

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

MISC. CIVIL APPLICATION NO. 158 OF 2023

(Arising from PC. Civil Appeal No. 42 of 2023 in High Court of Tanzania Mwanza Hon. Kamana, J dated 29/09/2023 and from the decision of the District Court of Nyamagana in Civil Appeal No. 09/2023 and Civil Case No. 21/2023 of Sengerema Urban Primary Court)

M/S MASS HUDUMA LIMITED.....APPLICANT

VERSUS

ABEL SIMON RESPONDENT

RULING

22th March & 19th April, 2024

ITEMBA, J.

The applicant successfully sued the defendant before Sengerema Urban Primary Court. The respondent appealed to the District Court of Sengerema which allowed the appeal that the applicant failed to prove the case on balance of probabilities. The Applicant's appeal to this court vide PC Civil Appeal No. 42 of 2023 was dismissed. Still dissatisfied the applicant intends to lodge his appeal to the Court of Appeal. As a matter of law, he is now seeking this court to certify points of law worth of determination by the Court of Appeal under Section 5 (2) (c) of the **Appellate Jurisdiction Act**, Cap 141 R.E 2019.

During hearing, parties were respectively represented by Messrs. Kelvin Mutatina and Michael Dudu both learned advocates. Mr. Mutatina

adopted the affidavit which contains deposition that both judgement of this court and of the District Court are tainted with serious errors which can only be remedied by the Court of Appeal on two points of law that;

- a. Whether the High Court Judge properly dealt with section 3 (2) (b) of the **Evidence Act** Cap 6 R.E 2019 in construing the standard of proof in civil matters which is mainly based on the preponderances of probabilities; and*
- b. Whether the High Court Judge erred in law and grossly misdirected himself in construing section 110 and 111 of the **Evidence Act** (*supra*)*

Mr. Mutatina further submitted that, at the hearing of appeal they explained in detailed before this court that, there was a business relationship between the parties. That, even the respondent admitted to have received the consignment in dispute but the controversy was the respondent agreed to have received 200 bags of cement while applicant insists on 620 bags. That, the respondent agreed to have received 260 bags of cement and paid money to applicant and gave C1 (Court Witness) the balance of the money but C1 denied to have known anything about payment and that there was no balance given to him. That, despite the said evidence, the District Court and this court decided that there was no business agreement between parties while the dispute was in the number of bags received. Therefore, to

him, the principle of burden of proof was misconstrued and for that reason the application should be allowed.

In reply Mr. Dudu submitted that, in civil cases the one who alleges must prove. That, the applicant had a legal burden to prove his case on the balance of probability. That, the applicant's testimony before the trial court was based on hearsay that SM1 was given information by SM3 while in Tabora. That, there was failure to provide contract, delivery note and invoice to prove the number of bags. He therefore, pray for the application to be dismissed with costs.

In rejoinder Mr. Mutatina maintained that, the lower courts misled themselves on the fact that parties have never done business. That, even the respondent had a duty to prove his case.

Having dispassionately considered the affidavits and submission made for both parties, I will now determine as to whether the instant application meets the threshold requisite for certification of a point of law that warrants the attention of the Court of Appeal. This being a matter originating from Primary Court, a party who wants to appeal need a certificate on point of law either from this court or from the Court of Appeal as a second bite. See the cases of **Rashid Rashid Mniposa vs Lyeha Jamali Msoi**, Civil Appeal No. 15 of 2022; **Naftary Petro vs Mary Protas**, Civil Appeal No. 103 of

2018 and **Zinabu Mwinjuma vs Hussein Abdallah**, Civil Appeal No. 109 of 2009 (all unreported). In the latter case the Court of Appeal held at pages 6 and 7 that;

"...having originated from a Primary Court had to comply with the provisions of section 5 (2) (c) (supra) of the Act before coming to this Court. As pointed out earlier, the High Court did not certify that there are points of law involved in the intended appeal. In the absence of a certificate of the High Court the Record of Appeal is incomplete and is rendered incompetent because in terms of Rule 89 (2) of the Rules, the Record of Appeal has to contain a copy of the certificate of the High Court... In the absence of a certificate of the High Court the appeal is incompetently before the Court and ought to be struck out. The lack of a certificate suffices to dispose of the matter."

Certification of a point of law is not a matter of academic exercise. The court need to scrutinize the points sought to be certified to see whether they real involve matters on law. I am also mindful to the settled law that; I should not venture to determine the merit of the intended appeal, that is an exclusive domain of the Court of Appeal. To see whether this application has merit, I have careful read the impugned judgment of this court. The first ground of appeal before this court in PC civil Appeal No. 42 of 2023 was captured at page 1 and 2 of the said judgement. It was on whether the District Court properly construed the principle of balance of probabilities.

The arguments for the appellant on that ground was based on section 3 (2) (b) of the Evidence Act (supra). This court at page 7 of the judgement cited the position of section 110 and 111 of the same Act. Therefore, whether the above sections were properly construed is a matter of law to be discussed by the Court of appeal in the intended Appeal.

In upshot, the application meets the legal threshold for its grant. Consequently, I accordingly certify the following two points of law for determination by the Court of Appeal;

1. Whether the High Court Judge properly dealt with section 3 (2) (b) of The **Evidence Act** Cap 6 R.E 2019 in construing the standard of proof in civil matters which is mainly based on the preponderances of probabilities; and
2. Whether the High Court Judge erred in law and grossly misdirected himself in construing section 110 and 111 of the **Evidence Act** Cap 6 R.E 2019.

Costs to be in the cause. It is so ordered.

DATED at MWANZA this 19th April, 2024



**L. K.J. ITEMBA
JUDGE**

Judgment delivered under my hand and seal this 19th day of April 2024, in the presence of Mr. Kevin Mutatina counsel for the applicant also holding brief for Mr. Michael Dudu, counsel for the respondent and Ms. G. Mnjari.

**L. K.J. ITEMBA
JUDGE**