IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF MWANZA)

AT MWANZA

MISC. CIVIL APPLICATION NO. 125 OF 2020

(Arising from the Judgment of the Court at Mwanza (Hon. Mgeyekwa, J) in PC. Civil Appeal No. 60 of 2020, dated 29th Seprember,2020.)

BAHATI MANOGU ..... APPLICANT

VERSUS

KIYUGA GWANCHELE ..... RESPONDENT

RULING

23rd February, & 7th April, 2021

ISMAIL, J.

The instant application calls the Court to certify that the impending appeal to the Court of Appeal of Tanzania carries a point of law worth a consideration by the Court of Appeal of Tanzania. The application is preferred under the provisions of section 5 (2) (c) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019; and Rule 46 (1) of the Tanzania Court of Appeal Rules, and it is supported by the applicant's own affidavit which sets out grounds for the prayers sought. What is perceived to be a point of law is contained in paragraph 6 of the supporting affidavit. It is as to

whether all grounds of appeal were determined on merit by the Judge who determined his appeal. The application has been opposed to by the respondent. This was done through the respondent's counter-affidavit in which the allegations levelled by the applicant were rebutted. The respondent contended that there is no way the grounds of appeal would be heard twice.

Hearing of this application was done through written submissions which were preferred ahead of time set out for filing. Submitting in support of the application, the applicant argued that it was erroneous for the Court to dismiss the appeal without considering that the applicant had raised a pertinent issue of jurisdiction of the trial court to hear and determine land matters while such matters are in the domain of a special forum, established under Land Disputes Courts Act, Cap. 216 R.E. 2019. The applicant contended that the Court ought to have resolved the question of jurisdiction first as it is a fundamental requirement in the administration of justice, and in determining the Court's mandate.

The applicant urged the Court to hold that there is a point of law which requires determination by the Court of Appeal, and that point is whether the Honourable Judge was correct to dismiss the appeal without

considering that the dispute which bred the appeal originated from the court which was not vested with jurisdiction to entertain it.

The respondent is stoutly opposed to this application. He defended the Court's decision to dismiss the appeal on the ground that the Court was *functus officio*, as the matter had already been adjudicated by Hon. Rumanyija, J., in PC Civil Appeal No. 32 of 2019. He buttressed his argument by citing the decisions in ***Scolastica Benedict v. Martin Benedict*** [1993] TLR 1; and ***Zee Hotel Management Group & Others v. Minister for Finance & Others*** [1997] TLR 265. He held the view that the decision to strike out the application came after the parties had been given a chance to address the Court on the point raised *suo motu*. The respondent's contention is that the only available remedy was to prefer an appeal against the decision in PC Civil Appeal No. 32 of 2019, and not to file a fresh appeal to the Court. He reiterated that PC Civil Appeal No. 60 of 2020 was not a competent appeal which would be determined on merit. As such, no point of law can be extracted from an incompetent appeal. The respondent insisted that an issue of jurisdiction would not succeed where the appeal is manifestly incompetent. He prayed that the application be dismissed with costs.

From these brief submissions, the question is whether this application has met the threshold for certification of a point of law sufficient to warrant the attention of the Court of Appeal.

It is an established position that appeals to the Court of Appeal, in respect of matters which originate from primary courts, have to be preceded by the Court's certification that there is a point of law worth and relevant for consideration by the superior Court. This is consistent with section 5 (2) (c) of the Appellate Jurisdiction Act (AJA), Cap. 141 R.E. 2019, whose substance provides as hereunder:

> *"Notwithstanding the provisions of subsection (1)-*
>
> *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."*

This statutory requirement was underscored in ***Abdallah Matata v. Raphael Mwaja***, CAT-Criminal Appeal No. 191 of 2013 (Dodoma-unreported), in which the Court of Appeal enunciated the following reasoning:

> *"In order to lodge a competent appeal to the Court, the intended appellant has to go through the High Court first with an application for a certificate that there is a point of*

law involved in the intended appeal. It is only when the appellant is armed with the certificate from the High Court, that a competent appeal may be instituted in this Court."

The reasoning in ***Abdallah Matata*** (supra) was an emphasis from the upper Bench's previous decision in ***Marco Kimiri & Another v. Naishoki Eliau Kimiri***, CAT-Civil Appeal No. 39 of 2012 (ARS-unreported), wherein it was held:

"Section 5 (2) (c) of the Appellate Jurisdiction Act governs a certificate that a point of law is involved in an appeal under the Magistrates' Court Act, Cap. 11 R.E. 2002 originating from a primary court."

See also: ***Omari Yusufu v. Mwajuma Yusufu & Another*** [1983] TLR 29; ***Dickson Rubingwa v. Paulo Lazaro,*** CAT-Civil Application No. 1 Of 2008; and ***Harban Haji Mosi & Another v. Omari Hila Seif***, CAT-Civil Reference No. 19 of 1997 (both unreported).

The applicant's sole basis for his quest to appeal is the alleged decision by the Court to shrug off the contention that the trial court that handled the matter was not vested with jurisdiction to preside over the matter. The argument which is specious to me is that, having adjudged that the Court was functus officio, the learned Judge ought to have kept the matter alive and go ahead and decide on the fate of the trial

proceedings. This is utterly erroneous, as going that far would negate the fact that the Court had no more power to deal with the matter subsequent to disposal of the matter which was before Hon. Rumanyika J (in PC Civil Appeal No. 32 of 2019).

As rightly contended by the respondent, the applicant's recourse would be to contemplate challenging the decision by Hon. Rumanyika, J., and that would be done by way of appeal to the Court of Appeal. Alternatively, the prayer would have a semblance of merit if the intended appeal were to challenge the Court's finding that it is *functus officio*. It is my humble contention that, in view of this erroneous contention, it cannot be said that a case has been made out for moving the Court to issue a certificate on the point of law in respect of the intended appeal.

In consequence, this application fails and it is dismissed with costs.

It is so ordered.

DATED at **MWANZA** this 7th day of April, 2021.

M.K. ISMAIL

JUDGE