

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MWANZA SUB-REGISTRY)

AT MWANZA

MISC. CIVIL APPLICATION NO. 139 OF 2021

(Arising from PC Civil Appeal No. 19 of 2021, from the Judgment of the High Court of Tanzania dated 29.9.2021)

MARIAM OTHMAN MATEKELE.....APPLICANT

VERSUS

NYACHERI JOSEPH MWANGWA.....RESPONDENT

R U L I N G

26th April & 10th May, 2022

DYANSOBERA, J.:

This is an application for a certificate on points of law filed by the applicant Mariam Othman Matekele. The application is made under Section 5 (2) (c) of the Appellate Jurisdiction Act [Cap. 141 R.E.2019] and supported by the affidavit of the applicant. The application has been opposed by the respondent through his counter affidavit filed on 23rd day of November, 2021.

The brief facts giving rise to this application are the following. The respondent Nyacheri Joseph Mwangwa instituted Civil Case No. 47 of 2020 before Ilemela Primary Court claiming recovery of a debt of Tshs. 11, 000,000/= . The respondent alleged that the appellant owed

him the said amount being the money advanced to her on 2nd day of May, 2017 as a loan. Admitting the debt, the appellant, however, argued that she had already paid to the respondent Tshs. 6,500,000/= and the remaining amount was Tshs. 4,500,000/= only. The trial court found for the appellant and ordered her to pay to the respondent the remaining amount of Tshs. 4,500,000/=. The respondent was aggrieved by that decision and successfully appealed to the District Court. The first appellate court, it seems, allowed the appellant's appeal, quashed and set aside the judgment of the Primary Court. The appellant's appeal to this Court was dismissed. The appellant then lodged a notice of appeal to the Court of Appeal against the decision of this Court. In view of the fact that this is a second appeal, there has to be certification that a point of law is involved hence this application.

On 23rd day of November, 2021 the respondent, through Bahati Kessy Yatabu, learned Advocate filed a Notice of Preliminary Objection. However, on 14th day of February, 2022, the respondent, through Advocate Anna Hango, prayed to withdraw the preliminary objection. It was, accordingly, marked withdrawn hence paving way for the hearing of this application.

When this application was called for hearing on 22nd day of March, 2022, Mr. Bahati Kessy who appeared for the respondent and held brief for Advocate Ezekiel James, learned Counsel for the applicant, informed this court that the said Advocate was indisposed but that they had agreed that this application be heard by way of written submissions. This court granted the prayer and set the time frame for filing the said written submissions. However, it is only the applicant who managed to file the written submission in chief in support of the application; the respondent has filed none in reply.

Supporting the application, learned Counsel for the applicant at first adopted the affidavit in support of the application. He then submitted that the application on certification on points of law centres on the issues/points highlighted under paragraph 4 of the applicant's affidavit.

According to paragraph 4 of the said affidavit, the points the applicant wants to take to the Court of Appeal for determination are the following:

- a) Whether the Hon. Judge erred in law for confirming that it was proper for the first appellate court to quash the

proceedings and judgment of the trial court without ordering a re-trial.

- b) Whether it was proper for the High Court to hold that the oral testimony of the appellant's witness was not proper to justify the part performance of the contract.
- c) Whether the High Court Judge erred in law for confirming that it was proper for the first appellate court to quash the proceedings and judgment of the trial court, setting aside the order of the trial court and ordering the applicant to pay the respondent a total of Tshs. 11, 000,000/= as if there were any existing proceedings.

It was argued by learned Counsel for the applicant that it was expected that after the Hon. Judge had discovered that the first appellate court quashed the entire proceedings and judgment of Ilemela Primary Court, the High Court could have ordered otherwise other than confirming the said order for being improperly ordered.

Having taken into account the applicant's affidavit and the submission of the applicant's learned Advocate, I have the following to observe.

In the first place, certification on points of law on cases originating from the Primary Courts such as the present one is governed by section 5 (2) (c) of the Appellate Jurisdiction Act [Cap. 141 R.E.2002] which provides: "*No appeal shall be against any decision or order of the High Court in any proceedings under Head (c) of part III of the Magistrate Courts Act unless the High Court certifies that a point of law is involved in the decision or order.*"

There is no dispute that it is this court which has exclusive domain to grant such a certificate on points of law. This position was elucidated by the Court of Appeal in the case of **Eustace Kubalyenda versus Venancia Daud**, Civil Application No. 70 of 2011(unreported) where the Court, *inter alia*, held that:

".....But it is the High Court only which has been granted exclusive jurisdiction to certify to the Court that a point or points of law is or are involved in the impugned decision or order in respect of the proceedings falling under Head (c) of Part III of the Magistrates' Courts Act, CAP 11 RE.2002 (the MCA), The said provisions of the MCA deal with the appellate and

*revisional jurisdiction of the High Court in matters
originating from the primary courts”*

There is no dispute that this Court has been properly moved and has jurisdiction to grant the same.

Second, going by the applicant’s affidavit and the submission in support of the application, I am in no doubt that there is an arguable case worth taking to the Court of Appeal and that there are points of law worth consideration by the Court of Appeal.

Third, strictly speaking, a point of law is a matter involving the application or interpretation of legal principles or statutes. It is the determination of what the law is and how it is applied to the facts in the case.

Fourth, it seems, the application has not been substantially opposed as the respondent has failed to respond to it by filing a written reply as ordered by this court on 22nd day of March, 2022.

Considering these factors and in view of the fact that the applicant has shown his dissatisfaction with the decision of this court, I find no reason to decline to grant certificate on points of law.

The application is, thus, granted and it is certified that the points raised by the applicant in paragraph 4 (a) to (c) of her affidavit are points of law for consideration by the Court of Appeal.

Order accordingly.




W.P.Dyansobera
Judge
10.05.2022

This ruling is delivered at Mwanza under my hand and the seal of this Court on this 10th day of May, 2022 in the presence of Mr. Ezekiel James, learned Counsel for the applicant and Mr. Bahati Kessy, learned Counsel for the respondent.




W.P. Dyansobera
Judge