

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM**

MISC. APPLICATION NO 221 OF 2019

(Arising from PC Civil Appeal No.79 Of 2018 High Court of Tanzania at Dar Es Salaam)

ENILA BASKEL KYANDO.....APPLICANT

VERSUS

VERONICA SABALI.....RESPONDENT

RULING

MASABO J.L:-

The application has its roots in a short-term loan allegedly advanced to the Respondent by the Applicant herein sometimes in 2016. The Applicant successfully sued the Respondent for recovery of the loan in Civil Case No. 273 of 2017 at Mbagala Primary Court. The suit was decided in favour of the Respondent. Disgruntled the Applicant appealed to the District Court of Temeke through PC Civil Appeal No. 79 of 2018 which was determined in her favour. The Respondent was aggrieved, she filed an appeal before this Court in PC Civil Appeal No.79/2018. At the conclusion of the appeal the Court reversed the decision of the Temeke District Court and affirmed the decision of the trial court. The Applicant is unhappy, she wants to appeal to the Court of Appeal. She has moved this Court through section 5(1) (c) of the Appellate Jurisdiction Act, Cap 141 seeking for leave of Court to appeal to the Court of Appeal. The application is supported by an affidavit sworn by Enila Baskel Kyando, the Applicant on the 16th April, 2019. What is discernible from the affidavit is that the application is based on two grounds, namely



that the Court wrongly decided the matter without considering that she produced the agreement an original document at Mbagala Primary Court and the same was admitted in court as "Exhibit A" and that the decision of the High Court is inconsistent with what transpired in that the trial court.

The application was heard in writing. Submitting in support of her application, the Applicant argued that the High Court misdirected itself to consider that the Admission of Exhibit A ought to comply with section 66 of the Evidence Act. She reasoned that this was wrong as the Evidence Act, Cap 6 R E 2002 is not applicable in Primary Courts and what applies in the primary courts is the Magistrates' Courts (Rules of Evidence in Primary Courts) Regulation, G. N No. 66 of 1972. The High Court erred for failure to consider that the document was tendered before the primary court and admitted as "Exhibit A" without any objection and the reason it was denied by the Primary court was that it was contrary to section 47(3)(a) of the Stamp Duty Act(cap 189 RE 2002). Therefore, the High court Judge erred in quashing the decision of the District Court.

On her party the Respondent submitted that, the Applicant has not shown sufficient reasons to warrant her to appeal to the Court of Appeal. She cited the case of **British Broadcasting Corporation V Erick Sikujuang' Maryo** Civil Application No 138 of 2004 where it was pointed out that the leave to appeal is not automatic, it is within the discretion of the court. As the matter of principle, leave to appeal will be granted where the ground of appeal raises issue of general importance or novel point of law or where the

ground show prima facie or arguable case. It was further submitted that Hon Munis J articulated that the judgment of the District Court was founded on Exhibit A which was a photocopy hence inadmissible unless there were reasons as to why the original was not tendered. The respondent further submitted that this being the application for leave to appeal to the Court of Appeal the Applicant had to confine himself on the errors found in the Judgment of the High Court. In addition she reasoned that, in the instant application the Applicant had a duty to point to the illegality and to argue the same properly to warrant the prayer for leave to appeal because a mere statement that there was an illegality without mentioning any of them is not proper in the eyes of the law.

I have carefully considered submissions for and against the application. Let me start by reproducing the provision of Section 5(1) (c) and 2 (c), of the Appellate Jurisdiction Act, Cap 141 RE 2002:

"5.-(1) In civil proceedings, except where any other written law for the time being in force provides otherwise, an appeal shall lie to the Court of Appeal;

(c) With the leave of the High Court or of the Court of Appeal, against every other decree, order, judgment, decision or finding of the High Court.

5 (2) Notwithstanding the provisions of subsection (1) (c) 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

Basing on the provisions above the applicant seeks this court for leave to appeal to Court of Appeal and for certification on the point of law.

It is settled principle of law that, appeals originating from primary courts are governed by section 5(2)(c) which require the part to obtain a certification on the point of law. Thus section 5(1)(c) was wrongly cited because what the Applicant requires to access the Court of Appeal is a certification on point of law, not a leave to appeal. Certification is aimed to ensure that all cases originating from primary courts end within the High Court except where there are matters of "legal significance and public importance" (see **Ali Vuai Ali v Suwedi Mzee Suwedi** [2004] TLR 110, **Eustace Kubalyenda vs Venancia Daud** Civil Appeal No 70 of 2011; and **Elly Peter Sanya v Ester Nelson**, Civil Application No. 3 of 2015, Court of Appeal of Tanzania at Mbeya (unreported) or where there is:

"a novel point, where the issue raised is unprecedented, where the point sought to be certified has not been pronounced by this Court before and is significant or goes to the root of the decision, where the issue at stake involves jurisdiction, where the court(s) below misinterpreted the law etc."

Mohamed Mohamed & Khamis Mselem v Omar Khatib, Civil Appeal No. 68 of 2011, Court of Appeal of Tanzania at Zanzibar (unreported).

Based on this principle, the question that follows is whether or not the points raised by the applicant are worthy of certification or put otherwise, do the points raised by the Applicant constitute a novel point? Or, does it constitute

an unprecedented issue which has not been certified before? Or does it involve jurisdiction, or a misinterpretation of the law?

The Applicant has raised two issues the first, both of which are centered on the Application of the Law of Evidence Act. It is the applicant's contention that the Court erred in applying the provision of the Law of Evidence Act in determining the Admissibility of the Exhibit A whereas the same is not applicable in the primary court. In essence the point made by the Applicant is valid but, only to the extent that the Evidence Act is not applicable in the primary courts as evidence in these courts is governed by the Magistrates' Courts (Rules of Evidence in Primary Courts) Regulations, G.Ns. Nos. 22 of 1964 and 66 of 1972. Having examined the provisions of these Regulation vis-a -vis section 66 of the Evidence Act, I have come to the conclusion that there is no controversy warranting the attention of the Court of Appeal. Section 66 of the Evidence Act and Rule 11 of the above rules all underline the requirement for primary evidence. For easy of reference. Section 66 states that:

66. Documents must be proved by primary evidence except in the cases hereinafter mentioned.

67.-(I) Secondary evidence may be given of the existence, condition or contents of a document in the following cases:

(a) when the original is shown or appears to be in the possession or power of

(i) the person against whom the document is sought to be proved; or

(ii) a person out of reach of, or not subject to, the process of the court; or

(iii) a person legally bound to produce it, and when, after the notice specified in section 68, such person does not produce it;

In the same spirit Rule 11 states that:

(1) The original document must always be produced.

Exceptions:

- (a) A copy of the original document may be proved if the original has been lost or destroyed or if it is in the hands of the opposing party and he will not produce it, but (unless paragraph (b) of this exception applies) oral evidence must be given that it is a true copy of the original

When the test in **Mohamed Mohamed & Khamis Mselem v Omar Khatib** (supra), is applied to the instant case, it can be said from the outset that the application fails the test. None of the points above stated raises a novel point of law compelling grant of a certificate to allow the applicant to proceed to the Court of Appeal.

Based on these grounds, I dismiss the application in entirety. Costs on the Applicant.

DATED at DAR ES SALAAM this 30th day of April 2020.



A handwritten signature in black ink, appearing to be "J.L. MASABO", written over a circular stamp.

J.L. MASABO

JUDGE