



**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**BUKOKA DISTRICT REGISTRY**

**AT BUKOKA**

**CIVIL APPLICATION NO. 19 OF 2021**

*(Originating from (PC) Civil Application No. 21 of 2019 HC of Tanzania at Bukoba and Civil Application No. 27 of 2018 of Bukoba District Court of Bukoba at Bukoba Urban Primary Court, Civil Case No. 171 of 2017 and Application No. 2/2018)*

**LUCIA KATO -----APPLICANT**

**VERSUS**

**DORIS EVODIUS ..... RESPONDENT**

**RULING**

**08/10/2021 & 10/12/2021  
NGIGWANA, J.**

Before me, is an application to certify that there are points of law involved worthy for consideration by the court of Appeal of the United Republic of Tanzania.

The application is preferred under Section 5(2)(c) of the Appellate Jurisdiction Act, Cap 141 (R.E 2019), Rule 46(1) of the Court of Appeal Rules, 2009 and Order XLIII Rule 2 of the Civil Procedure Code Cap 33 (R.E 2019). As usual, the same application is supported by the affidavit sworn by the Applicant one Lucia Kato.

In the chamber summons it appears the points of law which the applicant wants this court to certify are three but the first two points are similar as they

both boil down one issue of attachment of matrimonial home. I will therefore conveniently consider two points as one in later stages but suffice now to quote them as they appear hereunder:

*1. This Honourable Court be pleased to certify that attachment of matrimonial home based on a contract between the respondent and the husband of the applicant that was not consented by the applicant is a point of law worthy for determination by the Court of Appeal.*

*2. This Honourable Court be pleased to certify a point of law that attachment of matrimonial home used for residential purpose by the judgment debtor, his wife, or dependent children which has been objected by the innocent spouse and privy to the contract is not liable for attachment.*

*3. The Honourable Court be pleased to certify that an issue of geographical jurisdiction of the court is a point of law worthy for consideration by the Court of Appeal of Tanzania*

By parties' consensus, the court ordered this application to be disposed by way of written submission whereby both parties dully complied to.

In the filed parties' submissions, the applicant was peddling for his own canoe while the respondent enjoyed the service of the learned Advocate Gildon Mambo.

In her written submission, the applicant submitted that her matrimonial home has been attached for orders arising out from the suit which she was not party and the result that based on a contract that she did not consent. She further submitted that there is an issue of geographical limits of the trial court which the High Court termed as being delaying tact. That it is her considered

opinion that these facts constitute legal point of law to be certified by this court.

To substantiate the issue on attaching matrimonial house, He cited Rule 63(1)(a) and (b) of the Magistrate's Courts Civil Procedure in Primary Courts Rules which states categorically that no warrant of attachment shall be issued in respect of any land used for agricultural purposes by an individual whose livelihood is wholly dependent upon use of such land any residential house or building, or part of a house or building occupied by the judgment debtor, his wife and dependent children for residential purpose shall not be liable to the attachment or sale. He cited **Yohana Balole vs Anna Benjamin Malongo** Civil Appeal No.18/2020 Court of Appeal of Tanzania at Bukoba (Unreported) at pg. 11 to 18.

According to the Applicant, another issue which needs certification is on the issue of geographical jurisdiction of the trial primary court. That section 3 of the Magistrates' Court Act (Cap 11 R.E 2019) vests jurisdiction of Primary Court within a District under which it is established. She substantiated that the judgment in a main Civil Case Number 171/2017 states at paragraph 2 of page 2 that the contract was executed in the office at Misenyi but the main case was instituted at Bukoba Urban Primary Court the court having jurisdiction within Bukoba District contrary to law. The applicant further submitted that it was very unfortunate that this court did not manage to grasp the testimony of the respondent in the main suit that the contract was executed in the teachers' office at Misenyi. The court based on the contract tendered on the main trial and found that the said contract was silent as to place of its execution and the court termed it as sheer allegations with the view of occasioning technical delay. That the issue of jurisdiction is so

fundamental and nothing can overturn it save the Court of Appeal of Tanzania hence this court, certifying it as a point of law is necessary. On the issue of jurisdiction, He cited the case of **Neli Manase Foya v Damian Mlinga**, Civil Appeal No.25/2002 Court of Appeal of Tanzania at Arusha (Unreported) at pg 4 to 7.

