

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF ARUSHA
AT ARUSHA

MISC. CIVIL APPLICATION NO. 73 OF 2021

(Originating from Civil Appeal No. 21 of 2019 at High Court Arusha from Kiteto District Court at Kibaya, Appeal No. 1 of 2019, Original from Kiteto Primary Court at Kibaya, Civil Case No. 42 of 2017)

SAID ATHUMAN SASU..... APPLICANT

VERSUS

NELSON LETISYA.....RESPONDENT

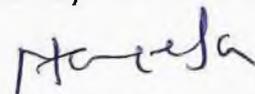
RULING

07.06.2022 & 12.07.2022

N.R. MWASEBA, J.

The applicant herein, Said Athumani Sasu beseeches this court to grant leave to appeal to the Court of Appeal as well as certification that there are points of law worthy to be determined by the Court of Appeal.

The application was brought under Section 5 (1) (c) and 5 (2) (c) of the Appellate Jurisdictions Act, Cap 141 R.E 2019. It is supported by an affidavit sworn by the applicant himself. The same was opposed by the respondent who filed a counter affidavit sworn by his counsel Mr Mathias Nkingwa.



The brief facts of the application are that the respondent herein sued the applicant at Kiteto Primary Court at Kibaya claiming for Tshs. 3,100,000/= which he alleged to be a loan he offered to the applicant on 08.05.2018 to be repaid with interest on 30.08.2018. After a full trial the court was satisfied that the applicant owes the respondent the alleged money and ordered the applicant to pay the responded Tshs. 2,500,000/= after excluding the interest since it is illegal for an individual person to give loans repayable with interest. Being aggrieved, the applicant appealed to Kiteto District Court whereby the court decided in favour of the applicant for the reason that there was no proof of a valid contract between the parties.

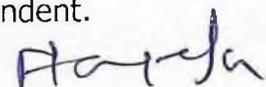
Aggrieved, the respondent appealed to the High Court of Arusha where the Court allowed the appeal with costs for the reasons that exhibit K1 and K2 proved that the applicant secured the loan from the respondent and ordered him to repay Tshs. 3,100,000/=. Being dissatisfied, the applicant now wants to appeal to the court of appeal. However, since the matter is originating from the primary court, the applicant needs to be given leave by this court to appeal to the Court of Appeal after being certified that there is a point of law worthy to be determined by the Court of Appeal.

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When the application was called for hearing, both parties agreed to dispose of the application by way of written submission whereby Mr Ephraim A. Koisenge, learned advocate represented the applicant and Mr Mathias Nkingwa, also learned advocate represented the respondent.

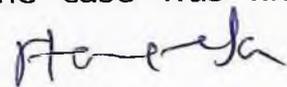
In the affidavit supporting the application, it was deponed that, being aggrieved by the impugned judgment, the applicant filed a notice of appeal to the CAT and requested to be supplied with copies of the proceedings, judgment and decree of this court. He deponed further that, the grounds for appealing are based on points of law related to the following issues to be considered by the CAT:

- A) Whether the second appellate court was justified to enforce the contract against the applicant against the suit filed prematurely before lapse of the contractual time frame.
- B) Whether there existed valid contract between the applicant and respondent worthy any enforcement before the court of law.
- C) Whether the existence of Exhibit K1 and K2 reflect one transaction and the two are one and the same thing in absence of clear evidence to that effect.
- D) Whether the second appellate court was correct in law to assume without evidence on records that exhibit K2 is the complementary of Exhibit K1
- E) Whether the evidence on records legally support the contention of the Applicant to have secured personal loan from the Respondent.



In his written submissions, the learned advocate for the applicant submitted that the decision of the High Court is marred with serious question of law that is why on the second ground they moved this court to grant leave for the Court of Appeal to consider whether there was a valid contract between the parties herein. On the third ground the applicant is challenging the act of the High Court to decide that Exhibit K1 and K2 bear the same transaction while their contents and dates are different. While K1 said the loan is Tshs. 2,700,000/= which was to be repaid on 30.04.2019 failure to do so the applicant was supposed to pay Tshs. 5,400,000, Exhibit K2 stated the amount of the loan to be Tshs. 3,100,000/= which was supposed to be repaid on 30.08.2018, thus the two documents do not relate.

On the fourth ground, Mr Koisenge submitted that the 2nd appellate court was wrong to decide that exhibit K2 was a complement of exhibit K1 while there was no reflection on the two documents. He added that the last ground relates to this ground, and it is also worthy of determination by the Court of Appeal. As for the first ground he submitted that the case was filed prematurely since the contract was supposed to be matured on 7.09.2018 but the case was filed on 15.04.2018.



To support his arguments, he cited the case of **Swissport Tanzania Limited Vs Michael Lugaiya**, Civil Appeal No. 119 of 2000 (HC-Unreported) and **Nurbhai N. Rattansi Vs Ministry of Water Cooperation Energy Land & Another** [2005] TLR 220 where the court was of the view that if a matter raises a contentious issue of law or fact, is a fit case for further consideration by the Court of Appeal.

