IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

MISCELLANEOUS LAND APPLICATION NO.21 OF 2021

(Originating from High Court of Tanzania at Mtwara in PC. Civil Appeal No. 13 of 2020)

KAMPUNI YA ULINZI SHARK.....APPLICANT

VERSUS

JUMA HASSAN @ NJECHELE.....RESPONDENT

RULING

Date of last Order: 22/02/2022
Date of Judgment: 01/03/2022

LALTAIKA, J.

This application is brought by **Kampuni ya Ulinzi Shark**, the applicant, seeking leave to appeal to the Court of Appeal of Tanzania. The application is preferred by way of a Chamber Summons made under Section 5(1)(c) of the Appellate Jurisdiction Act, Cap.141 R.E. 2002 and Rule 45(a) of the Tanzania Court of Appeal Rules, 2009 as amended by G.N. No.362 of 2017. The application is supported by an affidavit deponed by Mr. Bartholomew Nehata, the Director of the applicant.

The applicant is praying for this court to grant her leave to appeal to the Court of Appeal of Tanzania against the decision of the High Court of Tanzania at Mtwara in **Land Appeal No.13 of 2020** delivered on 22nd June 2021 by Hon. P.J. Ngwembe, J.

At this juncture, a brief recap of the matter is imperative. The respondent sued the applicant at Lisekese Primary Court vide Civil Case No.63 of 2018. The trial court delivered its judgment in favour of the respondent. Dissatisfied with the decision of the trial court the applicant appealed to the District Court of Masasi whose appeal case was registered as **Civil Appeal No. 17 of 2018**.

On the 25th January 2019 the first appellate court pronounced its judgment in favour of the respondent-upholding the decision of the Primary court. Still aggrieved by the decision of the District Court of Masasi the applicant lodged his appeal to this court vide **PC. Civil Appeal No.13 of 2020.** Upon finalization of the hearing of the appeal, this court also upheld decisions of the lower courts. Dissatisfied once again, the applicant has lodged a Notice of Intention to Appeal to the apex court, the Court of Appeal of Tanzania hence this application.

At the hearing, the applicant was represented by Mr. Bartholomew Nehata, the Director of the applicant whereas the respondent appeared in person, unrepresented. On his part, the applicant submitted that he is aggrieved by the decisions of the lower courts which were in favour of the respondent. He went on to submit that reasons for his appeal appear in the petition of appeal available in the court file. He prayed to adopt them and rested his case.

In response, the respondent submitted that the Honourable Magistrate decided the matter fairly and justly since, in his considered view, the learned magistrate made consideration to all gathered evidence. In conclusion, the respondent contended that lower courts and this court

were satisfied that the applicant was responsible for taking care of his properties which responsibility he had not honored.

Having heard the submission from both parties, I am inclined to decide on the crux of the matter in this appeal namely viability of leave to appeal to the court of appeal. It is trite law in our jurisdiction that appeals to the Court of Appeal on matters originating from Primary Courts require certification on a point of law from this court. The law requires the High Court to critically analyse such applications and be thoroughly satisfied that a point of law is involved. The case of **Dorina N. Mkumwa Vs. Edwin Davis Hamis** Civil Appeal No 53 of 2017 CAT, Mwanza (Unreported) is illustrative:

> "Therefore, when High Court receives applications to certify a point of law, we expect Rulings showing the 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 appeal proposes as a point of law to be perfunctorily forwarded to the Court as a point of law."

The practice of this court as reasoned in **Harban Hajimosi and Another vs Omari Hilal Seif and Another** 2001] TLR 409 at page 412 allows me to either frame the points of law or adopt those framed by the intending appellant. I choose the later. The appellant has framed the proposed points as provided for in paragraph 6 of her affidavit, quoted bellow:

"6. That, there are points which are worth and which the applicant wishes to be determined by the Court of Appeal of Tanzania namely, that;

(a) Whether the granted sum of 7,712,000/= was legally proved to the required standards of law.

(b) Whether the sum of 300,000/= granted as compensation costs was granted according to the law.

(c) Whether the burden of proof in civil cases has ever been shifted from the party who alleges of the existence of certain facts."

Admittedly, distinguishing between a point of law from a point of fact is not an easy task. This is in spite of the fact that the Court of Appeal of Tanzania seized an opportunity in **Agnes Severini vs Musa Mdoe** [1989] TLR 164 to proffer guidance for certification of a point of law. I am also persuaded by a persuasive Australian case of ***Collector of Customs v. Agfa-Gevaert Ltd*** (1996) 186 CLR 389, 394 in which the High Court of Australia distinguished between the *factum probandum* (the ultimate fact in issue) and *facta probantia* (the facts adduced to prove or disprove that ultimate fact.) Premised on the wisdom of these courts I will go ahead and analyse the three points framed by the appellant.

For reasons that will be obvious soon, I take the liberty to discuss Point (a) and (b) as appears in paragraph 6 of the affidavit of the appellant together. It seems to me that the two points aim at achieving the same purpose. They are both on the grant of a given amount of money namely

Tanzanian Shillings 7,712,000/ for the proposed point of law (a) and 300,000/= for the proposed point of law (b) respectively. It is my considered view that these are both points of fact and not of law as purported by the applicatn. To borrow from the Australian case of ***Collector of Customs*** **(supra)** these are *facta probantia.*

It can be gathered from judgements of the two courts bellow that he figures were arrived at from facts adduced by the appellant that when his shop was broken into, he lost items valued at TSH 7,712,000/ and he incurred the cost of TSH 300,000/= in prosecuting the case at first trial court. There is absolutely nothing to be found in construction of the law as proposed by the applicant. This would have been different had the figures quoted been provided by law say as the minimum amount that can be awarded by a court. Going against a statutorily set amount would be considered a legal issue. Not when such an amount is purely a factual matter as it is in the instant case. I hold that these two are points of facts and not points of law. This takes me to point (c) namely"

> *(c) Whether the burden of proof in civil cases has ever been shifted (sic!) from the party who alleges of the existence of certain facts*

Notwithstanding its hyperbolic construction, the point has been coached to come close to a point of law. This is because, our law rests on the principle of great evidentiary value that whoever alleges must prove. Unfortunately, this proposed "point of law" comes from "nowhere" both literally and figuratively. I have read the judgements and proceedings of

this court and the two lower courts bellow it and nowhere has either this court or courts bellow it misdirected themselves so grossly as to reverse the revered principle on burden of proof.

The applicant had, presumably, procured drafting services from an unnamed lawyer. Had the lawyer been brave enough to represent his client in this application, I would have seized that opportunity to direct that, in the future, only issues actually litigated upon and evidently discussed in court judgements be invoked in attempts to seek for leave to appeal to the Court of Appeal.

That not being the case I hereby advise the appellant, in the simplest of expressions, that no point of law worthy of consideration by the court of appeal has been framed and pointed out. Therefore, the prayer for leave to appeal to the court of appeal cannot be granted.

Premised on the above reasoning, therefore, leave to appeal to the Court of Appeal is hereby denied.

It is so ordered.

E. I. LALTAIKA

JUDGE

01.03.2022

This ruling is delivered under my hand and the seal of this Court on this 1st day of March,2022 in the presence of the applicant being represented by Mr. Barthlomew M. Nehata, the Director of the applicant and the respondent who has appeared in person and unrepresented.

E. I. LALTAIKA

JUDGE

01.03.2022