. Mr. Sogomba learned advocate readily conceded that the Application is not properly before me as he ought to have sought certificate on point of Law and not leave to appeal.

On the second issue, the learned advocate also conceded that the Court of Appeal Rules applies only in the Court of Appeal had the application been made thereat as a second bite, and that in the High Court the enabling provisions are the provisions of the Appellate Jurisdiction Act.

The leaned advocate in the circumstances prayed to withdraw this application with leave to refile to avoid impediments of time limitation.

On her party the respondent submitted that she is not aware with legal issues but prayed that the applicant be denied the automatic extension of time because she has been dragged in Court for too long time.

Turning to the issues, I find that in the first issue there is no doubt that in law leave is sought when the intended appeal to the Court of Appeal is the second appeal. In other words; when the intended appeal is to challenge the decision of the High Court in the exercise of its first appellate jurisdiction and the Court of appeal is intended to be moved to exercise its second appellate jurisdiction.

But when the intended appeal to the Court of Appeal is a third appeal, then the intended Appellant must seek and obtain a certificate of this Court that a point of law is involved in the decision of this Court or order wealthy to be considered by the Court of appeal. This is the requirement of section 5 (2) (c) of the Appellate Jurisdiction Act, Cap. 141 R.E 2019 which provides;

> *"No appeal shall lie against any decision or order of the High Court in any proceedings under head (c) of part III of the Magistrates Courts Act unless the High Court certifies that a point of Law is involved in the decision or order".*

The proceedings referred to under Head (c) of part III of the Magistrates Courts Act, Cap. 11 R.E 2019 (supra) are those which originates from the Primary Court and have been determined in the High Court as a second appellate Court from the District Court in the exercise of its appellate jurisdiction. Therefore, any appeal to the Court of Appeal therefrom shall

be a third appeal upon which a certificate on point of law must be first sought and obtained by the intended appellant.

In the instant matter, the Applicant is intending to challenge the decision of this Court which was entered by my learned brother in the exercise of his second appellate jurisdiction on a matter which originated from Kasulu Primary Court (Shauri la Madai Na. 105/2019) and arose from the District Court of Kasulu Civil Appeal No. 13/2019.

The applicant should have therefore applied for certification on point of law and not leave to appeal.

In the circumstances, I agree with the leaned advocate that this application is improperly before me as the same is misconceived.

The learned advocate had prayed to withdraw the same with leave to refile

Withdraw could only be granted if the applicant would have noted the defect herself. Withdraw is not granted when the preliminary objection is lodged or when the Court has raised an issue ***suo motto*** against the application. This is to avoid the possibilities of a party to pre-empty the objection or the raised issue. See ***Harish Ambaramjina (By his attorney Ajar Patel) versus Abdulrazak Jussa Suleiman (2004) TLR 343.***

In the circumstances, the application is hereby struck out for having been misconceived and wrongly brought before this Court.

About automatic extension of time for the applicant to refile her application, I find that it is better for the applicant to resort into a formal application so that she can state and establish the grounds of the delay

for this Court to determine them. I therefore refrain from extending any time to the applicant at this juncture.

Having determined the first issue as herein above, which has disposed off the entire application, I find it superfluous to dwell into the second issue as by doing so shall serve no useful purpose rather than an academic exercise.

As this application has ended on the legal issue raised by the Court *suo motto*, I order no costs to either party.

Whoever aggrieved with this ruling has the right of appeal to the Court of Appeal of Tanzania. It is so ordered.

A. Matuma

Judge

18/11/2020

Court: Ruling delivered in chambers in the presence of advocate Sogomba for the Applicant and in the presence of the Respondent in person.

Right of appeal explained.

Sgd: A. Matuma

Judge

18/11/2020