

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
AT TABORA

MISC. CRIMINAL APPLICATION NO. 14 OF 2021

(Originating from PC. Criminal Appeal No. 1/2020 of the RM – Ext
Jurisdiction of Tabora and originating from Isevy Primary Court-
Criminal Case No. 78/2020 of Tabora)

1. KAWILI RAMADHANI 2. MARY NKYA 3. SADA MAGANGA 4. MOHAMED ISMAILI 5. MASHAKA IDD	} APPLICANTS
---	---	-------------------------

VERSUS

JILYA MADUKARESPONDENT

RULING

Date: 6/9/2021 & 17/09/2021

BAHATI, J.:

This ruling is in respect of the preliminary objection (PO) on points of laws which was raised by the learned counsel for the respondent Musa Khasim against the application that has been preferred by the applicant. This application has been made under section 7 (a) (b) of the Appellate Jurisdiction Act, Cap 141 [RE 2019]. The application was preferred by chamber summons supported by an affidavit and the order sought for in the chamber summons is leave on a point of law to appeal to the court of appeal.

On the opposite, the application was countered by the counter affidavit of Mr.Khasim Musa, learned counsel. Together with the counter affidavit, the respondent filed the Notice of Preliminary Objection that ;

- 1. The applicant's application at hand applying for leave to appeal to the court of appeal is incompetent since the matter originates from the primary court in PC. Criminal Case No. 78/2020 Isevy Primary court.*

During the hearing of the preliminary objection, the respondent was represented by the learned counsel, Mr.Musa Khasim whereas the applicant had the services of Mr.Lucas Ndanga, learned counsel.

In compliance with the cherished practice of the Court, the court had to dispose of the preliminary objection which had been raised by the respondent first before I proceed with the application. With the permission of this court, both parties agreed to dispose of the preliminary objection by way of written submission.

Supporting on the first limb of the preliminary objection, counsel for the respondent submitted that as indicated under the title of the applicant's application, the court of the first instance in this matter intended to be appealed against is Isevy Primary Court Criminal Case No. 78/2020 for that matter. Now they want to appeal to the Court of Appeal of Tanzania against the decision of the High Court in PC. Criminal Appeal No. 1/2020

having exercised its appellate jurisdiction. The applicants as pointed out in the preliminary objection are applying before this court leave to appeal to the court of appeal of Tanzania (see applicant's chamber summons) instead of applying for the certificate on point of law.

He further submitted that the appeal to the Court of Appeal of Tanzania is governed by the Appellate Jurisdiction Act, Cap 141 [R.E 2019] read together with the Court of Appeal Rules, 2009. Criminal matters originating from primary courts, their appeal to the court of appeal of Tanzania lies with High Court certificate on point of law and not leave to appeal. To support his argument he referred the court to section 6 (7) (b) of the Act which provides thus:-

"6 (7) (b)- Either party to proceedings of a criminal nature under head (c) of part III of the magistrate's courts Act, may if the High Court Certifies that a point of law is involved, appeal to the court of Appeal".

Head (c) of Part III of the Magistrate's courts Act, reads thus:-

"(C) Appellate and Provisional Jurisdiction of the High Court in relation to Matters Originating in Primary Court

He prayed to this court to declare the application incompetent and struck out with costs.

In response, the applicant submitted that it is a principle of law that, an appeal in the court of appeal, cannot come automatically, leave on point of law is mandatory and required, and that leave shall be made in the High Court at which the certification on point of law shall be proved by the High Court.

He further submitted that regarding the present application, the applicants in the chamber summons seeking leave to appeal to the court of appeal. The essence of the Applicants' Affidavit is to the effect of disclosing the points of laws that need to be determined by the Court of Appeal. Leave to appeal on the certificate on point of law shall be made into the High Court especially under section 6 (7) (a) (b) of the Appellate Jurisdiction Act, Cap. 141 [R.E. 2019].

