IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

MISC. CIVIL APPLICATION NO. 63 OF 2020

(C/f High Court (PC) Civil Appeal No. 48 of 2019)

PAULO JOSEPH ..... APPLICANT

VERSUS

PETER JOHN ..... RESPONDENT

RULING

05/04/2022 & 24/05/2022

KAMUZORA, J.

The Applicant brought this application under section 68(e), 95 of the Civil Procedure Code Cap 33 R. E 2019 and section 5(1) (c), (2) (c) of the Appellate Jurisdiction Act. 1979 Cap 141 R. E 2019 seeking for a certificate on point of law and leave to appeal against the decision of this court in PC Civil Appeal No 48 of 2019 that was pronounced on 29th May, 2020. The application is supported by an affidavit sworn by Paulo Joseph, the Applicant herein. The Respondent contested the application through his counter affidavit.

The brief facts leading to this current application as may easily be gathered from the court record is such that, the Respondent sued the Applicant at the trial primary court claiming a total of Tshs. 669,500/ being the price of 38 pieces of timber that he hired to the Applicant. The trial court dismissed the suit for lack of merit. Being the dissatisfaction of the Respondent preferred an appeal to the District Court of Babati at Babati (the first Appellate Court) which upheld the trial courts decision and dismissed the Respondent's appeal.

The Respondent being aggrieved by the first appellate court decision preferred a second bite to this court vide PC Civil Appeal No. 48 of 2019 where as this court before Hon. Massara, J. made a decision in favour of the Respondent to the effect that the Respondent was only entitled to the refund of the purchase price of the 25 pieces of timber estimated at Tshs 125,000/=. The High Court also awarded to the Respondent Tshs. 260,000/= being ten rounds of hiring timber and tin drum cover per each day. Dissatisfied with the decision of this court the Applicant desires to appeal to the Court of Appeal hence this application seeking for a certificate on point of law and leave to appeal as required by the law.

Hearing of the application was by way of written submissions and each part filed its submission as scheduled. During hearing of the application, the Applicant was represented by Advocate Alpha Ng'ondya while the Respondent appeared in person.

In the Chamber summons filed by the Applicant, the following points were outlined as points of law to be certified by this court to the Court of Appeal: -

i) *That, the whole judgment in (PC) Civil Appeal No. 48 of 2019 involves illegality as there was no any validly enforceable agreement as per dictates of the law between the disputants culminating to an award a claim to a tune of Tanzania Shilings Three Hundred Eighty-Five Thousand (Tzs 385,000/=) and consequential costs.*

ii) *That, the whole judgment in (PC) Civil Appeal No. 48 of 2019 involves serious irregularities as the Honourable judge who presided over the appeal re-evaluated and res-assessed evidence of witnesses who neither appeared at subordinate courts nor examined by Applicant and the Court at the hearing of the (PC) Civil Appeal No. 48 of 2019.*

iii) *That, the whole judgment in (PC) Civil Appeal No. 48 of 2019 involves illegality as the honourable judge who presided over the appeal erred in law allowing the appeal before it by relying and erroneously importing new testimony at appellate stage that was not even adduced, tendered and examined at the subordinate courts.*

iv) *That, the whole judgment in (PC) Civil Appeal No. 48 of 2019 involves illegality as the honourable judge who presided over the appeal erred in law on relying on evidence of interested witnesses whose testimony occasioned injustice to Applicant.*

Submitting in support of the application, Mr. Alpha Ng'odya prayed to adopt the affidavit to form part of his submission and submitted that, the High Court in (PC) Civil Appeal No 48 of 2019 misdirected itself to withhold that there was an enforceable agreement while it is apparent in record of the trial court that there is no agreement that binds the parties to it to be enforceable in law. That, the High Court misdirected itself to re-evaluate and re-assess evidence of Leo Kwaslema and January Tluway as such evidence was never tendered in the trial court hence the Applicant was denied his right of being heard. That, the High Court misdirected itself to order the Applicant to pay the Respondent Tshs. 385,000/ while such decision was reached by importing new evidence for the claim not raised by the Respondent before the trial court. The Applicant considers that there is a point of law thus prays that this Court be pleased to grant certificate that there is a point of law to be determined by the Court of Appeal.

