

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

**(MWANZA SUB-REGISTRY)**

**AT MWANZA**

**MISC. CIVIL APPLICATION NO. 142 OF 2020**

*(Arising from PC Civil Appeal No. 17 of 2019 of the High Court of Tanzania at Mwanza originating from the judgment of the District Court of Nyamagana at Mwanza in Misc. Civil Application No. 27 of 2018. Original Mwanza Urban Primary Court Civil Case No. 522 of 2017)*

**ROBERT MAZIBA SENGHERMA.....APPLICANT**

**VERSUS**

**ERASTO MAZIBA.....RESPONDENT**

**RULING**

**21<sup>st</sup> April & 1<sup>st</sup> Sept. 2022**

**DYANSOBERA, J.:**

The applicant has filed this application for a certificate on a point of law following his dissatisfaction of the decision of this Court in the Civil Appeal No. 17 of 2019 though mistakenly indicated to be 2018. In that appeal, the applicant was impugning the decision of the District Court of Nyamagana in Misc. Civil Application No. 27 of 2018 in which his application for extension of time in which to appeal was dismissed on 26<sup>th</sup> September, 2018 of lack of merit.

His appeal to this court (PC Civil Appeal No. 17 of 2019) was found to be misconceived and lacking in merit and was, therefore, dismissed with costs on 15<sup>th</sup> day of October, 2020. The applicant now wishes to go to the Court of Appeal and is seeking for certification on points of law for consideration by the Court of Appeal. According to paragraph 6 of the

applicant's affidavit, the points of law the applicant seeks to be certified are one, whether it is properly in law to consider as evidence facts in documentary evidence which was written without prejudice after it was admitted in court and two, whether this court was right to hold that the extension of time is an equitable discretion/right and not a creature of statute.

Parties prayed and the court granted the prayer for the application to be heard by way of written submissions.

Supporting the application, the applicant argued that having been aggrieved by the decision of this court dated 15<sup>th</sup> October, 2020 that dismissed his appeal has preferred this application for certification on points of law. Relying on the case of **Shangwe Mjema v. Frida Salvatory and anor**. Criminal Appeal No. 103 of 2017 CAT at Dar es Salaam, the applicant contended that without a certificate on point of law in proceedings originating from primary courts, the appeal before the Court of Appeal is invalid.

Elaborating on the first point, the applicant asserted that exhibit P 5, a letter written without prejudice was admitted in contravention of Section 25 (1) of the Evidence Act and this court in PC Civil Appeal No. 17 of 2019 ought to take note of that and allow the appeal. On the second alleged point of law, the applicant thought that the court's holding that

extension of time was an equitable discretion/right and not a creature of a statute was not the proper legal position.

The respondent, on his part, urged the court to find the application lacking in merit and subject to dismissal. He contended that the applicant has misled himself on the applicability of section 25 (1) of the Evidence Act. He reasoned that the Evidence Act is not applicable in Primary Courts rather, it is the Magistrate's Courts (Rule of Evidence in Primary Courts) Regulations, GN No. 22 of 1964 that governs admissibility and consideration of Evidence in Primary Courts. Counsel for the respondent relied on section 2 of the Evidence Act and pointed out that this court was right in dismissing PC Civil Appeal No. 17 of 2019 for lack of merit and that the primary court could not be said to have contravened the law which is inapplicable.

On the argument that Hon. Ismail, J stated that granting extension of time is in the court's discretion and not a creature of statute, Counsel for the respondent regarded the argument to be without justification. Quoting the holding of this court at page 14 of the judgment, Mr. Mwanaupanga clarified that the Hon. Judge took into consideration the fact that the extension of time is not the right of the litigant against a court but a discretionary power of courts which litigants have to lay basis where they seek grant of it. Further that even if the judge had stated as the applicant claims, that statement was not a ratio decidendi rather, it was

an obiter dictum. Counsel for the respondent concluded that there is no point of law stated by the applicant significant enough to warrant issuance of a certificate and subsequent consideration by the Court of Appeal. It was also submitted on part of the respondent that there is no novel and unprecedented point (s) sought to be certified that goes to the root of the decisions of both lower courts.

In a brief rejoinder, rebutting the respondent's argument that Hon. Ismail, J. gave an obiter dictum and not a *ration decidendi*, Counsel for the applicant quoted the holding at page 8 of the judgment that 'the law is settled in this country that extension of time is an equitable discretion exercised judiciously and on proper analysis of the facts and application of law to facts.

On the argument that section 25 of the Evidence Act is inapplicable to Primary Courts, counsel for the applicant stated that in the cited Regulations there is a provision which is *in pari materia* with section 25 of the Act.

Having gone through the Applicant's Affidavit, I accept the position taken by Counsel for the respondent that no point of law stated by the applicant significant enough to warrant issuance of a certificate and subsequent consideration by the Court of Appeal. What the applicant terms as points of law do not answer the questions whether there is an arguable case worth taking to the Court of Appeal and whether there are

points of law worth consideration by the Court of Appeal which is the highest court of land. The argument that exhibit P 5 which is the letter written without prejudice was admitted contrary to section 25 (1) of the Evidence Act is not a point of law worthy taking to the Court of Appeal. It is true that without prejudice is a legal term which finds recognition with section 25 of the Evidence Act. It is a privilege that governs admissibility of evidence in court and is founded on the public policy of encouraging litigants to settle their disputes rather than litigate them. It is a rule that protects admissions but as rightly submitted by learned Counsel for the respondent, the Evidence Act is by virtue of section 2 of the said Act, inapplicable in a Primary Court. The applicant's first point is misconceived. Likewise, granting extension of time is within the court's discretionary powers. This Court was right to hold as it did because that is the legal position.

For the reasons stated, I find this application lacking in merit and hereby dismiss it with costs.

  
**W. P. Dyansobera**

**Judge**

**01.09.2022**

This ruling is delivered under my hand and the seal of this Court on this 1<sup>st</sup> day of September, 2022 in the presence of Mr. Mwanaupanga learned Counsel for the applicant but in the absence of the respondent.



  
**Dyansobera**  
**Judge**