

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

**IN THE DISTRICT REGISTRY OF ARUSHA**

**AT ARUSHA**

**MISC. CIVIL APPLICATION No. 09 OF 2021**

(Originating from Pc Civil Appeal No. 47 of 2019 by Judge Y. B. Masara, J at the High Court of the United Republic of Tanzania Arusha Registry)

**ALPHAYO ANDREA .....APPLICANT**

**VERSUS**

**AMON MWAKIPESILE..... RESPONDENT**

**RULING**

02<sup>nd</sup> & 17<sup>th</sup> June 2022

**TIGANGA, J**

In this application, the applicant applies for certification of point of law worth determination by the Court of Appeal. This is following the decision of the High Court, Hon. Y. B. Masara, J in Pc Civil Appeal No.47 of 2019 which originates from the decision of the Primary Court of Emaoi Civil Case No. 42 of 2017 c/f Civil Appeal No. 44 2018 of Arumeru District.

The applicant proposed the following as the points of law for certification by this court for determination by the Court of Appeal.

- i. That, the High court failed to remit back the file to the first appellate court after finding that the first appellate court did not determine all grounds of appeal or the High court itself had to determine them.
- ii. That, the point of *res judicata* has never been raised by the Appellant at the trial court. The High court didn't determine the issue of *res judicata* at all.

The background of this application albeit briefly goes as follows, that way back in 2016 the respondent successfully sued the appellant before the Primary Court of Emaoi in Arumeru District in Civil Case No. 42 of 2016 for a claim of Tsh. 3,996,800/=. The Appellant was aggrieved by the decision, he therefore appealed to the District Court of Arumeru vide Civil Appeal No. 10 of 2017. The appellate District Court after hearing the parties nullified the proceeding of the trial Court following the procedural error committed by the Trial Court. Consequent to that, he ordered the same to be tried *de novo*.

The judgment of the retried case was delivered on 14/03/2018 where the claim was dismissed on the ground that the claimant had failed to prove his claim. Once again, the respondent appealed to the District Court of Arumeru in Civil Appeal No. 16 of 2018. In such appeal it was found that, the trial Primary Court Magistrate in the course of composing the Judgment

introduced new facts which were not adduced in evidence. Following that anomaly, the case was once again ordered to be tried de novo again.

Tirelessly, he went back to the trial Primary Court where his case was retried. This time, the respondent managed to prove the claim. The appellant was aggrieved by the decision, he appealed to the District Court of Arumeru vide Civil Appeal No. 44 of 2018 which appeal was dismissed. Still aggrieved he decided to appeal to High Court in the PC. Civil Appeal No.47 of 2019 before His Lordship Y. B. Masara, J. That appeal was partly allowed.

Before the High Court, the grounds upon which the appeal was predicated were three, **first**, that the learned Magistrate did not properly consider the evidence on record, **second**, that the learned magistrate erred by framing issues and **third**, that the learned magistrate did not determine all the ground of appeal.

As earlier on pointed out, the appeal before the High Court was partly allowed, consequently the High Court ordered the respondent to be paid his claims as per the order of the trial court (Primary court). It is following that decision the applicant having been dissatisfied by the decision, he decided appeal to the Court of Appeal and as a matter of law, he had to file this

application for certification of the points of law for his appeal to be admitted and entertained by the Court of Appeal.

With leave of this court, the application was argued by way of written submissions. In his submission in chief, the counsel for the applicant submitted that, the application was filed under section 5(2)(c) of the Appellate Jurisdiction Act, [cap 141 R.E.2019] as well as Rule 45(a) of the Court of Appeal Rules of 2009 as amended in 2017, and Order XLIII Rule 2 of the Civil Procedure Code, [cap 33 R.E 2019] and any other enabling provisions of the law.

The counsel for the applicant submitted further the first appellate Court did not determine some of the issues or ground of appeal raised. Following that omission, the High Court was supposed to do either of the following things, **one** to determine the undetermined grounds of appeal by the first appellate court, two, which is in the alternative, to remit back the case file to the first Appellate court for it to determine the undetermined grounds of appeal.

According to him, non of these two was done, therefore this forms a point of law worthy certification by this Court for determination by the Court of Appeal.

