

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE
DISTRICT REGISTRY OF MWANZA**

AT MWANZA

MISC. CIVIL APPLICATION NO. 85 OF 2020

(Arising from PC. Civil Appeal No. 28 of 2019, High Court of Tanzania at Mwanza)

SOSPETER BWILIMA.....APPLICANT

VERSUS

ERENO (STEVEN J. NGAWA)..... RESPONDENT

RULING

Date of last order: 14/5/2021

Date of Ruling: 01/07/2021

F. K. MANYANDA, J.

The Applicant herein being aggrieved by the decision of this Court in Civil Appeal No. 28 of 2019 (Hon. Ismail J) dated 23rd of June 2020, lodged this application by way of chamber summons supported by the affidavit of one Sospeter Bwilima urging this Court to grant certificate on points of law to appeal to the Court of Appeal. The application has been preferred under the provisions of section 5(2)(c) of the Appellate Jurisdiction Act, [Cap. 141 R. E. 2019].



According to the affidavit deposed by the Applicant on 21st of July 2020 in paragraph 6, the following are grounds required for certification:-

- a) The Honourable High Court erred in law in confirming a decision of the first appellate court as well as the trial court for it was instituted by a person who had no locus standi; and
- b) The Honourable High Court erred in law in concluding that the amount of money in issue was meant to be a loan to the Applicant while there was no clear evidence adduced to that effect.

Hearing of this application was, by leave of this Court, conducted by way of written submissions. The written submissions for the applicant were drawn by Mr. James Njelwa, learned Advocate and filed by the Applicant himself, Sospeter Bwilima. The submissions for the Respondent were drawn and filed by William E. Chama, learned Advocate.



The Applicant submitted by adopting the affidavit in support of the application to be part of his submission. Arguing in support of ground one for certification, the Applicant observed that:-

It was not proper for the trial court, first appellate court and this Court, to allow one Steven Ngawa to testify on behalf of, Ereno Shija, under a special power of attorney while the principal, the said Ereno Shija was also in attendance in court and testified as PW2.

It was the argument of the Applicant that the irregularity is fatal and rendered the proceedings and judgements of trial court, first appellate court and this Court, a nullity. He referred to the case of **Paaring A. A. Jaffa vs. Abdallah Ahmed Jaffa and Others** [1996] TLR 110 where this court held *inter alia* that: -

"Where however, the principal under power of attorney applies to or appears before a court, his attorney has no locus standi."

The Applicant also referred to a case of **Naiman Moiro vs. Nailejlet K. J. Zabron** [1980] TLR 110 where the Court of Appeal held *inter alia* that:-



"Power of Attorney in the High Court of Tanzania and lower courts does not apply where the party concerned is also present in court."

It is the Applicant's argument that, that is a point of law he intends to argue before the Court of Appeal.

The Respondent admits that the instant Civil case was instituted by the said Ereno Shija, but due to ill health she appointed Stephen J. Ngawa to represent her in the litigation. He conceded further that when she recovered she entered appearance and testified in the trial court. It was observation of the Respondent that this Court and the first appellate court expunged the testimony of the donor, therefore, the irregularity was cured. The Applicant insistingly says the irregularity was fatal and affected the whole proceedings.

As regard to the second point the Applicant submitted that he intends to argue whether a document tendered as evidence by an incompetent witness is valid and can be considered in composing of a judgement in law. It is the Applicant's argument that document can only be tendered in court as evidence by its maker, addressee or custodian.

In the matter at hand PW1 tendered in evidence Exhibits A and B which were bank pay in slips evidencing that the amounts of pay shown therein were paid into the Applicant's bank account by PW2 who was the maker and custodian too. According to the Applicant PW1 was incompetent witness to tender the said documents because PW2 who was a competent one was also in attendance in court and testified. The irregularity violated the provisions of section 127 of the Evidence Act, [Cap. 6 R. E. 2019]. He was of the view that documents which were wrongly tendered and admitted cannot be used to prove existence of a fact. Therefore, using Exhibits A and B to implicate the Respondent to have received TShs. 7,500,000/= as a loan is wrong. This, according to the Applicant, is a point of law he is prepared to argue before the Court of Appeal.

Certification on points of law for appeal purposes is not automatic, this court will have to consider points to be certified as contained in paragraph 7 of the affidavit of the Applicant. The practice of this Court in application of this nature was stated, among others, in the case of **Harban Hajimosi and Another vs. Omari Hilal Seif and Another** (2001) TLR 409 in which the following observation was made: -



"Therefore, according to subsection (2)(c), a certificate on point of law is necessary with appeals relating to matters 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 Applicant's proposed points for certification to determine if at all they qualify for certification purposes.

In a point relating to *locus standi* of a donee of a special power of attorney who litigates a case while the donor of the said special power of attorney is in attendance in court and testified as a witness, I find it to be a point of law worth of certification. This is a legal point and is accordingly certified.

With regard to the second ground for certification that he intends to argue the issue that: -

"whether a document tendered as evidence by an incompetent witness is valid and can be considered in composing of a judgement in law."

This Court finds that the proposed ground in the submissions is in variance with the ground he stated in ground 7 of the affidavit which I quote hereunder: -

"7(b) The Honourable High Court erred in law in concluding that the amount of money in issue was meant to be a loan to the Applicant while there was no clear evidence adduced to that effect."

As it can be gleaned, the ground sworn in the affidavit is completely different from what the Applicant argued in his submissions in support of the application. In the affidavit the Applicant talks about evidential matters concerning proof of amount of money received by the Applicant as loan while in the submission he talks about admissibility of bank documents as exhibits.

This Court has failed to find any issue of point of law worth for certification for the Court of Appeal to look at. The ground raised in the affidavit is factual while the arguments in the submission is afterthought.


I find that the application partly succeeds and this Court certifies only one point of law that is to say;

"whether a donee of a special power of attorney has locus standi in litigating a suit in which the donor is in attendance and testifies as a witness; if in negative, then whether the proceedings become a nullity".

In view thereof, this application is allowed to the extent as demonstrated above. Each part to bear its own costs of the application.

It is so ordered.




F. K. MANYANDA
JUDGE
01/07/2021