

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF MWANZA
AT MWANZA

MISC. CIVIL APPLICATION CASE NO. 23 OF 2021

(Arising from Civil Appeal No. 67 of 2020 in the High Court of Mwanza and Civil Appeal No. 07 of 2020 in the District court of Magu. Originating from Civil case No. 121 of 2019 in the Primary Court of Magu urban at Magu)

JOHN WAZIRI MPANGA..... APPELLANT

VERSUS

CALVERT SINDATO RESPONDENT

RULING

20th June & 8th July 2022

Kahyoza, J.:

This a ruling in respect of an application for certificate that there is point law to be considered by the Court of Appeal of Tanzania. **John Waziri Mpanga** is an applicant and **Calvert Sindato** respondent.

Calvert Sindato advanced money to **Shija Masato** not a party to the matter before this court, which **John Waziri Mpanga** guaranteed. Shija Masato defaulted to pay the loan. **Calvert Sindato** sued John Waziri Mpanga to recover the debt. **John Waziri Mpanga** is lost the appeal before this Court. He intends to appeal to the Court of Appeal. He is seeking this Court to certify that there exists a point of law to be considered by the Court

of Appeal. The duty of this Court when it is called upon to certify that there is a point law to be considered by the Court of Appeal is explained in **Dorina N. Mkumbwa Edwin David Hamis**, Civil Appl. No.53/2017 CAT (unreported), that-

*"It is therefore self-evident that applications for Certificates of the High Court on points of law are serious applications. Therefore, 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. We are prepared to reiterate that Certificates on points of law for appeals originating from Ward Tribunals mark a point of finality of land disputes that are predicated on matters of fact.***

There is yet another decision of the Court of Appeal explaining the role of this Court when called upon to certify whether there exists a point of law for determination by the Court of Appeal. **Agnes Severini V Mussa Mdoe** [1989] TLR 164 (TZCA) the Court of Appeal observed that-

*"We wish to observe at the outset that this was an unsatisfactory way of certifying a point of law. That certificate is capable of two interpretations. It could mean posing the question **whether there was any evidence at all to support the concurrent decisions of the courts below.** It could equally mean to ask the question **whether the evidence as adduced was sufficient to support and justify those decisions.** How, this distinction is imported. The question whether there was any evidence at all to support the decision is a question of law which can properly be certified for the opinion of this court. But whether the evidence as adduced was sufficient to support the decision is a question of fact which could not properly be the subject of a certificate for the opinion of this court. For, this court takes the view that if there was some evidence on which the courts below could have arrived at the decision they did, then this court will not interfere, even though had this court itself tried the case it might have come to a different decision. Those who are called upon to certify points of law should, therefore, **keep this distinction in mind in order to ensure that only the correct questions are certified for the opinion of this court.**"*

The applicant prayed this court to certify a point of law that, whether it was correct pursue the guarantor, instead of the principal debtor who was brought to court and admitted to have borrowed and ordered to pay. I do not see a point of law or a question of public importance for the Court of Appeal to consider. The applicant does not dispute that he guaranteed the

Shija Masato, he contends that **Shija Masato** should be called upon to pay. It is clear that the applicant promised to repay the loan in the event the borrower defaulted to pay. It does not matter whether **Shija Masato**, the borrower was joined or not, the applicant's liability stands stems from the fact that **Shija Masato** defaulted to repay the loan.

I therefore, do not find point of law in the first ground in support of the application for a certificate on point of law.

The applicant further prayed this Court to certify as a point of law that whether it was correct to attach the house which is not a security for loan and which does not belong to the respondent (sic) (Applicant).

I do not find any merit in this point. The applicant cannot be given certificate to appeal because the house to be attached in execution of a decree belongs to someone else. The law states in no uncertain terms that if a property attached does not belong to the judgment debtor, in this case the applicant, the owner is entitled to institute objection proceedings. It is not a duty of the judgment debtor to object to the attachment because the property attached does not belong to him. The judgment debtor has no interest to protect in someone's property.

In addition, the applicant stated that the property attached is not subject of attachment as it was not offered as security. It is trite law that

once the property mortgaged or offered to secure a loan is sold and the amount accrued cannot settle a debt, the lender is at liberty to process to other properties of the borrower. Arguing by analogy, if the guarantor's property offered to secure a loan cannot settle the debt, the lender is at liberty to proceed with the guarantor's other properties.

It is on record in the present case, that the applicant offered his motor vehicle to secure the loan and surrendered the registration card to the respondent. He, however, maneuvered and sold the security. This was nothing but duplicitous. To hold that the applicant's other property should not be sold as he sold the pledged property would be to condone criminality. Thus, the applicant cannot be heard to complain that the property sought to be attached were not offered when he knows that he disposed the security in breach of the contract between him and the respondent.

I, therefore, do not find the applicant's contention, whether it was correct to attach the house which is not a security for loan and which does not belong to the respondent applicant, amounting to a point of law.

Lastly, the applicant prayed to this court to certify whether it was proper to order for substituted service without proof that the respondent failed to effect service to the applicant.

The law requires this Court certify a point of law. The issue raised in third ground is not a point of law. It is a mixture of law and facts. It cannot form a ground of appeal to the Court of Appeal. See **Shangwe Mjema v. Frida Salvatory and Another**, Criminal Appeal No. 103 of 2017 (unreported) where the Court of Appeal stated that-

*It should be noted that this is a third appeal... It is a mandatory requirement that a party intending to appeal to this Court, must seek and obtain from the High Court **a certificate on points of law involved in the appeal**. The provisions of section 5(2) (c) of the Appellate Jurisdiction Act, Cap 141 R.E. 2002 (the Act) are unambiguous on that requirement.The import of the above quoted provisions is that without a certificate on a point of law... the appeal before the Court is invalid." (Emphasis added)*

Similarly the Court of Appeal in **Mohamed Mohamed and Another v. Omari Khatib**, Civil Appeal No. 68 of 2011 at pages 11-13 (unreported), the Court stated the following as to what constitutes a point of law:-

"... for instance, where there is a novel point, where the issue raised is unprecedented, where the point sought to be certified has not been pronounced by the Court before and is significant and goes to the root of the decision, where the issue at stake involves jurisdiction, where the court(s) below misinterpreted the law etc..."

To determine the third ground, if certified as point of law, the Court of Appeal would be compelled to find whether there was evidence to prove if

the respondent took trouble to serve the applicant physically and failed. This is not a duty of the third appellate Court, the Highest Court in our Court system. It is a fact-finding exercise. Issues of facts end at the first appellate court and to a limited extent to the second appellate court. In nowhere factual issues should find their way to the third appellate Court. I find the last point raised for this court to certify to the Court of Appeal, baseless.

In the end, I find the applicant has not raised points of law worth to be considered by the Court of Appeal. I dismiss the application with costs.

It is ordered accordingly.

Dated at Mwanza this 8th day of July, 2022.



A handwritten signature in black ink, appearing to read "J.R. Kahyoza".

J.R. Kahyoza
Judge

Court: Ruling delivered in the presence of the applicant and the respondent.

B/C Ms. Jackline present.

A handwritten signature in black ink, appearing to read "J.R. Kahyoza".

J.R. Kahyoza
Judge
08/07/2022