He averred that in chamber summons the applicants are seeking for point of law to appeal to the court of appeal but the claim by the respondent about the certificate on point of law, this is the principle of law that upon the High Court satisfied that there is a point of law involved the court shall grant the certificate on point of law and this is cemented in the case of **Simon Martin Vs the DPP Criminal Appeal No. 457 of 2017 (CAT) at Mbeya (unreported)** at page 3, 9, 10, 12 and 13. The alleged by the respondent is a matter of the language however leave on point of law must be applied first.

He submitted that indeed, there is a typographic error in regard to citation of the law at which the proper law is under Section 6 (7) (b) of the Appellate Jurisdiction Act, Cap.141 [R.E. 2019] but is curable under the current laws to disregard of minor irregularities and unnecessary technicalities to abide with the need to achieve substantive justice.

He submitted that this is denounced under section 3A (1) (2) and section 3B (1) (a) (b) (c) and 3B (2) of the Appellate Jurisdiction Act, Cap. 141 [R.E 2019] and section 3A (1) (2) and section 3B (1) (a) (b) and (c) and Section 3B (2) of the Civil Procedure Code Cap 33 [R.E. 2019] and Article 107A (2) (b) and of the Constitution.

Having read written submissions by both parties and gone through Court records and since it is undisputed that the applicant has conceded to point of preliminary objection which suffices to bring this application to an end.

It is undisputed that certification on point of law is guided under section 6 (7) (b) of the Appellate Jurisdiction Act, Cap 141 [R.E 2019] provides thus:-

“6 (7) (b)- Either party to proceedings of a criminal nature under head (c) of part III of the magistrate’s courts Act, may, if the High Court Certifies that a point of law is involved, appeal to the court of Appeal”.

Head (c) of Part III of the Magistrate's courts Act, reads thus:-

“(C) Appellate and Provisional Jurisdiction of the High Court in Relation to Matters Originating in Primary Court

As pointed out by the applicant, a typographic error of section 7 (a) and (b) in regard with the citation of the law at which the proper law is under section 6(7) a and b of the Appellate Jurisdiction Act, Cap 141 is curable under the oxygen principle. I quite agree in a recent development, the law has turned into addressing the principle of overriding objectives in our civil justice system to ensure that substantive objective is given a higher priority. According to section 3A (2) of the Civil Procedure Code Cap 33 as amended by Written Laws (Miscellaneous Amendment) (No. 3) Act 2018 [Act No. 8 of 2018] provides that the court shall; in the exercise of its power or the interpretation of any of its provisions, seek to give effect to the overriding objective

But the applicant is still insisting that leave on a point of law is mandatory and is required and that shall be made in the High Court at which the certification on point of law shall be proved by the High Court.

It is my considered view that this is not the procedure as clearly elaborated by the respondent that are two different things, the court of the first instance is Isevy Primary Court, now they want to appeal to the court of appeal against the decision of the High Court having exercised

its appellate jurisdiction instead of applying for a certificate on point of law.

In the upshot, I find the objection raised by the respondent with merit, hence this application is struck out with costs.

Order accordingly.




A.A.BAHATI,

JUDGE

17/9/2021

Date: 17/09/2021

Coram: Hon. G. P. Ngaeje Ag, DR

Appellant: Present and Represented by Advocate Lucas Ndanga.

Respondent: Present and represented by Advocate Musa Kassimu.

B/C Grace Mkemwa, RMA

Mr. Ndanga: We are ready for ruling.

Mr. Musa: We are also ready.

Court: Ruling delivered.

Court: Ruling delivered this 17th day of September, 2021 in presence of two Applicants and their Counsel, Lucas Ndanga and the Respondents and their counsel Musa Kassim in the open court.



G.P. NGAEJE

Ag DEPUTY REGISTRAR

17/9/2021

Right to appeal is explained.



G.P. NGAEJE

Ag. DEPUTY REGISTRAR

17/9/2021