

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
IN THE SUB-REGISTRY OF MANYARA  
AT BABATI**

**MISC. CRIMINAL APPLICATION NO.25 OF 2023**

*(Arising from Misc. Criminal Application No. 3 of 2022 Manyara High Court, Criminal Revision No. 7 of 2021 at Hanang' District Court, Originating from Criminal No. 227 of 2022 Primary Court Katesh)*

**DEEMAY LOHAY.....APPLICANT**

***Versus***

**JULIANA MUHALE .....RESPONDENT**

**RULING**

*7<sup>th</sup> & 15<sup>th</sup> August, 2023*

***Kahyoza, J.:***

This ruling is in respect of an application for this Court to certify that there is a point of law involved in the intended appeal to the Court of Appeal. The application was filed under S.5(1)(c) of **the Appellate Jurisdiction Act**, Cap.141 R.E. 2019 and Rules 45 (a) and (b) of **the Tanzania Court of Appeal Rules**, 2009. The **Deemay Lohay**, the applicant lost a second appeal against **Juliana Muhale**, the respondent. The applicant prays for the following orders:

- (a) *"That this Honourable Court be pleased to give leave to appeal to the Court of Appeal against the ruling in criminal application No. 03/2022...*

*(b) That this Honourable Court be pleased to certify that there are points of law involved in the judgment and decree in Misc. Crim. Application 3/2022..."*

Juliana Mhale instituted criminal proceedings against Deemay in the primary court. Before the primary court determined the case on merit, Deemay raised a preliminary point of law. The primary court overruled the preliminary objection. Aggrieved by decision of the primary court on a preliminary objection, Deemay appealed to the district court. The district court dismissed the appeal because it was incompetent and untenable because it was preferred against an interlocutory order. Deemay did not appeal on time against the decision of the district court. He had to file an application for extension of time to appeal against the decision of the district court. The High Court struck out the application for extension of time to appeal against the decision of the district court. Deemay is before this Court praying for a certificate on point of law to appeal to the court of appeal.

The instant application proceeded orally. Juliana, the respondent did not file a counter affidavit. The applicant's advocate submitted in support of the application that, his client was not satisfied with the decision of this Court. He narrated that the applicant lodged his appeal to the High Court at Arusha Sub-registry and withdrew it so as to file it to this Court. Before he

filed it, he realized he was time barred. He instituted the application which was struck out. He argued that the Court struck out the application after it sustained the preliminary objection. He argued that the Court erred to determine the preliminary objection instead of hearing the application on merit. He insisted that the primary court had no jurisdiction to entertain the matter.

The respondent submitted that she cannot tell if the applicant disclosed any point of law for this Court to certify.

The issue for determination is whether there are points of law in the intended appeal. This matter originates from the primary court, the law is settled that when a person intends to appeal to the Court of Appeal from a matter which commenced in the primary court he can only appeal to the Court of Appeal on point of law. The applicant applied for leave to appeal and for a certificate that there exist a point of law in the intended appeal. I am of the firm view that since the applicant intends to lodge a third appeal, he was required to apply a certificate on point of law and not for leave and certificate. I am fortified by the observation of the Court of Appeal in **Magige Nyamoyo Kisinja vs Merania Mapambo Machiwa** (Civil Appeal 87 of 2018) [2021] TZCA 42 (25 February 2021) that-

*"However, as this is a third appeal, as per the requirement of the law, the appellant was required to apply before the High Court for the certificate on the point of law."*

The duty imposed on this Court is to certify that, there is point of law worthy to be considered by the Court of Appeal. It is settled that to amount to a point of law, the issue raised in the application must be a novel point, a point, which has not been pronounced by the Court of Appeal or an issue, which is significant or which goes to the root of the matter. I wish to refer to the holding in the case of **Mohamed Mohamed and Another v. Omari Khatib**, Civil Appeal No. 68 of 2011 at pages 11-13 (unreported) where the Court of Appeal held that-

*"... for instance, where there is a novel point, where the issue raised is unprecedented, where the point sought to be certified has not been pronounced by the Court before and is significant and goes to the root of the decision, where the issue at stake involves jurisdiction, where the court(s) below misinterpreted the law etc..."*

In yet another case of **Magige Nyamoyo Kisinja vs Merania Mapambo Machiwa** (supra) considered what amounts a point of law it stated that-

*"We must emphasize that the point to be certified by the High Court must be **that of legal nature and significant to warrant the decision of the Court.** It is not enough for a party in a third appeal,*

*like in the instant appeal, to simply think the lower court is wrong in its decision to have his case heard by the Court of appeal. Matters of law which the Court is called upon to determine must transcend the interest of the immediate parties in the appeal. Indeed, in some cases matters of law placed before the Court for determination are of public importance especially when an interpretation of the law is involved."*

The Court of Appeal explained the role of this Court when called upon to certify whether there exists a point of law for determination by the Court of Appeal in **Agnes Severini V Mussa Mdoe** [1989] TLR 164 (TZCA) where it stated that-

*"We wish to observe at the outset that this was an unsatisfactory way of certifying a point of law. That certificate is capable of two interpretations. It could mean posing the question **whether there was any evidence at all to support the concurrent decisions of the courts below**. It could equally mean to ask the question **whether the evidence as adduced was sufficient to support and justify those decisions**. How, this distinction is imported. The question whether there was any evidence at all to support the decision is a question of law which can properly be certified for the opinion of this court. But whether the evidence as adduced was sufficient to support the decision is a question of fact which could not properly be the subject of a certificate for the opinion of this court. For, this court takes the view that if there was some evidence on which the courts*

*below could have arrived at the decision they did, then this court will not interfere, even though had this court itself tried the case it might have come to a different decision. Those who are called upon to certify points of law should, therefore, **keep this distinction in mind in order to ensure that only the correct questions are certified for the opinion of this court.***"

The applicant did not specify the issues he prays this Court to certify to the Court of Appeal. However, the applicant's advocate submitted that the High Court erred to determine the preliminary objection instead of considering if the application for extension of time was meritorious. He added that the primary court had no jurisdiction. Indisputably, the matter before the primary court is still pending. The primary court dismissed the preliminary objection. The applicant is all out trying to appeal against the interlocutory order. This Court upheld the preliminary objection that the applicant cannot appeal or apply for revision of an interlocutory order. It is that order which the applicant intends to appeal against. The Court of Appeal has pronounced itself in cases without number that there is no appeal or revision against interlocutory order. Thus, an intended appeal does not intend to raise a novel point, a point, which has not been pronounced by the Court of Appeal or an issue, which is significant or which goes to the root of the matter.

In the upshot, I find, the applicant has not demonstrated that there are points of law to be certified to the Court of Appeal for determination. For that reason, I dismiss the application with costs.

It is ordered accordingly.

Dated at Babati this **15<sup>th</sup>** day of **August**, 2023.



**John R. Kahyoza**  
**Judge**

**Court:** Ruling delivered in the presence of the applicant, Mr. Raymond Kim, the applicant's advocate and the respondent in person.

**John R. Kahyoza**  
**Judge**

**15.8.2023**