In contesting the application, the Respondent also adopted the counter affidavit and submitted that, under section 5(2) (c) of the AJA

there must be a point of law involved in the decision intended to be appealed against. That this was also held in the case of **Bulyanhulu Gold Mine Ltd and 2 others v Petrolube (T) Ltd and Another,** Civil Application No 364/16 of 2017 CAT at Dar es Salaam (Unreported).

The Respondent went on and submitted that, as per the law it is the duty of whoever applies for leave to appeal to the Court of Appeal and for a certification by the High Court that there is a point of law involved, to produce materials before the court showing that there is arguable appeal having point of law in the impugned decision. For this he cited the case of **Simon Kabaka Daniel v Mwita Marwa Nyang'anyi,** [1989] TLR 64.

The Respondent contended that in the present application the Applicant stated in paragraph (a) (i) of the Chamber Summons and Paragraph 4 of his affidavit that the finding of the High Court that there was the bailment agreement despite his resistance, was one of point of law to be considered. That, the Applicant even averred that the records of the trial court revealed that there was no such agreement. The Respondent was of the view that, the Applicant was expected to substantiate this averment in his written submission but the same was not done. The Respondent added that, apart from the fact that this is a

ground of fact and not a point of law, still there is abundant evidence which sufficiently proved that there was bailment contract. That, a question whether the evidence which was adduced at the trial court was sufficient to support the High Court decision is a question of fact which cannot be certified as a point of law to be attended by the Court of Appeal. To cement this point, he cited the case of **Agness Severin Vs Mussa Mdoe** [1989] TLR 164 at 166 B- D and **Haji Mradi Vs Linda Sadiki Rupia,** Civil Appeal No. 24 of 2016 CAT at Mbeya (Unreported).

Regarding paragraphs (a) (ii) and (iii) in the chamber summons and paragraph 5 and 6 of the affidavits the Respondent submitted that, those statements are a total lie, frivolous and vexatious that intends to abuse the court process. That, the High Court had never used new testimonies rather what was done was re-evaluation of evidence. To buttress his submission, he cited the case of **Harban Haji Mosi and Another Vs Omar Hilal Seif and Another** [2001] TLR 409 at 414 H-I to 415 A- B.

Regarding paragraph (a) (iv) of the chamber summons where the Applicant contended that the High Court relied on the evidence of interested witness the Respondent submitted that, no submission was done by the Applicant in support of that allegations. He added that

even the same was addressed, no any witness from the plaintiff who had interest to serve.

Contesting paragraphs 7 and 8 of the Applicant's affidavit the Respondent submitted that, there is no any sound ground of appeal and that there is no any point involved in the impugned judgment. The Respondent contended that in the intended appeal there is no any chance of success rather it is frivolous and vexatious. To cement on this point, he cited the case of **Twaha Michael Gujwile Vs Kagera Farmers' Cooperative Banka Ltd,** Land Case Misc. Application No. 12 of 2017 HC at Bukoba (Unreported).

Basing on the above submission the Respondent prays that the application be dismissed with costs as the Applicant has failed to show the points of law involved in the impugned decision.

In a brief rejoinder submission, the Applicant reiterated the submission and insisted that from the record of the trial court there was no any binding agreement between the Applicant and the Respondent. He explained that, it was only the Respondent who at the trial court said that the Applicant went to borrow the piece of timber but other witness said the Applicant went to take the piece of timber. That, there was no binding agreement that could be enforceable by the law or create a right

to one part against the other thus he stated that the High Court misdirected to withhold that there was enforceable agreement.

