

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

**AT DAR ES SALAAM**

**MISC. CIVIL APPLICATION NO. 257 OF 2021**

(Arising from PC Civil Appeal No. 162 of 2020)

**BETWEEN**

**ISAAC SABURI ..... APPLICANT**

**VERSUS**

**DELVINA LIBENT ..... RESPONDENT**

**RULING**

**MRUMA, J.**

This is an application for a certificate that there is a point of law fit for consideration by the Court of Appeal, which is the highest court of the Land.

The Application has been preferred under section 5(2) (c) of the Appellate Jurisdiction Act and Rule 45 (a) of the Court of Appeal Rules of 2009.

Section 5(2) (c) of the Appellate Jurisdiction Act provides that:-

*"Notwithstanding the provisions of subsection (1) no appeal shall lie against any decision or order of the High Court in any of the proceedings under head (c) of Part III of the Magistrates' Court Act, unless the High Court certifies that a point of law is involved in the decision or order".*

Proceedings under head (c) of part III of the Magistrates Court Act are proceedings arising from decisions and orders of the High Court in exercise of its appellate and revisional jurisdiction in relation to matter originating from Primary Courts.

I have perused proceedings of the High Court in PC Civil Appeal No. 162 of 2020, and I have no doubt that they originated from a primary court. The question that follows is whether there is a point of law involved in the decision of this Court (Mgonya, J.) which fit for consideration by the Court of Appeal.

We have hierarchy of courts in court jurisdiction and the Court of Appeal is at the top of the pyramid. It decides cases with a seal of finality. The decision is an authority for what it actually decided. The Appellate jurisdiction of the Court of Appeal in both Civil and Criminal Cases on matters originating from primary court can only be invoked by a certificate granted by the high Court under section 5(2) (c) of the Appellate jurisdiction in respect of any judgment, decree or final order certifying that the case involves a substantial question of law of general importance and that in the opinion of the High Court the said question needs to be decided by the Court of Appeal.

That is so because in general Court of Appeal in our jurisdiction refers to the apex adjudicatory agency of the judicial system. It cannot hear everything from the lower courts. When a party institute his/her in a primary court by time in appeal is heard by the High Court, the factual issues (i.e evidence) will have been reviewed by three different levels of the court. In other words, three different persons namely the trial magistrate, the first appellate district court magistrate and the High Court judge will have had exhaustive reviewed that evidence. Requesting a panel of three judges of the Court of Appeal to review the same evidence may not bring about a different result.

In the present case the Applicant listed three points which he thinks that they constitute points of law fit for consideration by the Court of Appeal.

The points are:

- (i) That, the Honourable Judge erred in law by relying on a non-existing provision of law regulating manner of taking evidence of children.
- (ii) That, the Honourable Magistrate erred in law by holding that the presence of Social Welfare Officer was mandatory under circumstances while the same is only in restricted matters namely

Criminal charges, Civil matters for child care, maintenance and protection.

- (iii) That, the Honourable Judge erred in law for denying the parties right to be heard on the issue of composition of the trial court particularly presence of Social Welfare Officer the issue which was not raised by the parties and/or during the first appeal in the first appellate court.
- (iv) That, the Honourable Judge error in law by placing custody of children to the Respondent without affording the effected persons, i.e children their right of opinion hence denying the children their right to be heard on issues affecting their best interest and/or their wellbeing.
- (v) That, the pointed defects are points of law, being sufficient and appoint on the face of the record hence there is prime facie case that merits serious judicial consideration by the superior court.

The Respondent filed a counter affidavit opposing the Applicant's assertions. He asserts that the points alleged to constitute points of law are not actually points of law but they are raised as a delaying tacts to delay the cause of justice.

In his oral submissions, Mr. Ngasa Ganja submitted that in view of the decision of the Court of Appeal in the case of **Ally Vuai Ally versus Sued Mzee Sued [2004] TLR 110**, where it was held that cases deserving to reach the Court of Appeal are those cases which raise issues of legal significance. The Learned Counsel contended that the decision of this Court contained illegality which constitutes matters of legal significance.

Regarding the second point, the learned counsel submitted that the Appellate Judge raised "suo motu" issues of composition of the trial Court and invoked **S. 99 (1) (d) of the law of child act [Cap. 13 R.E 2009]**.

He said that issue was neither complained of nor raised by the parties during the first and second appeal. He said that raising of issues "suo motu" at the time of composing judgment constitutes denial of the right to be heard.

The third point concerns placing the children under the custody of the Respondent without seeking their opinion. He said that the learned judge erred in law by changing the custody from the Applicant to the Respondent without affording to them the right to be heard.

The learned counsel didn't substantiate the fourth and fifth alleged points of law he raised.

Submitting in response to Mr. Ngasa Ganja's submissions, Mr. Revocatus Thadeo, stated that the issue of composition of the trial court was not raised for the 1<sup>st</sup> time by the second appellate court. he said that they had raised that issue in the last paragraph of his submissions. Therefore, the appellate Judge was collect in discussing it in her judgment.

On the issue that the children well not heard, the Learned Counsel submitted that the children were heard. What the learned Judge did in her judgment was to apply the facts of the case to the relevant provision of the law.

I have carefully gone through the submissions of the learned counsel for the parties, the records and the law applicable, particularly **section 5(2) (c) of the Appellate Jurisdiction Act**, and I find that all points listed by the Applicant do not fit to be points of law which this Court can certify for consideration by the Highest Court of the land. As intimated herein before, the Court of Appeal being at the apex of judicial system must be relieved of hearing of issues which are not strictly matters of law significant for deliberation by the highest court of the land.

For instance on the issue of the composition of the trial court, I agree with Counsel for the Respondent that the issue of composition of the trial court was not raised "suo motu" by the Appellate Judge. The learned Judge did

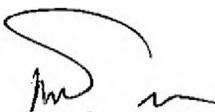
not err in discussing in her judgment the involvement of Social Welfare Officers in matters which touch the interest of children and I find nothing to certify for determination by the Highest Court of the Land.

On the right to be heard of the children, I note that the original matter was a matrimonial dispute which is governed by the Law of Marriage Act. Under that law subsequent to a decree of divorce the trial court may determine issues relating to division of matrimonial assets and custody and maintenance of children.

In determining custody of children of the marriage the wellbeing of the children is of paramount consideration. The finding of the Court on that issue is not a point of law but a point of fact.

Accordingly, there is nothing to certify to the Court of Appeal. I proceed to dismiss this application with no orders as to the costs as parties in this matter were once husband and wife and have children who do recognize them as their parents' divorce notwithstanding.



  
A. R. Mruma

**JUDGE**

**15/11/2021**