

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

MISCELLANEOUS CIVIL APPLICATION NO. 163 OF 2020

(Originating from High Court Civil Appeal No. 18 of 2020).

DAWAPA SECURITY GROUPAPPLICANT

VERSUS

ERADIUS JOHN RESPONDENT

RULING

Date of last Order: 12/04/2021

Date of Ruling: 2/7/2021

F. K. MANYANDA, J.

This is an application for a certificate of point of law lodged under section 5 (1) (c) of the Appellate Jurisdiction Act, [Cap. 141 R. E. 2019] and Rule 45 (a) of the Tanzania Court of Appeal Rules GN. No. 368 of 2009 as amended by G.N 362 of 2017 and GN No. 344 of 2019. The application is intended for this Court to certify that there is a point of law involved which need determination by the Court of Appeal.



The application is made by way of a chamber summons supported with an affidavit which gives the grounds thereof.

Paragraph 6 of the affidavit sworn by one Michael Ephraim, a principal officer of the applicant firm gives four grounds intended to be certified as parties of law for appeal purposes namely: -

- i. That the Honourable first appellate Court erred in law in deciding in favour of the Respondents while the case was not proved according to the standard in Civil Cases.*
- ii. That the Honourable first appellate Court erred in law in failing to appreciate the fact that theft occurred on 05/12/2019 before the Respondents (Eradius John) has personally, entered into a contract with the Respondent.*
- iii. That the Honourable first appellate Court erred in law in basing his decision on the agreement dated 01/08/2019 between Mwenyekiti wa Wafanyabiashara Nyashishi and umoja wa wafanyabiashara Nyashishi which covers all the traders at the market, not individual traders.*



iv. That the Honourable first appellate Court erred in law in ignoring the decision in Misungwi District Criminal Case No. 138 of 2019 in which the Security Guards responsible for the market (Alexander s/o Nyakusanya @ Songolwa) was charged with theft but the charge was withdrawn and the accused discharged.

Hearing was conducted via audio teleconference and Mr. Mhingo, learned Advocate argued on behalf of the Applicant while Mr. Mubezi, learned Advocate argued for the Respondents.

Arguing in support of the application Mr. Mhingo stated the background of the matter as follows: - That the Applicant is a legal person providing guard services and the Respondent is a biological person conducting business at Nyashishi market.

On 01/08/2019 the Applicant entered into a contract to provide security guard services to the Umoja wa wafanyabiashara wa Nyashishi. This contract required the Applicant to provide the security guard services to the businessmen including the Respondent at Nyashishi.

On 07/03/2020 a new contract for provision of security guard services was entered between the Applicant and the Respondent individually. This second contract terminated the first contract.

With that background Mr. Mhingo argued combining all grounds in the application contending that they raise one important issue on point of law that is whether the vacated first contract which was a general contract, makes the Applicant liable for the theft. Mr. Mhingo contention is that the Applicant is not liable because theft occurred during the first contract which did not cover the Respondent individually. He was of the view that the Court of Appeal will look, from legal point of view, which of the two contract binds the Applicant to the Respondent.

Mhingo cited the case of **Agnes Serein vs Musa Mdoe** [1989] TLR 164 where the Court of Appeal gave guidance on how to look at point of law on certification.

On his side Mr. Mubezi opened his argument by arguing that there is no legal issue raising a point of law because the two contracts are clear on

point. Mr. Mubezi pointed out that the theft occurred in December 2019 during persistency of the first contract which was between the Applicant and Umoja wa wafanyabiashara Nyashishi. The second contract between the Applicant and the Respondent in person did not revoke or terminate the first contract, hence the Applicant is liable.

At this point I wish to restate the principle of law in matters like this one where this Court is required to certify on point of law. It is trite law that certification on point of law for appeal purposes is not automatic, this Court will have to consider points to be certified as contained in paragraph 6 of the affidavit of the Applicants Principal Officer, Michael Ephraim.

The practice of this Court in application of this nature was stated in the case of **Harban Hajimosi and Another vs Omari** Hilal Seif and Another [2001] TLR 409 at page 412 it was stated as follows: -

"Therefore, according to subsection (2) (c), a certificate on point of law is necessary with appeals relating to matter originating in Primary Courts. The practice of the High Court



is to frame such a point or to approve and adopt one framed by the intending Appellant to certify it to the Court of Appeal."

In doing the above prescribed duty I will traverse in the affidavit and counter affidavit of the parties and their submissions.

Basically it is not disputed that in this matter there are two contracts involved. The first contract is a general one which was entered between the Applicant and an association of traders in Nyashishi known as Umoja wa wafanyabiashara wa Nyashishi. The second contract was entered subsequent to the first one which was between the Applicant and the Respondent personally. Both of the contract were for provision of security guard by the Applicant.

The complaint event by the Respondent of theft occurred during the first contract, where the Respondent as an individual was not a party, but it was his association which was a party. A question asked by the Applicant is whether the Applicant is liable to the Respondent individually in respect of breach of the contract with the association which the Respondent is a member.



The Applicant says this is a point of law sufficient to be certified for appeal purposes. The Respondent says it is not because the lower Courts resolved it on merit.

I may say, based on the principle of law in **Agnes Severin's Case** (supra), this Court is required to certify questions of law as opposed to questions of fact. The argument that the lower courts resolved the issue of existence of the two contracts, to me, is a question of facts.

Therefore, the question "whether the Applicant is liable to the Respondent individually for breach of contract with the association which the Respondent is a member", is a point of law worthy of certification.

In view thereof, this application is granted. Costs in the course. It is so ordered.




F. K. MANYANDA
JUDGE
2/7/2021