Reverting to the second point of law, he further submitted that, the point of *res judicata* has never been raised by the appellant before the trial court. Also the High court did not determine the issue of *res judicata* at all, but rather it made a comment as reflected at page 6 at the 1<sup>st</sup> paragraph.

In reply submissions by the respondent, he submitted that there was no miscarriage of justice caused and it was not necessary for all issues to be addressed, in the circumstances where a single issue could have disposed the suit. The Respondent further submitted that, the point of law can be raised at any stage of the proceedings. It is not necessary that it be raised only at the trial stage.

Having summarized both Parties submission, I find one main issue for determination by this court is “whether the raised two points of law are worthy for certification for determination by the Court of Appeal of Tanzania”.

Having gone through the Applicants' submissions, the judgement of of the High Court in Pc Civil Appeal No.47 of 2019. Among other things, at page 4 of the judgment the High court issues which were raised before the first Appellate court were reproduced, the issues are as follows **first**, whether the primary court Magistrate considered the evidence of the appellant, **second**, whether the trial court evaluated the evidence properly, **third**, whether the appeal be allowed and **fourth**, whether the claim before the trial court was *res judicata*.

This court's in deliberation is whether the points of law proposed by the applicant qualify to be the points of law worth certification by this court for determination by the Court of Appeal starts with the first point framed as follows.

- i. That upon finding that the first appellate court did not address all grounds/issues of appeal the High Court was supposed to remit the case file to the first appellate court for determination of the undetermined grounds of appeal or alternatively itself decide the said grounds.

The issue here should be whether failure to order and remit the case file to the first appellate court or the High Court itself deciding the undetermined issue is a point of law for determination by the court of appeal.

This issue is based on the authority of the case of *Demay Daati and 2 others vs Republic*, Criminal Appeal No. 80 of 1994 CAT–Arusha that, it is the duty of the second appellate court to make a fresh analysis of evidence whenever it appears that, the lower court did not do so, and that for such failure there has been misapprehension of evidence, a miscarriage of justice or violation of some principle of law or procedure.

It is clearly shown at page 7,8 and 9 of the High court's judgment that following the failure of the first appellate court to determine the issues it raised, the High court as a second Appellate court determined them by assuming the powers of the first Appellate court, of re hearing the matter and analyze afresh the evidence and come out with the new findings. The complaint here is whether the second appellate Court sufficiently determined all the grounds of appeal and the issues framed therefrom? In my considered view, this is the point of law worthy certification for determination by the Court of Appeal.

The second proposed point of law for certification is the raising of the point of *res judicata* by the 1<sup>st</sup> appellate court without being raised and determined by the trial Court and the fact that the High Court did not decide on it but made just a comment. On this point it has been submitted that, that the same was raised *suo moto* by the first appellate Magistrate which was never been decided by the trial court. On this issue the High Court (second appellate Court) at page 6 paragraph 1 of its judgment, it is categorical that;

*“The raised issue of res judicata which is the fourth issue before the first appellate court was not among the Trial court’s issues.*

The High court further stated that;

*It is unfortunate that the first appellate court got into trap of deciding on the issue of res judicata that was never decided by the trial court.”*

Court found that the first appellate court fall into trap and decided on the issue of *res judicata*, it ended there without taking a step further of either declaring what was decided in that regard as a nullity or otherwise. In my view, this also constitutes a point of law framed as follows.

Whether it was proper for a second appellate court after having found that the issue of *Res Judicata* was erroneously raised and decided to leave



it without taking action. In my considered view these two issues are the point of law worthy certification by this court for consideration by the Court of Appeal.

These points of law have been certified in consonance with the authority in the case of **Dorina N. Mkumwa vs Edwin David Hamis**, Civil Appeal No.53 of 2017 in which the Court of Appeal held at page 11 that;

*"When High Court receives applications to certify point of law, we expect Rulings showing serious evaluation of the question whether what is proposed as a point of law, is worth to be certified to the Court of Appeal. This Court does not expect the certifying High Court to act as an uncritical conduit to allow whatsoever the intending appellant proposes as point of law to be perfunctorily forwarded to the Court as point of law"*

That said application is hereby granted, the two points of law are elaborated above are certified as the points of law for consideration by the Court of Appeal of Tanzania.

Order accordingly.

**DATED at ARUSHA** this 17<sup>TH</sup> day of June 2022



  
**J.C. TIGANGA**  
**JUDGE**