In his written submission opposing the application, Mr Nkingwa adopted the contents of their counter affidavit to be part of his submission. He added that the raised grounds of appeal are not purely points of law as they are based on evidence. The main issue before the court was the determination of the validity of the contract executed between the parties and upon evaluation of evidence, it was decided that the parties entered into a contract as per the law of contract.

To allow this application will defeat the aim of justice and increase congestion of cases since there is no issue of general importance, novel point and *Prima facie* arguable on appeal. To buttress his point, he cited the case of **Simon Kichele Chacha Vs Aveline M. Kiwale**, Civil Appeal No. 160 of 2018 (CAT- Unreported) and prayed for the application to be dismissed with costs.



Having heard the rival submissions from both parties this court will now determine the main issue as to whether or not this application is meritorious.

Section 5 (1) (c) of Cap 141 R.E 2019 provides that:

"1. In civil proceedings, except where any other written law for the time being in force provides otherwise, an appeal shall lie to the Court of appeal; -

c) with the leave of the High Court or of the Court of appeal, against every other decree, order, judgment, decision or finding of the High Court.

And **Section 5 (2) (c) of Cap 141** R.E 2019 stipulates that:

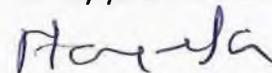
"2. Notwithstanding the provisions of subsection (1)-

c) no appeal shall lie against any decision or order of the High Court in any 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."

The same was held in the case of **Harban Hajimosi and Another Vs.**

Omari Hilal Seif and Another (2001) TLR 409 at page 412 that:

"Therefore, according to subsection (2) (c), a certificate on point of law is necessary with appeals relating to matters originating in Primary Courts. The practice of the High Court is to frame such a point or to approve and



adopt one framed by the intending Appellant to certify it to the Court of Appeal”.

In exercising the said duty, I will deal with the Applicant's proposed points for certification to determine if at all they qualify for certification purposes. I will begin with the first ground on whether the second appellate court was justified to enforce the contract against the applicant based on the suit filed prematurely before the lapse of the contractual time frame.

The applicant herein alleged that the case was filed before the contract was matured something which is against the law. In my considered view, this is not a legal point worthy of determination by the CAT due to the fact that the said issue was neither raised nor discussed by the lower courts. The Court of Appeal in **Hotel Travertine Limited and 2 Others vs National Bank of Commerce** [2006] TLR 133 had this to say:

“As a matter of general principle an appellate court cannot consider matters not taken or pleaded in the court below to be raised on appeal.”

Similarly, as in this case, since the issue of pre-maturely filing of the case was not an issue at the trial court and the 1st appellate court the same cannot be brought at this stage to be certified as a point of law

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worthy of determination by the Court of Appeal. For the said reasons, this ground is rejected.

The second point is whether there existed a valid contract between the applicant and respondent worthy of any enforcement before the court of law. It is my considered view that validity of contract is a point of law worthy of determination by the Court of Appeal since there are some contracts tendered as exhibits entered between the parties herein which were challenged by the appellant on the basis that they are not related. More to that, since my duty at this stage is to certify only a point of law, I will not deal with the evaluation of evidence to see whether the lower court did consider the issue of validity of contract or not. For that reason, this ground is hereby certified as a point of law worthy of determination by the CAT.

The third issue is whether the existence of Exhibit K1 and K2 reflect one transaction and the two are one and the same thing in the absence of clear evidence to that effect. It is my view that the same does not constitute a point of law worthy to be determined by the Court of Appeal since it is merely a matter of evidence. This point is thus not certified.

I am now coming to the fourth ground of whether the second appellate court was correct in law to assume without evidence on records that

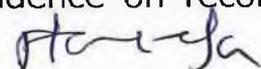


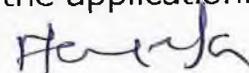
exhibit K2 is the complementary of Exhibit K1. The same is related to the third ground and not worthy of determination by the Court of Appeal as it has no point of law or matter of general importance. This point is not certified too.

Finally, the last ground of appeal is whether the evidence on records legally supports the contention of the Applicant to have secured personal loan from Respondent. The same does not qualify to be a point of law or a matter of general importance worthy of determination by the Court of Appeal. This is also rejected.

As it was held in the case of **Nurbhai N. Raittansi Vs Ministry of Water Construction Energy Land and Environment and Another**, (Supra) that:

"In determining an application for leave to appeal to the Court of Appeal, the Court must ascertain if there is a legal point worth of being considered by the Court of Appeal."

In the end, since there is one point which was certified as point of law worthy of determination by the Court of Appeal the application is hereby allowed to such extent and the applicant is given leave to appeal to the Court of Appeal. Each party will bear its own costs of the application.



Ordered accordingly.

DATED at **ARUSHA** this 12th day of July, 2022.



A handwritten signature in blue ink, appearing to read "N.R. Mwaseba".

N.R. MWASEBA

JUDGE

12.07.2022