

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(IN THE DISTRICT REGISTRY OF MWANZA)  
AT MWANZA**

**MISC CIVIL APPLICATION No. 135 OF 2021**

*(Arising from the Judgment of the High Court of Tanzania at Mwanza, Hon.  
Rumanyika J., in PC Civil Appeal No. 81 of 2020 dated 26<sup>th</sup> February 2021)*

**ABIUS ERASTO ..... APPLICANT**

**VERSUS**

**JOSEPH CHILYA ..... RESPONDENT**

**RULING**

*27<sup>th</sup> September, & 13<sup>th</sup> October, 2022.*

**OTARU, J.:**

The Applicant, **ABIUS ERASTO** has filed this Application under Section 5(2)(c) of the **Appellate Jurisdiction Act**, Cap 141 of the Laws and Rule 46(c) of the **Tanzania Court of Appeal Rules** (2009) to move this Court to certify that a point of law, worthy of consideration by the Court of Appeal of Tanzania, exists in the third Appeal that he intends to file.

The impending Appeal is against the decision of this Court dismissing the Appeal against the decision of the District Court. The District Court had upheld the decision of the Primary Court. In the Applicant's understanding, the decision of the High Court is faulty.

The Application is supported by an Affidavit sworn by Mr. Abius Erasto, the Applicant. The facts establishing the basis of this Application

are gathered therefrom. On 8<sup>th</sup> January 2020, the Respondent was declared a winner in Urban Primary Court (Civil Case No. 1 of 2020). The Applicant, dissatisfied, instantly filed an Appeal to the District Court of Nyamagana. Again, it was decided in favour of the Respondent. The Applicant unsuccessfully appealed to this Court in which the District Courts decision was upheld. The Applicant is still determined to pursue his right. He is now before this Court seeking for certification on point of law so he could challenge this Court's decision in the Court of Appeal of Tanzania.

This matter was heard by way of written submissions. The Appellant is represented by Ms. Bitunu Y. Msangi and the Respondent is represented by Advocate Marwa. Praying to adopt the Applicant's Affidavit, Ms. Msangi submitted that two points of law are extracted from the impugned decision. These are, whether the lower Courts and the High Court were legally right to rely on the text message as an exhibit which was not tendered in Court and admitted as exhibit and whether the lower Courts and the High Court were right to rely on unsworn testimony of the Respondent.

In her submission in support of application Ms. Msangi's contention is that, electronic evidence which were tendered in the trial court was unprocedural as it contravened Section 64A of the **Evidence**

*M. Msangi*

**Act**, Cap 6 [RE 2022] and Section 18 of the **Electronic Transactions Act**, Act No. 13 of 2022. She decries that it was an error for the trial Court to enter decision based on oral testimony by the Respondent which makes reference to the contents of short message service (SMS) such as Exhibit P2. This Exhibit was extracted from the Respondent's phone and used as the basis of the trial court's findings while the law governing electronic evidence does not apply at the Primary Court level. In support of her argument, she cited the Case of **Christina Thomas vs Joyce Justo Shimba**, PC Civil Appeal No. 84 of 2020 (Unreported).

The unsworn testimony of the Respondent, is the subject of the second ground of this Application. The Applicant's counsel submitted that on page 2 of the trial court's proceedings, the Respondent's testimony was taken without oath. According to him, it violated provisions under Section 4(a) of the **Oaths and Statutory Declaration Act**, Cap. 34 [RE 2019]. In supporting her averments, she referred this Court to the decision in the case of **Gabriel Boniface Nkakatisi vs The Board of Trustees of the National Security Fund (NSSF)**, Civil Appeal No. 237 of 2021 (Unreported). Based on the above contentions she urges this Court to certify that sufficient points of law exist for consideration of the Court of Appeal of Tanzania.

In reply Mr. Jackson Marwa Ryoba, the counsel for the Respondent criticized the Application for failure to raise points of law worthy of the attention of the Court of Appeal. Submitting in respect of the first point he stated that, the printout of the text messages and money gram receipts were tendered by the Respondent as evidence and the same were admitted by the trial Court without objection. He holds the view as the Primary Court is governed by the rules of evidence under the **Magistrates Courts (Rules of Evidence in Primary Courts) Regulations**, thus Section 64A of the **Evidence Act** (supra) and Section 18 of the **Electronic Transactions Act** (supra) which were cited by the Applicant do not apply in the Primary Court.

Counsel for the Respondent also added that the issue of the Respondent not being sworn during trial has never been raised by the Applicant before, therefore it is improper to bring it at this stage. He supported his averments by citing in the case of **Hassan Bundala @Swaga vs Republic**, Criminal Application No. 386 of 2015 (Unreported) and **Seifu Mohamed Seifu vs Zena Mohamed Jaribu**, Misc. Land Case No. 84 of 2021 HC. The council also cited the persuasive decision of **Maico Zacharia vs Chama cha Msingi Wakulima Nkome**, Misc. Land Application No. 199 of 2019 H.C (Unreported) and prayed for the Court to dismiss the Application with costs.

Having heard the rival submissions by both counsel, the Court's duty, at this stage of the proceedings, is to determine as to whether the instant application meets the threshold required for certification of a point of law to warrant the attention of the Court of Appeal.

The law is settled that an Appeal to the Court of Appeal, against matters originating from either the Ward Tribunal or the Primary Court, the same must undergo scrutiny including ascertainment if it carries a point of law of sufficient importance, worth of and relevant for consideration by the Court of Appeal. This position of law has been emphasized in numerous decisions in this Court and the Court of Appeal.

In the decision of **Abdallah Matata v. Raphael Mwaja**, CAT-Criminal Appeal No. 191 of 2013 (DDM-unreported), the Court of Appeal summarized the imperative requirement of certifying the point of law, thus:-

*'In order to lodge a competent appeal to the Court, the intended appellant has to go through the High Court first with an application for a certificate that there is a point of law involved in the intended appeal. It is only when the appellant is armed with the certificate from the High Court, that a competent appeal may be instituted in this Court.'*

Having gone through the Affidavit that supports the Application and the submissions of the parties, I am persuaded that the concern raised by the Applicant constitutes a point of law, sufficient to draw the

*M. Othman*

attention of the Court of Appeal's engagement and make a finding thereon. These points are, as stated earlier, are extractable from paragraph 6(a) and (b) of the supporting Affidavit and they are:

- 1. Whether the lower courts and the High Court were right to rely on the text message as an exhibit which was not tendered in Court and admitted as exhibit.*
- 2. Whether the lower courts and the High Court were right to rely on the evidence of the respondent which was taken while he was not under oath.*

The Respondent has resisted the Application basing on the fact that it contains new grounds that were never raised before. However, the Court in **Simon Emanuel v. Republic**, Criminal Appeal No. 531 of 2017, when faced with a similar situation had this to say;

*'We are settled that as a matter of general principle, this Court will only look into the matters which came up in the lower courts and were decided and not new matters which were not raised or decided by neither the trial court nor the High Court on appeal. **However, to add on the same note, this principle does not apply when the matter involves a point of law.**'*

(Emphasis supplied)



I find the above quotation relevant to us, considering the new issues that were not raised earlier. That as long as the issues are of legal nature, the same can be acceptable for certification.

From the foregoing analysis, I am of the firm view that the Application meets the legal threshold for its grant. Consequently, the Application for certification on points of law is hereby granted as prayed.

Costs to be in the cause.

It is so Ordered.

**DATED** at **MWANZA** this 13<sup>th</sup> day of October, 2022.



  
M.P. OTARU

**JUDGE**