In reply, Advocate Gildon Mambo had a conviction that the two points raised by the applicant as points of law needs no certification as they are devoid of being called points of law.

As regards to the issue of attachment of a matrimonial property used for residential purpose, He submitted that it does not feature in any proceedings of both courts' records. That the records are very clear that the applicant from primary court in Civil Case No.2/2018 to the High Court was contesting for attachment of her own house. The applicant has never contested attachment of matrimonial home in all proceedings rather she has raised this issue in the instant application. Therefore, this issue cannot be entertained for the first time at the Court of Appeal as it needs evidence on record from the very beginning in proceedings of Civil Case No.2/2018 to justify and prove the same. Raising a new issue which is not supported by the records from the lower courts is contrary to the law and directions of the Court of Appeal which has often insisted that new issues should not be raised at the Court of Appeal. In the case of **Jackson Zebedayo@Wambura & Another vs Republic**, Criminal Appeal No.419/2018, CAT at Dar es salaam (Unreported) which held that the court entertains appeals from High Court and If a matter originating from a subordinate Court is not appealed against before the High Court, it cannot be brought directly to the Court on Appeal unless it is from subordinate court with extended jurisdiction.

However, the respondent submitted that the applicant once raised that issue in her appeal to the District Court in Civil Appeal No. 27/2018 but she later prayed to amend her petition of appeal where she totally abandoned it in the amended petition of appeal which is evidence that she denied the fact that the attached house was not a matrimonial home and therefore that one cannot say that this point is in the records as the previous petition of appeal which was amended ceased to have any legal force.

The respondent cited the Court of Appeal case in **Sarbjit Singh Bharya & Another vs NIC Bank Tanzania LTD**, Civil Appeal No.94/2017, CAT at Dar es salaam (Unreported) which had the following to say on the status of the previous document after amendment, as quoted at pg. 18 of its judgment.

*".....It is trite law that when a pleading is amended, the previous document ceases to have any legal force/effect as it is taken as if it was never part of the record"*

Responding on the issue of geographical jurisdiction of the trial court, the respondent submitted that it should not be certified as point of law to be involved to the Court of Appeal. He concurred with the elaborations in the High Court judgment subject to impunity to wit (PC) Civil Appeal No.21/2019 that the contract (Exhibit A1) at Bukoba Urban Primary Court does not depict where the contract was entered and it was the main contract which cause of action arose. He further elaborated that the said contract was not performed as per agreed terms and conditions, hence the respondent decided to approach the office of Misenyi District Executive Director who is Mr. Mtakyawa's employer to register her claims so as to compel Mr. Mtakyawa to pay that amount of money to the respondent. It was Mr. Gildon submission

that the cause of action does not arise from the agreement entered in the office of Misenyi District Executive Director but from the previous contract named exhibit A1.

Mr. Mambo further submitted that it is not healthy practice in law for a party to challenge jurisdiction of the Court in matter where he/she was not a party, especially through objection proceedings. In Civil Case No.171/2017 at Bukoba Urban Primary Court, the applicant was not a party. That She emerged later to institute objection proceedings in Civil Case No.2/2018 whereas from it she now brings an issue of jurisdiction faulting the decision of the decision of the same court in Civil Case No.171/2017 the procedure which the respondent's counsel views it as not accepted in law.

It was Mr. Mambo conclusion that Rule 70 of the Magistrates' Court (Civil Procedure in Primary Courts) Rules only requires a person other than the judgment debtor who claims to be the owner of or to have interest in the property attached to institute objection proceedings and adduce evidence for the purpose of the court to investigate the objection.

