

**THE UNITED REPUBLIC OF TANZANIA**

**(JUDICIARY)**

**THE HIGH COURT**

**(MUSOMA SUB REGISTRY)**

**AT MUSOMA**

**Misc. CIVIL APPLICATION No. 46 OF 2022**

*(Arising from the High Court (Musoma Sub Registry) in (PC) Civil Appeal No. 6 of 2022; determined at the District Court of Tarime at Tarime in Civil Appeal No. 37 of 2021; originating from Shirati Primary Court in Civil Case No. 89 of 2021)*

**ADOYO NANDORI KAKOYO ..... APPLICANT**

*Versus*

**ADRIANO DEVELOPMENT MICROFINANCE ..... RESPONDENT**

**RULING**

**04.04.2023 & 12.04.2023**

**Mtulya, J.:**

The present applicant, **Adoyo Nandori Kakoyo**, had hired the legal services of **Mr. Emmanuel Paulo Mng'arwe**, learned counsel, to identify a point of law that may persuade this court to grant the applicant leave to access the **Court of Appeal** (the Court). On 4<sup>th</sup> April 2023, Mr. Mng'arwe was summoned in this court to explain the identified point of law, and complained on a photocopy of the alleged contract agreement (the contract) between the applicant and the respondent, which was tendered and admitted in **Civil Case No. 89 of 2021** (the case) resolved by **Shirati Primary Court** (the primary court) as exhibit P.1. In his opinion, this court in **(PC) Civil Appeal No. 6 of 2022** (the appeal)

had quashed the decision of the **District Court of Tarime at Tarime** (the district court) in **Civil Appeal No. 37 of 2021** (the civil appeal) and upheld decision of the primary court in the case which had heavily relied on photocopy of the contract without original document contrary to the law enacted in Rule 11 (1) of the **Magistrates' Courts (Rules of Evidence in Primary Court) Regulations, GN. No. 22 of 1964** (the Rules).

In order to bolster his submission, Mr. Mng'arwe cited article 13 (6) (a) of the **Constitution of the United Republic of Tanzania [Cap. 2 R.E. 2002]** (the Constitution) on the right of appeal and precedent of this court in **Mariam Othman Matekele v. Nyacheri Joseph Mwangwa**, Misc. Civil Application No. 139 of 2021 on the meaning of point of law. According to Mr. Mng'arwe, if the applicant is granted leave, he shall raise, before the Court, an issue: *whether this court was right to vary decision of the district court on exhibit P.1 which was a mere photocopy admitted at the primary court.*

On the other hand, the respondent decided to invite **Mr. Daud Mahemba**, learned counsel to reply the submission of Mr. Mng'arwe. In his submission, Mr. Mahemba contended that the submission of Mr. Mng'arwe was not one of the points of determination in the appeal resolved in this court and that page 4

of the judgment of this court in the appeal shows that the applicant was complaining absence of the contract on the record and in the present application has changed his complaint to photocopy of the contract.

In making his point understood, Mr. Mahemba cited the authority of this court in **Nyamaroso Chacha v. Regina Maibu**, Misc. Civil Application No. 64 of 2020, which had declined leave to access the Court for applicant who had raised reasons of leave for the first time in the application for leave to access the Court. According to Mr. Mahemba, that is the practice and has already received the support of the Court in the precedent of **Dorina N. Mkumwa v. Edwin David Hamis**, Civil Appeal No. 53 of 2017.

Rejoining the submission, Mr. Mng'arwe submitted that it was respondent who had brought the appeal before this court and decided to decline the issue of photocopy for its own interest and the cited two cases of this court and the Court are distinguished from the present application. In justifying the distinction, Mr. Mng'arwe submitted that the indicated precedents in **Nyamaroso Chacha v. Regina Maibu** (supra) and **Dorina N. Mkumwa v. Edwin David Hamis** (supra), the applicants were appellants in this court whereas in the present application, the applicant was respondent in this court.

The law regulating applications like the present one shows that reasons of certification in leave to access the Court must raise issues of general importance or novel point of law or *prima facie* case or arguable appeal or where proceedings as a whole reveal disturbing features as to require the guidance of the Court. The practice displays that leave is not automatic. It is necessary materials that persuade courts to exercise their discretionary mandate in granting applications in favor of the applicants (see: **Rutagatina C.L. v. The Advocates Committee & Another**, Civil Application No. 98 of 2010; **British Broadcasting Corporation v. Eric Sikujua Ng'maryo**, Civil Application No. 138 of 2004; and **Buckle v. Holmes** (1926) All E. R. 90).