Citing section 110(1) of the evidence Act, Cap 6 R. E 2019 the Applicant submitted that, it is a trite law that whoever alleges must prove. That, basing on the evidence of the trial court as it was re-assessed by this court the claim of the Respondent was the amount of Tshs 669,500/= the amount which he was bound to prove. That, after the re-assessment of the Respondent's evidence, this court it came out with a different claim hence the Applicant is of the view that the Respondent failed to prove the existence of the said allegation the act which he stated that it invites the Court of Appeal to act upon it for rectification.

Having considered the application together with the submissions presented by both parties, it is clear that the Applicant's prayer was referring to leave to appeal to the Court of Appeal and certification on point of law. However, this application was preferred under the provision of section 68 (e) and 95 of the Civil procedure Code Cap 33 R. E 2019 and section 5 (1) (c) (2) (c) of the Appellate Jurisdiction Act (AJA) Cap 141 R.E 2019. Section 68 (e) of Cap 33 concerns the grant on

interlocutory order which I will disregard as far as the present application is concerned.

It is the requirement of law that no appeal shall lie against the decision of the High Court originating from the Primary Court unless and until the High Court certifies on point of law that the matter is worth the determination by the Court of Appeal and this is by virtue of section 5(2) (c) of the AJA. I am alive of the requirement that the High Court must be satisfied that what is raised by the Applicant fall within a point of law to be determined by the court. In **Dorina N. Mkumwa vs Edwin David Hamis,** Civil Appeal 4 No. 53 of 2017, CAT - Mwanza (unreported) the Court of Appeal held that,

> *".....when the High Court receives application to certify point of law, we expect the ruling showing 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 appellant proposes as point of law to be perfunctorily forwarded to the court as point of law."*

It is well settled that, the application for certification on the point of law must undergo a proper scrutiny in determining the existence of point of law in the intended appeal to be dealt with by the Court of

Appeal. There mere claim that there is point of law does not raise an automatic right for certification.

I have examined the Applicant's application as well as his submission thereto, the Applicant only claims that there exists illegality and irregularity in the High Court's judgment as first, there was no validly enforceable agreement between the parties. Second, that, the High Court imported new evidence and re-valuated the evidence of witnesses who did not appear at the trial court. Third, that, the High Court erred in relying on the evidence of an interested witness.

What is contained in Applicant's affidavit and submission in support of the application raises factual issues which call for re-evaluation of evidence on record and not contentious points of law which requires determination by the Court of Appeal. The Applicant's argument that the High Court imported new evidence and re-valuated the evidence of witnesses who did not appear at the trial court is unwarranted. Looking at the judgment of this court, it is clear that re-evaluation of evidence was in accordance to the law the court well addressed the reason behind its decision to re-evaluate the evidence. What was re-evaluated by the High Court was gathered from the lower court's records and this court concluded that there was oral agreement

which have similar effect as written agreement. Thus, the claim by the Applicant that there was no enforceable agreement remain point of fact and not of law thus lack the quality of being certified as point of law for the Court of Appeal attention.

It is also the requirement of law that leave is only granted where the grounds presented before the court raises issues of general importance or novel points of law or a prima facie or arguable appeal. Leave cannot be granted when the proposed grounds are frivolously, vexatious or hypothetical. In this application the Applicant intends to appeal on the irregularity and illegality of the decision of this court which he failed to clearly point out. As prior discussed, what were raised are factual issue that were well determined by the High Court thus, no novel points of law or a prima facie or arguable appeal to be determined by the Court of Appeal.

In the upshot I agree with the submission by the Respondent that the Applicant has adduced the grounds of facts and not point of law and a question of fact cannot be certified to be attended by the Court of Appeal. Consequently, this Court finds no merit in this application and proceed to dismiss it with costs.

DATED at **ARUSHA** this 24th day of May, 2022.

D.C. KAMUZORA

JUDGE