

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

MISC. CIVIL APPLICATION No 116 OF 2020

(Appeal from the judgment of the High Court of Tanzania at Arusha(Honourable Judge Gwae) in PC Civil Appeal Number 43 of 2019 originated from Civil Case Number 257 of 2018 from Arusha Urban Primary Court)

NEEMA STEVEN TEMU.....APPLICANT

VERSUS

ARPINA INVESTMENT LIMITED.....RESPONDENT

RULING

9th February&25 March 2022

MZUNA, J.:

Neema Steven, the Applicant herein, lost before the High court in PC Civil Appeal Number 43 of 2019 (Hon Gwae, J). She has knocked the doors of this court praying for leave to appeal as well as certification on points of law to be considered by the Court of Appeal of Tanzania.

During hearing of this application which proceeded by way of written submissions, Mr. Emmanuel Shio, the learned counsel appeared for the applicant whereas Ms. Arpina Investment Limited, the respondent herein, was represented by Mr. Mnyiwala Mapembe, the learned counsel.

The points of law relied upon by the Applicant for adjudication are:-

- i. Whether the Appellate Court was legally right to confirm the decision of the District Court of Arusha at Arusha without considering the evidence of the Appellant.*
- ii. Whether, in law, its proper for the first and second Appellate Court Appellate Court confirmed decision (sic) of the trial Court and failed to note that the trial court Judgment lacks opinion of Assessors.*
- iii. Whether is (sic) proper in law for the first and second Appellate Court confirmed decision of the trial court and failed to note that the whole Proceedings and judgment of the trial court is null and void as there was no evidence showing that the Respondent had business relation with the Appellant.*

The main issue is whether there are points of law worth consideration by the Court of Appeal?

I propose to start with grounds No.1 and 3. Arguing in support of the application, Mr. Shio submitted with special attention to paragraph 9 of the Applicant's affidavit where the alleged points of law have been stated, that the Court's decision is tainted with illegalities. He further stated that it was wrong for the District court of Arusha at Arusha to confirm the decision of the trial court without considering the evidence of the Appellant. The learned Counsel also submitted that the proceedings as well as the trial court

judgment were null and void because the evidence do not prove that there has been the business relationship between the Appellant and Respondent.

More so, the learned Counsel submitted that it was wrong for the trial court to deliver the judgment without considering the evidence of the Applicant.

On the second ground, the learned Counsel raised an issue that the opinions of the Assessors were not considered in contravention of section 7(1) of the Magistrate's Courts Act, Cap 11 RE 2012 (MCA) and Rule 3(1) of the G.N No 2 of 1988. He further made reference to the case of **Agness Severini v. Musa Mdoe** [1989] TLR 165.

On his part, Mr. Mapembe submitted in counter to the applicant's submissions that issue of non consideration of evidence invites the third appellate court to re-evaluate facts and evidence and make findings thereof. That, this is prohibited by virtue of section 5 (2) (c) of the Appellate Jurisdiction Act, Cap 141 RE 2019 (AJA) which requires every appeal from Primary Court to be only on points of law and facts. He found none.

Similarly, on the issue Assessors he said that at Page 6 of the typed judgment they were consulted as per the law. That the learned counsel for

the applicant wants to mislead court as Assessors were consulted and the District court ruled against the applicant on issue of Assessors opinion.

It was his view that, court should refuse to certify it as points of facts not law cannot be certified.

In his rejoinder submission, Mr. Shio insisted that he wants the Court of Appeal to determine the illegality of the decision not to inquire into the presence of the evidence as alleged.

I should thank all learned counsels for their painstaking submissions. The question is, are there points of law for certification by this court worth consideration by the Court of Appeal?

Reading from the learned counsel for the applicant, it is plainly clear that grounds no. 1 and 3 deals with issue of evaluation of evidence. That is something which this court cannot certify as per the law. Section 5(2), (c) of AJA, relevant to this application provides as follows;

5(2), (c)“ No appeal shall lie against any decision or order of the High Court in any proceedings under Head (c) of Part III of the Magistrates' Courts Act unless the High Court certifies that a point of law is involved in the decision or order.”

Issue of consideration of the Applicant's evidence as well as lack of evidence proving the business relationship between the Parties are matters of facts which do not fall under the purview of section 5(2), (c) AJA. No court worth such a name could certify such points. I desist from certifying it as they are not points of law.

On the issue of the proceedings as well as judgments of the Primary court to lack opinion of Assessors, I find equally this point is misplaced. As well submitted by the learned counsel for the respondent, as per the annexed copy of the judgement of the Trial court in the filed counter affidavit, the trial court took cognizance of opinion of Assessors (see page 6 of the Trial court's judgment). It reads as follows;

"Hivyo kwa kuzingatia maoni ya washauri wote wawili na Ushahidi uliowasilishwa hapa Mahakamani, Mahakama hii kwa Pamoja inatangaza kuwa ..."

The above transcript of the trial court's judgment evidences that the court considered the Court Assessor's opinion. Similarly, the judgment of the High court at page 5 dealt with this issue extensively that *"the decision was not founded by the trial magistrate alone..."*.

That being the case, this ground follow suit. I dismiss it as well. It was held in the case of **Auguster Salanje v. Mussa Mohamed Pemba** [1992] TLR 62 (CA) that:-

*"Under section 5(2)(c) of the Appellate Jurisdiction Act, 1979, **no appeal shall lie to the Court of Appeal if the matter started in the Primary Court unless the High Court certifies that a point of law (or, by necessary extension, a point of mixed law and fact) is involved...**"*

(Underscoring mine).

This case re-emphasizes the need to certify on points of law or mixed law and facts before certifying for leave to appeal to the Court of Appeal on matters originating from the primary court as the one under consideration.

For the reasons above stated, I see no point of law for certification by this court. This application which is devoid of merits is hereby dismissed with costs.

Order accordingly



**M. G. MZUNA,
JUDGE.
25/03/2022**