

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**  
**IN THE DISTRICT REGISTRY OF SHINYANGA**  
**AT SHINYANGA**

**MISCELLANEOUS CIVIL APPLICATION NO. 3 OF 2022**

*(Arising from the judgment of the High Court of Tanzania at Shinyanga  
(Madam Justice E. Y.Mkwizu, J) in PC Civil Appeal No. 3 of 2020 Dated the  
10<sup>th</sup> December, 2021)*

**TITUS MWITA MATINDE ..... APPLICANT**

**VERSUS**

**DANIEL J. SINGOLILE .....RESPONDENT**

**RULING**

25 March, 2022

**A. MATUMA, J.**

The applicant Titus Mwita Matinde had his appeal dismissed by my learned sister Justice Mkwizu in PC Civil Appeal no. 3 of 2021. As a matter of law, he is now before me seeking certificate certifying that there are points of law involved in the impugned judgment worthy to be considered by the court of appeal. At the hearing of this application, Mr. Frank Samwel learned advocate represented the applicant while Mr. Pharles Malengo learned advocate represented the respondent who was also present in person.

The applicant's affidavit is to the effect that three grounds have to be certified that they constitutes points of law to be determined by the court of appeal which are:-

- i) That, this court (Mkwizu, J) erred for not determining that the trial primary Court of Kizumbi had no jurisdiction to determine the suit.
- ii) That, this court (Mkwizu, J) after having expunged exhibit A1 of the respondent, erred for failure to analyse the remaining evidence properly.
- iii) That, this court (Mkwizu, J) erred for not nullifying the proceedings of the primary court for it had breached the rules of natural justice to wit; right to be heard (*audi alterum partem*) and one to be the judge in his own cause (*Nemo Judex in causa sua*)

Submitting in the first ground, Mr. Frank Samwel learned advocate argued that, during trial at the Primary Court, one of the assessors namely Gogadi in putting questions, to the respondent instigated him to tender a documentary exhibit which he had otherwise not tendered at the time the respondent was giving his evidence in Clief. In that regard, the learned advocate is of the opinion that such assessor might have known the case before it came to court and thus had interest in it. That since the assessor was part of the court, then the whole coram had interest in the suit and therefore ought to have not entertain it.

Mr. Pharles Malengo, learned advocate on his party, opposed the said complaint submitting that the same is an afterthought because it was not raised anywhere in the two courts below and in this court during the appeal. In that regard, the learned advocate argued that the court of appeal does not entertain afterthoughts for matters which had not been raised and determined in the lower court. He cited the case of

**TUICO versus Mbeya Cement Co. Limited (2005) TLR 41 (CA)** to that effect.

The learned advocate further argued that, for the assessor to ask a leading question which lead the respondent to tender his documentary exhibit does not necessarily imply that he had an interest in the suit and that the complaints against him are mere allegations without any supporting evidence.

He finalized on this ground by submitting that even though, the High Court determined the complaint that such documentary exhibit was improperly admitted in evidence because it was admitted at the late stage of the respondent's case without the applicant having opportunity to cross examine on it. The determination was in the applicant's favour as the exhibit was finally expunged and it was himself who assisted the court to reach in that decision by citing the case of ***Robinson Mwanjisi and 3 others versus Republic (2003) TLR 218.***

On my party, I agree and subscribe to the submission of Mr. Pharles Malengo learned advocate. In fact, Mr. Frank Samwel, learned advocate is advancing before me afterthoughts, and allegations basing on mere suspicions.

It is an afterthought because, jurisdiction was not a ground of complaint by the applicant not only in the District Court but also was not among the grounds in this court on appeal. Even at the trial Court, there was no such complaint. The learned advocate has coached the complaint by using the term "**Jurisdiction**" just to mislead the court and fraudulently obtain the certificate on point of law. I am of this view because when I asked him which of the ~~types~~ of jurisdictions whether

pecuniary or Territorial the Primary Court lacked, he could not tell. He was just submitting while **beating about the bush**. He was not straight and tried to confuse me the better he could do.

If the issue is that one of the assessors asked a question to the respondent who was the plaintiff during trial, the question which lead the respondent to tender a documentary exhibit which he could have not otherwise tendered in the absence of such question, that does not make the court to lack jurisdiction. The allegations that such assessor had interest in the suit are based on suspicions and the leaned advocate wants me to certify his suspicions.