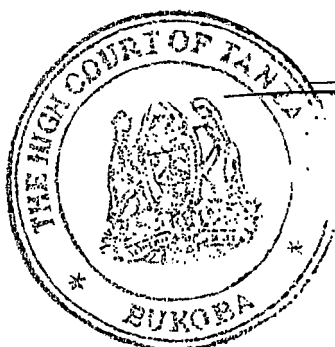
Section 5 (2) (c) of Cap 141(Supra) confers jurisdiction on the High Court to grant or refuse such certificate and it is only the High Court which is entrusted with its issuance (See, **Auguster Salanje v. Mussa Mohamed Pemba**, Civil Application No. 4 of 1991 (CA) (unreported); **Mohamed Adinani v. Mohamed Selemani**, Civil Application No. 32 of 1992 (CA) (unreported). Moreover, it is the certificate on a point of law under section 5 (2) (c) that confers jurisdiction to this Court to hear and determine the appeal in question. See **Mohamed Mohamed & Another vs Omar Khatibu** Civil Appeal No.17 of 2008, CAT at Zanzibar (Unreported).

I must register my concern at this juncture that the duty of this court is not to correct its own errors in law or facts through the High Court judgment which is subject to impunity but rather to see if the applicant has registered the pure points of law worthy to be considered by the Court of Appeal in the intended appeal which will later be the grounds before the Court of Appeal. In my considered view, the same points of law must be the issues or grounds which were previously litigated from the primary court to High Court because if certified will in turn be grounds of appeal before the Court of Appeal. I shake hands with respondent's counsel that matters or issues which have never been dealt by the High Court from Primary Court cannot be entertained by the Court of appeal as there are new grounds. The same stance was buttressed in the case of **Jackson Zebedayo@Wambura & Another vs Republic** (Supra) as rightly referred by Advocate Mambo. With regard to the first point of attaching the matrimonial house, I have passed through the records of High Court and the courts below and find that the applicant from primary court in Civil Case No.2/2018 to the High Court was contesting for attachment of her own house which was wrongly attached in the execution process and which at the executing court (trial court) failed to prove her ownership through objection proceedings. The applicant has never contested attachment of matrimonial home in all proceedings as rightly argued by the respondent's counsel. Therefore, the issue of attaching the matrimonial home used for residential purpose and agricultural purpose which the livelihood of the entire family solely depends is the new ground and which needs evidence to be litigated hence this court cannot certify it as a point of law involved worthy to be determined by the Court of Appeal in circumstances where the High Court had never heard it.

Equally, the issue of the trial court lacking geographical jurisdiction is worthless to be certified as the point of law as the High Court had rightly observed that exhibit A1 which was the center of controversy does not depict where the contract was entered and signed. The High court *inter alia* found that it was improper to deny that the trial Primary Court in Bukoba District had no territorial jurisdiction under such circumstances. The same is devoid of being certified as a point of law worth for consideration by court of appeal.

In the upshot, and in view of the above fore explained, I thus find no merit in this application and hence proceed to dismiss it. Each party to bear its own costs.

It is so ordered.

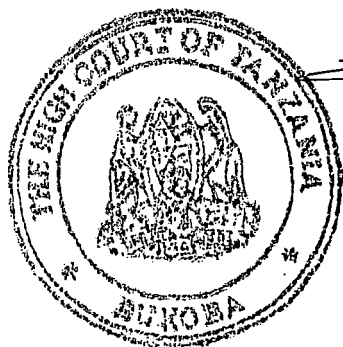


E. L. NGIGWANA

JUDGE

10/12/2021

Ruling delivered this 10<sup>th</sup> day of December, 2021 in the presence of both parties in person, Mr. Gildon Mambo for the respondent, Mr. E. M. Kamaleki, Judges' Law Assistant and Mr. G. Rugaika, B/C.



E. L. NGIGWANA

JUDGE

10/12/2021