

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

MSC. CIVIL APPLICATION NO. 401 OF 2022

(Originating from the High Court of Tanzania, Dar es Salaam

District Registry in Civil Case No. 77 of 2021)

LUGANO SIMON MWANYALU..... APPLICANT

VERSUS

COSMAS DANIEL AGAPITI.....RESPONDENT

RULING

30/01/2023 & 27/02/2023

BWEGOGGE, J.

The applicant herein above mentioned has filed an application praying for a certificate of leave on point of law to appeal to the Court of Appeal being aggrieved by the decision of this court in Civil Appeal No. 77 of 2022. The application herein is brought under section 5 (2) (c) of the Appellate Jurisdiction Act [Cap 141 R.E. 2019].

In substance, it is deponed by the applicant that the trial judge has strayed into an error to have reached the decision that the applicant entered into an agreement accepting a lesser amount for the satisfaction of the whole debt. That the trial judge failed to apprehend that there was no consensus *ad idem* between the parties herein when they executed the impugned deed of settlement.

On the other hand, the respondent in his counter affidavit averred that the purported point of law asserted by the applicant is misconceived. That the issue of wanting consent was never raised in this court and the courts below. Therefore, the applicant failed to substantiate this application to warrant grant of the certificate.

Both parties herein were unrepresented and fended for themselves. The same prayed to argue for and against this application by way of written submissions. This court granted the prayer and both parties filed their respective submissions in compliance with the schedule of this court.

The arguments raised in the written submissions of the applicant may be recounted as follows: That, as a matter of law, the agreement must be freely

entered by both parties and the consent must be freely obtained as it is stipulated by sections 10 and 13 of the Law of Contract Act [Cap. 345 R: E 2019]. The case of **Eradius John vs Dawasa Security Group**, Civil Appeal No. 18 Of 2020 HC (unreported), was cited to bolster the point. The applicant maintained that the agreement (exhibit D1) entered by both parties herein and relied on by this court and the court of the first instance in the determination of the dispute thereof was not freely executed as the applicant was forced to sign the same.

Further, the applicant contended that he was not in consensus *ad idem* with the respondent but he was forced to execute the agreement before the leaders of the Kisiwani Tundu village. That the purported agreement, in one way or another, violated the trite principle of the law of contract in that the consent of the parties should be freely obtained and, or not procured by undue influence.

Thus, based on the above arguments, the applicant submitted that he deserves the grant of the certificate as he successfully established the point of law required for the determination by the court of appeal and the intended appeal has the chance of success.

The respondent, filed a document namely, "Notice of Respondent" purporting to be his submission in reply. The document is mainly an extract of the impugned judgment of this court. Hence, this court remains with the counter affidavit of the respondent as the opposing argument in this matter.

The first proposed point of law that this Court is enjoined to consider for certification may be rephrased as follows:

Whether the executed agreement (exhibit D1) was entered with free consent by both parties.

The purported second point of law for certification is vague and incomprehensive. I find it needless to reproduce herein.

I now proceed to determine whether the application is merited.

Upon scrutiny, I find that the applicant's purported written submission contains factual matters not deponed in his affidavit supporting this application, save the wording of the asserted point of law proposed for certification. It is apparent that, in his written submission, the applicant has laboured to establish that he had entered a settlement agreement without his consent and, or under duress, let alone the averment in his affidavit that

he was not in consensus *ad idem* with the respondent when he executed the impugned deed.

It is an operating principle of law that for a point to be certified as a point of law for determination by the superior court, it must be a pure point of law **[Said Ramadhani Mnyange vs. Abdallah Salehe [1996] TLR 74]**. It may be simply stated that the applicant must demonstrate that there is a point of law involved for the attention of the superior court for grant of leave and certificate on point(s) of law to issue **[Kabaka Daniel vs Mwita Marwa Nyang'anyi and 11 Others, [1989] TLR 64 HC]**.

The above mentioned principle is elaborated in the case of **British Broadcasting Corporation vs. Eric Sikujua Ng'maryo**, (Misc. Civil Application No. 138 of 2004) [2005] TZCA 93 whereas it was held:

"Needless to say, leave to appeal is not automatic. It is within the discretion of the court to grant or refuse leave. The discretion must, however judiciously exercised and on the materials before the court. As a matter of general principle leave to appeal will be granted where the grounds of appeal raise issues of general importance or novel point of law or where the grounds show a prima facie or arguable appeal. However, where the grounds of appeal are frivolous, vexatious, or useless or hypothetically no leave will be granted."

Based on the above principle, the applicant herein was obliged to show the points of law that were not determined by the trial judge and establish that he has an arguable case on appeal. This obligation, in my opinion, the applicant failed to discharge.

Having gone through the affidavit supporting the application herein, I find that the grounds deponed by the applicant and those argued in his written submission raise factual issues which call for the re-evaluation of evidence on record and not contentious points of law requiring determination by the superior court. Besides, the issue of wanting consent, as rightly contended by the respondent, was not raised in the court below.

For reasons endeavoured to be given herein above, this court finds the application herein devoid of merit. The application is hereby dismissed with costs. Order accordingly.

Dated at Dar es Salaam this 23rd February, 2023.



A handwritten signature in blue ink, appearing to read "O.F. Bwegoge", written over a horizontal line.

O.F. BWEGOG
JUDGE