

IN THE HIGH OF COURT OF TANZANIA

(IN THE SUB-REGISTRY OF MWANZA)

AT MWANZA

MISC. CIVIL APPLICATION NO. 46 OF 2022

(Arising from Misc. Civil Application No.159/2021)

DERICK DAVID.....APPLICANT

VERSUS

MUSSA LUFUNGA.....RESPONDENT

RULING

Date of Last Order:02/03/2023

Date of Ruling: 07/03/2023

Kamana, J:

This is an application for a certificate on the point of law instituted by Derick David, the Applicant. The application is brought under section 5(2)(c) of the Appellate Jurisdiction Act, Cap. 141 [RE.2019]. The same is supported by an affidavit deposed by the Applicant. Despite being countered by Mr. Mwita Emmanuel, learned Counsel for the Respondent, the application was objected to on the ground that it is incompetent for being misconceived.

Briefly, in Civil Case No. 10 of 2020 at Mkuyuni Primary Court, the Respondent sued the Appellant claiming Tshs. 7,300,000/- as the purchase price for stone blocks that he supplied to him. The matter was heard *ex parte* and the judgment was entered in favour of the Respondent. The said judgment was set aside and both parties were

heard by that Court in Civil Case No.117 of 2020. Again, the trial Court ruled in favour of the Respondent.

Aggrieved by that decision, the appellant preferred an appeal in Civil Appeal No. 65 of 2020 at Nyamagana District Court. The District Court decided that the appeal was devoid of merit and consequently, it dismissed the same.

Again, the Appellant was not satisfied. Through PC Civil Appeal No. 49 of 2021, he appealed to the High Court against the decision of the District Court. The appeal in question was dismissed for want of prosecution.

Following the dismissal order, the Appellant continued to remain in the corridors of the High Court by filing Misc. Civil Application No.159 of 2021 seeking an order for setting aside the dismissal order issued in PC Civil Appeal No.49 of 2021. Likewise, the application was dismissed.

Consequent to the dismissal order, the Appellant, in his quest for justice, filed this application for a certificate that there is a point of law worthy of determination of the Court of Appeal concerning Misc. Civil Application No. 159 of 2021. It is this application that is now objected to for being incompetent.

During the hearing, both parties were represented whereby the Applicant did enjoy the services of Mr. Kelvin Mutatina, learned Counsel,

and the Respondent was advocated by Mr. Mwita Emmanuel, learned Counsel.

Submitting in support of the preliminary objection, Mr. Emmanuel was of the view that the application is defective and misconceived. He reasoned that section 5(2)(c) of the Appellate Jurisdiction Act, Cap. 141 is applicable to an application for a certificate on point of law in matters heard by the High Court when exercising its appellate or revisional jurisdiction over matters originating from primary courts.

It was his contention that the Misc. Civil Application No. 159 of 2021 was heard by the High Court in the exercise of its original jurisdiction which does not fall within the ambits of the Head (c) of Part III of the Magistrates' Courts Act, Cap. 11 [RE.2019]. To buttress his arguments, the learned Counsel brought to the attention of this Court the cases of **Mariam Othman Matekele v. Nyacheri Joseph Mwangwa**, Misc. Civil Application No. 139 of 2021, **DAWAPA Security Group v. Eradius John**, Miscellaneous Civil Application No. 163 of 2020. In summing up, the learned Counsel for the Respondent beseeched this Court to strike out the application with costs.

Replying, Mr. Mutatina contended that the application at hand originated from Civil Case No. 117 of 2020 which was heard by the Primary Court. That being the case, the learned Counsel was of the view

that the application falls within the ambits of section 5(2) (c) read together with head (c) of Part III of the Magistrates' Courts Act, Cap.11. Because of that, the learned Counsel contended that the application is competent before this Court as it relates to the main case which originated from the Primary Court. He implored this Court to reject the preliminary objection.

In his rejoinder, Mr. Emmanuel reiterated his reasoning that Misc. Civil Application No. 159 of 2021 was determined by the High Court in the exercise of its original jurisdiction. He insisted that the said application was never heard by any court other than the High Court and in that case, the application is misconceived.

According to section 5(2)(c) of the Appellate Jurisdiction Act, Cap. 141, applications which are brought under such section as a matter of principle are those falling within the ambits of Head(c) of Part III of the Magistrates' Courts Act, Cap. 11. The section reads:

*Notwithstanding the provisions of subsection (1)—
(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;'*

Head (c) of Part III of the Magistrates' Courts Act, Cap. 11 provides for matters relating to the appellate and revisional jurisdiction of the High Court in relation to matters originating in primary courts.

That being the position of the law, it is my conviction that the application before me does not in any way relates to the appellate or revisional jurisdiction of the High Court. As rightly put by the learned Counsel for the Respondent, when the High Court heard and determined an application for setting aside the dismissal order did not exercise its appellate or revisional jurisdiction to a matter originated in primary court. The Court determined the application in the exercise of its original jurisdiction.

With due respect to Mr. Mutatina, learned Counsel, it is true that Misc. Civil Application No. 159 of 2021 sought to set aside a dismissal order relating to an appeal that originated from the decision of the primary court in Civil Case No. 117 of 2020. However, as a matter of law, the High Court is invited to certify on the point of law in respect of the decisions of the High Court when exercising appellate or revisional jurisdiction. This application would be competent if there would be a point of law concerning a decision in PC Civil Appeal No.49 of 2021.

At this juncture, may I refer to the case of **Eustace Kubalyenda v. Venancia Daud**, Civil Application No. 70 of 2011 where the Court of Appeal had this to state:

'.....But it is the High Court only which has been exclusively 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 (the MCA), Cap. 11 [RE.2019]. The said provisions of the MCA deal with appellate and revisional jurisdiction of the High Court in matters originating from the primary courts.'

Much as this application originates from Misc. Civil Application No. 159 of 2021 and not from the appeal or revision which originates from the primary court, the application is misconceived. I strike it out with costs. Order accordingly. Right to Appeal Explained.

DATED at MWANZA this 7th day of March, 2023.



A handwritten signature in blue ink, appearing to read 'KS Kamana', is written over a horizontal line.

KS KAMANA

JUDGE