

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB- REGISTRY OF MWANZA

AT MWANZA

MISC. CIVIL APPLICATION NO. 133 OF 2023

(Arising from the Judgment of the High Court at Mwanza (Hon. Morris, J) in PC. Civil Appeal No. 23 of 2023, dated 21st July, 2023)

BULIMBE BONIPHACE BULIMBE APPLICANT

VERSUS

FREDY JAPHET RESPONDENT

RULING

7th & 17th November, 2023

MUSOKWA, J

The instant application calls this court to certify that the impending appeal carries a point of law that is worth consideration by the Court of Appeal of Tanzania (Court of Appeal). The application is preferred under the provisions of section 5 (2) (c) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019 (AJA), and it is supported by the applicant's affidavit which sets out the grounds for the prayers sought. What is perceived to be points of law are contained under paragraph 7 of the supporting affidavit, comprising of two grounds as follows: -

- i. Whether the Hon. Judge was right to decide the matter in favour of the respondent who had no locus standi to institute the matter before the trial court.*

- ii. Whether the Hon. Judge was right to disregard the illegality committed by the trial court by determining the case without jurisdiction.*

The parties herein are both members of a group of young men engaged in the business of local transportation through motorbikes ("bodaboda"). They litigated over a sum of Tshs. 1,800,000/= at Nyankumbu Primary Court in Geita, whereby the respondent herein instituted the claim for repayment of the claimed amount, allegedly an outstanding loan which the appellant herein was advanced by the group. The judgment was entered in favour of the respondent both in Nyankumbu Primary Court, and subsequently in the District Court of Geita where the aggrieved applicant herein had filed his appeal. The applicant preferred a second appeal to this Court (Hon. Morris J.). The appeal was determined on merit and judgement was, yet again, entered in favour of the respondent. It is from this background that the prospective appellant has lodged the instant application.

The application has been opposed by the respondent through the respondent's counter-affidavit in which the allegations asserted by the applicant were rebutted. The respondent contends that this application is not for the interest of justice and ought to be dismissed for want of merit.

At the hearing of the matter, the applicant was represented by Ms. Hidaya Haruna, learned counsel, while the respondent was represented by Mr. Silas John, learned counsel. In support of the application, Ms. Haruna prefaced her submission in chief with the prayer, that this court be pleased to certify that there is a point of law to justify the grant of leave for an appeal to the Court to Appeal. The applicant's counsel invited the court to refer to paragraph 7 of the affidavit, whereby she proceeded to argue collectively the two grounds in support of this application.

Ms. Haruna submitted that while the respondent is indeed among the members of the "bodaboda" group, and further that he facilitated the applicant herein in obtaining the loan; he however, erred in law to file the suit in his personal capacity at the trial court. Ms. Haruna contended that the proper approach would have been to institute the suit under the name of the group. The learned counsel for the applicant went further to state that; in the event the group had been registered, the respondent, upon formal appointment, would have been able to represent the other members through a representative suit.

Ms. Haruna proceeded to clarify, that the applicant does not dispute the fact that he is indebted to the group; the point of contention is whether the said group was legally represented before the court. Ms.

Haruna asserted that the group was not legally represented before the court, hindering the fair adjudication of the matter. The issue of *locus standi*, she submitted, is a point of law, and it determines the jurisdiction of the court. In support of her submission, Ms. Haruna cited the case of **Peter Mpalanzi Vs. Christina Mbaluka**, Civil Appeal No. 153 of 2019, (unreported). The applicant's counsel asserted that in adjudicating the matter in the second appeal, this court ought to have exercised its revisional powers and called for the records of the subordinate court in order to satisfy itself as to the correctness and legality of the proceedings as provided under section 30(1) (b) of the Magistrate Court's Act, Cap 11. R.E 2019 (MCA). Ms. Haruna reiterated that the Primary Court had no jurisdiction to adjudicate on the matter.

In view of the foregoing, the applicant prayed this court be pleased to grant this application and certify the existence of a point of law which requires determination by the Court of Appeal.

In reply, the respondent firmly opposed the application. The learned counsel, Mr. John, contended that there is no point of law to be certified, citing the case of **Jamal S. Nkumba & Another Vs. Attorney General**, CAT Civil Application No. 240 of 2019, (unreported). He submitted further that the issue of *locus standi* was not raised by the applicant neither in

the primary court nor in the first appellate court, the district court. The applicant rather, decided to raise the issue of *locus standi* in the second appeal. This, he proceeded to state was rather absurd, resulting in the second appellate court to reject it altogether. Mr. John made reference to pages 6 to 8 of the impugned judgment. The learned counsel for the respondent submitted further that this matter is not foreign before this court, the same was adjudicated upon in the case of **Evodia Kayombo Vs. Kikoba (Chistina Oscar)**, PC. Civil Appeal No. 22 of 2022. He submitted that the case of **Evodia Kayombo**, (supra), has paved the way for a member of an unregistered group to sue on behalf of the rest of the members of the group.

In contending further, Mr. John asserted that certification on the basis of *locus standi*, at this stage of the matter, will be contrary to section 5(2) (c) of the AJA, whereby the jurisdiction of this court is limited to certification on a point of law, and not on facts and evidence. The respondent observed that the applicant's submission did not cite any authority that bars a member of an unregistered group to sue for recovery of money on behalf of his fellow members. He prayed that the application be dismissed with costs as the issue of *locus standi* has already been

entertained and rejected by this court; adding further that the trial court had both territorial and pecuniary jurisdiction.