This court in the precedents of **Shaban Said Mganda v. FINCA Tanzania Ltd**, Misc. Civil Application No. 21 of 2022; and **Joseph Kasawa Benson v. Mary Charles Thomas**, Misc. Civil Application No. 21 of 2022, stated that applicants who are seeking certifications on points of law in this court to access the Court should produce relevant materials that reveal arguable appeal or novel point of law. In defining the meaning of a point of law, this court at page 6 in the precedent of **Mariam Othman Matekele v. Nyacheri Joseph Mwangwa** (supra) had resolved that:

*a point of law is a matter involving the application or interpretation of legal principles or statutes. It is the determination of what the law is and how it is applied to the facts in the cause.*

The stand of this court has remained undisputed and there is large family of precedents in support of the move from our superior court, the Court (see: **Jireys Nestory Mutalemwa v. Ngorongoro Conservation Area Authority**, Civil Application No. 154 of 2016; **The Regional Manager-TANROADS Lindi v. DB Shapriya & Company Ltd**, Civil Application No. 29 of 2012 **Murtaza Mohamed Viran v. Mehboob Hassanali Versi**, Civil Application No. 168 of 2014; **Victoria Real Estate Development Limited v. Tanzania Investment Bank & Three Others**, Civil Application No. 225 of 2014; and **Hamisi Mdida & Said Mbogo v. The Registered Trustees of Islamic Foundation**, Civil Appeal No. 232 of 2018.

The question in this application is whether the applicant has produced relevant materials that reveal arguable appeal or novel point of law in the Court. In his opinion, he would prefer intervention of the Court to reply the issue: *whether this court was right to vary decision of the district court on exhibit P.1 which was a mere photocopy admitted at the primary court.*

This is obvious a point of law as there is already enactment of the law in Rule 11 (1) of the Rules which provides that the original document must always be produced in cases conducted at primary courts, save for the circumstances mentioned in proviso in the Rules. It is plain and certain that the cited complaint of the applicant has merit to enjoy leave for interpretation of our superior court.

It is unfortunate that Mr. Mahemba has declined a reply on this submission and cited authorities related to what is supposed to be brought to the Court. In my considered opinion, the point of law for want of proper record of courts, may be raised at any time even in an appeal. That is established law in our jurisdiction (see: **Meet Singh Bhachu v. Gurmit Singh Bhachu**, Civil Application No. 144/02 of 2018; **Method Kimomogoro v. Registered Trustees of TANAPA**, Civil Application No. 1 of 2005 and **Agineda Balisela v. Abila Benedictor**, Misc. Land Application No. 18 of 2023).

I have had an opportunity to read the complained decision of this court in the appeal and the other indicated decisions of this court and the Court which were interpreted by learned minds of the parties. The judgment of the appeal, from page 4 to 7 shows

citation and analysis of the exhibit P.1, and this court finally at page 7 to 8 of the judgment had resolved that:

*Procedures of tendering and admission of the documentary evidence at the primary court are determined by court itself. This is according to Rule 45 of the Magistrates' Courts (Civil Procedure in Primary Courts) Rules, GN. No. 310 of 1964 ...the exhibit P.1 was tendered and according to trial court record, it was admitted by the court That mean Regulation 45 was adhered to.*

From the above quoted paragraph, it is obvious that there were conversations during the hearing of the appeal which necessitated this court to touch on the dispute of exhibit P.1, which seemingly emanated from ground number one of the protests registered at this court. Reason number one of the protests as it reads from page 1 of the judgment shows that:

*...that the first appellate court erred in law to disregard the lending agreement which was tendered and admitted as exhibit P.1 as a result the first appellate court reached erroneous and unfair conclusion.*

From this reason, it is plain that the issue of protesting exhibit P.1 took its course from the district court and raised again



in this court and it has to go to the Court. The reason is straight forward that it is a point of law. Reading the judgment and submission of learned minds in Mr. Mng'arwe and Mahemba, it is also apparently there are two laws cited regulating the first protest in the appeal. In brief, the complaint of Mr. Mahemba on raising the reason of this application at this stage has no merit. Similarly, the cited precedents in **Nyamaroso Chacha v. Regina Maibu** (supra) and **Dorina N. Mkumwa v. Edwin David Hamis** (supra), are clearly distinguished from the present application.

The indicated issues in this application displays that there is a point of law or arguable appeal or need guidance of the Court. I am conscious that this court is restrained from considering and determining the raised issue to the finality (see: **Jireys Nestory Mutalemwa v. Ngorongoro Conservation Area Authority** (supra) and **The Regional Manager-TANROADS Lindi v. DB Shapriya & Company Ltd** (supra). The reason is obvious that to decline prejudging the merit of the appeal. The duty of resolving the indicated matters is reserved to the Court (see: **Murtaza Mohamed Viran v. Mehboob Hassanali Versi**, Civil Application No. 168 of 2014 and **Victoria Real Estate Development Limited v. Tanzania Investment Bank & Three Others**, Civil Application No. 225 of 2014).



In the end, and for the need of proper record of courts, and of course in cherishing the right to access the Court enacted in article 13 (6) (a) of the **Constitution of the United Republic of Tanzania** [Cap. 2 R.E. 2002], I forward the present issue, namely: *whether this court was right to vary decision of the district court on exhibit P.1 which was a mere photocopy admitted at the primary court* to the Court for determination on merit. Therefore, I am moved to grant the applicant leave to access the Court in accordance to the laws regulating appeals from this court to the Court. I award no costs in the present application. The reason is obvious that the contest is still on the course in search of the rights of the parties at the Court.

Ordered accordingly.



  
F. H. Mtulya

**Judge**

12.04. 2023

This Ruling was delivered in Chambers under the Seal of this court in the presence of the applicant, **Adoyo Nandori Kakoyo** and in the presence of the respondent's learned counsel, **Mr. Daud Mahemba.**

  
F. H. Mtulya

**Judge**

12.04. 2023