The court of appeal is not there to determine afterthoughts and suspicions. It is there for matters of general importance or noval points of law and had actually warned this court not to let people go to it by granting them leave or certificate on point of law for frivolous matters. Seen the ***case of British Broadcasting Corporation versus Erlick Sikujua Ng'amaryo, Civii Application no. 138 of 2004 (Nsekela, J.A)***. You may also find this in the case of ***Buckle v. Holmer (1926) aii ER Rep. 90 at page 91.***

The court of appeal also speaking on the provisions requiring leave and in my view including certificate on point of law, in the case of **Harban Haji Mosi and Shauri Haji Mosi versus Omar Hilal Seif and Seif Omary, Civil Reference no. 19 of 1997** stated that the purposes of such restrictions in the law is to spare the court of appeal the specter of unmeriting matters and to enable it to give adequate attention to cases of the public importance. Being guided by such

authorities, I cannot let the applicant go to the court of appeal and disturb it by afterthoughts and suspicions.

Also as rightly argued by Mr. Pharles Malengo learned advocate, the court of appeal cannot entertain on appeal any matters which was not raised and determined by the lower court. In addition to the authority cited by Mr. Malengo (Supra), there is also the other court of appeal decision to that effect. That is; ***Elisa Moses Msaki v. Yesaya Ngateu Matee (1990) TLR 90*** in which it was held:-

*"The court of appeal will only look into matters which came up in the lower court and were decided, not on matters which were not raised nor decided by either the trial court or the High Court on appeal"*

In that respect, the applicant has no room to go to the court of appeal to raise the complaint that the Primary Court adjudicated the matter it had an interest. Not only that, but also and as rightly submitted by Mr. Malengo learned advocate, this court expunged the exhibit which is subject to this complaint because it found that the same was tendered at the time the applicant had finished his cross examination to the respondent. The court expunged such documentary exhibit in the applicant's favour and not against his favour. There is thus no question of law here. It is a dishonest trick by the learned advocate Mr. Frank to procure certificate on point of law by hooks and crooks. I dismiss this ground for the herein above stated reasons.

In respect of the second ground upon which certification on point of law is sought, Mr. Frank Samwel learned advocate argued that, after this court Hon. Mkwizu, J had expunged exhibit A1 from the record erred for not evaluating the remaining evidence properly. According to the learned advocate failure to make ~~proper~~ evaluation of the evidence

is a legal error to be certified so that the matter is referred to the court of appeal. When I asked him as to whether I am in law better positioned to go through the manner in which my learned fellow Judge evaluated the evidence on record and conclude that she did not properly re-evaluated the evidence and therefore allow him to go to the court of appeal to have the evidence re-evaluated thereat, he quickly pointed out:-

*"You have powers to certify but you don't have power to re-evaluate the evidence or fault your fellow Judge in her evaluation"*

In other word, the learned advocate wants me to certify a point of law blindly without even satisfying myself whether there is really a legal issue to be brought to the attention of the court of appeal.

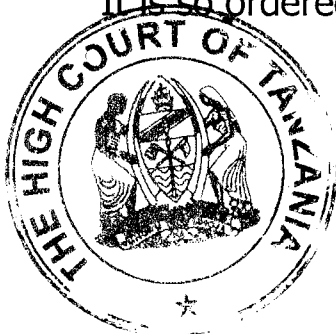
It is in that respect; I agree with Mr. Pharles Malengo learned advocate for the respondent that the issue of improper evaluation of evidence is not a point of law to be certified unless there would be no evaluation of the evidence at all.

The three courts have evaluated the evidence on record and had concurrent findings against the applicant. In law matters of facts or evidence in suits originating from Primary Courts ends in the High Court. No party shall be allowed to challenge the concurrent findings of the subordinate courts to the court of appeal. I thus find this ground without any merit as well and accordingly dismiss it.

The learned advocate then argued the 3<sup>rd</sup> ground stating that, the Primary Court breached the rules of natural justice as his client was not given opportunity to cross examine on exhibit A1 which was tendered after he had cross examined the respondent.

On this, I once again join hands with Mr. Pharles Malengo learned advocate for the respondent in his submission that the evidence upon which the applicant was not afforded opportunity to cross examine was expunged by this court and did not form the basis of the decision. The allegations that one cannot be a judge in his own cause are frivolous and uncertain. Who was a judge in his own cause in the instant matter! Was this raised in the District Court or even in this court for determination? The answer is not. The learned advocate for the applicant Mr. Frank complained before Mkwizu, J on the manner exhibit A1 was tendered during trial and his complaint was sustained. The exhibit was expunged. The allegations that the trial court had interest in the suit and therefore should have not adjudge on its own course were not raised nor argued or determined. My finding on this is as I have determined the first ground. The learned advocate and his client are making a dishonest struggle against the legal requirements. It is quite unfair to accuse the trial court at this stage of certification on point of law after they have lost the case in the trial court, in the District Court and in this court. I have no mandate to certify accusations, allegations and mere suspicions. I therefore and accordingly dismiss this application in its entirety with costs.

It is so ordered.



  
**A. MATUMA**

**Judge**

**25/03/2022**