In her rejoinder submission, the applicant's counsel adopted her submission in chief and added further that the case of **Evodia Kayombo**, (supra), is distinguishable, as the group was registered while in the present case, the group is unregistered.

Having due regard to the submissions of both parties, the pertinent issue for determination before this court is whether this application has merit to warrant its certification on a point of law, for determination by the Court of Appeal. The law as it stands, necessitates the certification on a point of law for a matter that originates from the primary court; before an appeal can lie to the Court of Appeal. The rationale behind the practice is to determine whether there is indeed an issue of sufficient importance for consideration by the superior court. This is consistent with section 5 (2) (c) of AJA, whose substance provides as hereunder: -

*"Notwithstanding the provisions of subsection (1)-
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.**" [Emphasis added].*

This statutory requirement was underscored in the case of **Abdallah Matata Vs. Raphael Mwaja**, Criminal Appeal No. 191 of 2013 (unreported), in which the Court of Appeal enunciated the following reasoning: -

*"In order to lodge a competent appeal to the Court, the intended appellant has to go **through the High Court first with an application for a certificate that there is a point of law involved in the intended appeal.** It is only when the appellant is armed with the certificate from the High Court, that a **competent appeal may be instituted in this Court.**"*[Emphasis added]

The applicant's sole basis for his quest for appeal is that the trial court was not vested with jurisdiction to preside over the matter as the respondent had no *locus standi*. Ordinarily, an appellate court will only look into matters which came up in the lower court and decided. In the case of **Elisa Mosses Msaki Vs. Yesaya Ngateu Matee** [1990] TLR 90, it was held by the court of appeal that: -

"This Court will only look into matters which came up in the lower court and decided; not on which were not raised nor decided by neither the trial court nor the High Court on appeal."

This position was emphasized in the case of **George Mwanyingili Vs. Republic**, *Criminal Appeal No. 335 of 2016* (unreported). It was held:

*"As a second appellate court, we cannot adjudicate on a matter which was not raised as a ground of appeal in the second appellate court. The record of appeal at pages 21 to 23, shows that this ground of appeal by the appellant was not among the appellant's ten grounds of appeal which he filed in the High Court. In the case of **Abdul Athuman vs R** [2004] TLR 151 the issue on whether the Court of appeal may decide on a matter not raised in and decided by the High Court on first appeal was raised. The Court held that the Court of Appeal has no such jurisdiction. This ground of appeal is therefore, struck out."*

However, in exceptional circumstances, as correctly asserted by Ms. Haruna, the issue of *locus standi* (if established), being a point of law can be raised at any stage including at the appellate court. The case of **Peter Mpalanzi** (supra) was cited in support thereof. Similarly, Ms. Haruna submitted further that the respondent is indeed among the members of the "*bodaboda*" group, and that he facilitated the applicant herein in obtaining the loan. In the cited case of **Peter Mpalanzi** (supra), the court of appeal on page 7 and 8 stated that: -

*"In the case at hand, although in her claim before the Ward Tribunal the respondent claimed that the **suit land was***

entrusted to her by the appellant, the truth, according to the evidence appearing on page 3 of the record of appeal, is that the same was not entrusted to her but to her husband, Amosi Ngaga. That, the suit land was not entrusted to the respondent but to Amosi Ngaga was not only admitted by the appellant but it also came from Amosi Ngaga himself. The fact that the suit land was not entrusted to the respondent but to her husband Amosi Ngaga and also the fact that the respondent was not part to the agreement between the appellant and Amosi Ngaga on the occupation and use of the suit land is what makes the respondent lack locus standi to sue over the suit land. The occupation and use of the suit land by the respondent and her husband Amosi Ngaga, is rooted into the agreement between the appellant and Amosi Ngaga. If there is any dispute over the suit land then it is Amos Ngaga who has locus standi to sue, not the respondent. [Emphasis added]

From the above quoted case, the respondent was not part to the agreement between the appellant and Amosi Ngaga on the occupation and use of the suit land. That is what made the respondent lack *locus standi* to sue over the suit land. Thus, the case of **Peter Mpalanzi** (supra), is distinguishable from the case at hand. While in the former case the respondent was completely a stranger to the agreement; in the instant

case, the respondent is indeed a member of the "*bodaboda*" group; as correctly submitted by Ms. Haruna. It follows therefore that the respondent being a member of the "*bodaboda*" group is directly interested in the rights and obligations of the group. Undoubtedly, the position of the respondent in a "*bodaboda*" group had sufficient and close relation to the subject matter so as to give a right which required protection through bringing a legal action. Therefore, the respondent had the right or legal capacity (*locus standi*) to file a Civil Case No. 53 of 2022 before the trial court regardless of other possible legal challenges, if any.

Having held that the respondent had interest in the "*bodaboda*" group and the legal capacity to bring an action, the points raised by the applicant do not qualify to be pure points of law. Instead, it calls for evidence hence a mixture of facts and law. Consequently, in terms of section 5(2) (c) of AJA, there is no point of law involved in the decision or order made by Hon. Morris J.

In consequence, this application is devoid of merits and it is hereby dismissed. Considering that the amount in issue is insignificant, each party to bear own costs.

It is so ordered.

DATED at **MWANZA** this 17th day of November, 2023.



I.D. MUSOKWA
JUDGE