IN THE HIGH COURT OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

MISC. CIVIL APPLICATION NO. 175 OF 2019

(Arising from the Judgment of the Court at Mwanza (Hon. Mgeyekwa, J) in PC. Civil Appeal No. 38 of 2019, dated 16th October, 2019.)

GEORGE SONA ..... APPLICANT

VERSUS

ENOS DAMAS ..... RESPONDENT

RULING

22nd April, & 9th July, 2020

ISMAIL, J.

The applicant seeks the Court's indulgence to certify that a point of law exists in his intended appeal to the Court of Appeal of Tanzania. The intended appeal is against the decision of the Court (Hon. Mgeyekwa, J) in PC Civil Appeal No. 38 of 2019, whose decision was delivered on 16th October, 2019. The Court partly allowed his appeal and whittled down the sum due to him from TZS. 1,440,000/-, which was ordered by the trial court, to TZS. 300,000/-, which was admitted by the respondent in the lower court proceedings.

Enabling the application is Section 5 (2) (c) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002 (now R.E. 2019). The applicant's own affidavit supports the application by setting out grounds on which the application is sought. Besides stating that a notice of appeal has been filed and duly served on the respondent, paragraph 3 of the affidavit has laid down what the applicant considers to be a point law worth consideration by the Court of Appeal, and he prays that this Court certifies it. The proposed point is:

(i) Whether the burden of proof in civil cases cannot be shifted to the other party who alleges the existence of certain facts in his favour.

The respondent sees nothing untoward in the decision sought to be impugned. In his counter-affidavit, the averment is that the decision is a confirmation of what has been a consistent verdict that has cleared him of the blemishes contended by the applicant. He is of the view that since the evidence adduced was properly dealt with, nothing meritorious can be distilled and constitute a point of law that can be certified for determination by the Court of Appeal.

When the matter was called on for orders on 22nd April, 2020, it was unanimously agreed by the parties, and upheld by the Court, that the matter be disposed of by way of written submissions, to be preferred in the manner agreed in the schedule for filing of the submissions.

Submitting in support of the application, Mr. Mussa Joseph Nyamwelo, the learned counsel for the applicant began by stating the law as it currently obtains, which is to the effect that if appeals from the Court emanate from the proceedings under Head (c) of Part III of the Magistrates' Court Act, then the same must be certified that they involve points of law worth of consideration by the Court of Appeal. Reproducing the point that has been stated in paragraph 5 of the affidavit, the learned counsel submitted that since the respondent disputed that he owed the applicant any sum of money, then the burden of proving that the respondent owed nothing to the appellant was his. He took the view that the Court ought to have taken the position that the burden of proof that the respondent owes nothing to the applicant ought to have rested on the respondent's shoulders and that the same was not discharged. The learned counsel contended that the decision has raised a novel point of law which merits the attention and consideration by the Court of Appeal.

Mr. Erick Katemi, learned counsel for the respondent has vigorously attacked the application. Through his laconic submission, he contends that the alleged point of law as coined by the applicant is nothing better than matters of facts which were completely dealt with by two appellate courts. To buttress his contention, Mr. Katemi cited the decision in the matter of ***Jerome Michael v. Joshua Okanda***, CAT-Civil Appeal No. 19 of 2014 (Mwanza-unreported) in which the Court of Appeal quoted the decision of this Court that refused to certify that there was a point of law in the appeal which was intended to be preferred.

In a brief rejoinder, the learned counsel for the applicant began by contending that the decision cited by the counsel for the respondent is distinguishable as the theme in the decision was on the appealability of the ruling of the Court that refused to certify a point of law. The counsel reiterated what was submitted in his submission in chief and contended that the learned Judge was not amenable to the proposal that the respondent bore the burden to prove that he is not indebted to the applicant. This is where the applicant contends that the learned Judge erroneously shifted the legal burden of proof. He reiterated that there is a point of law which should be certified as such.

The contending submissions bring out one profound issue for determination by the Court, and this is as to whether the decision of the Court sought to be impugned consists of a point of law worth of certification for consideration by the Court of Appeal. The view held by the respondent is that what the applicant perceives as a point of law is merely a factual issue provable by evidence and it has been covered sufficiently by the courts that determined the appeals, including this Court.

Let me embark on the disposal journey by addressing the import of decision in ***Jerome Michael*** (supra) relied upon by the counsel for the respondent to repel the applicant's passionate plea to this Court. As rightly held by Mr. Nyamwelo, the decision was solely addressing the issue of whether an appeal can lie against the decision of the Court to refuse a party an application for certification on a point of law. The position given by the Court is that such refusal does not constitute an appealable decision. This has nothing to do with whether the point in contention is factual or legal as contended by Mr. Katemi. In view thereof, it is my considered view that the said decision is devoid of any useful application to the instant application.

As unanimously contended by the counsel for the parties, appeals to the Court of Appeal originating from the primary court or going as a third

appeal can only be admitted if the prospective appellant secures this Court's certification that there is a point of law of sufficient importance to engage the superior Court. This requirement is enshrined in the section 5 (2) (c) of the Appellate Jurisdiction Act (supra) under which the instant application has been preferred. This imperative obligation was underscored in ***Marco Kimiri & Another v. Naishoki Eliau Kimiri*** , CAT-Civil Appeal No. 39 of 2012 (ARS-unreported) in which it was held as hereunder:

> *"Section 5 (2) (c) of the Appellate Jurisdiction Act governs a certificate that a point of law is involved in an appeal under the Magistrates' Court Act, Cap. 11 R.E. 2002 originating from a primary court."*

This position was restated in ***Abdallah Matata v. Raphael Mwaja***, CAT-Criminal Appeal No. 191 of 2013 (Dodoma-unreported). The superior Court fortified its earlier position as follows:

> *"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."*

See also: ***Omari Yusufu v. Mwajuma Yusufu & Another*** [1983] TLR 29; ***Dickson Rubingwa v. Paulo Lazaro,*** CAT-Civil Application No. 1

of 2008; and ***Harban Haji Mosi & Another v. Omari Hila Seif***, CAT-Civil Reference No. 19 of 1997 (both unreported).

The parties' diametric positions relate to the question as to what this Court decided. While the appellant contends that the decision was arrived at after shifting the burden of proof to the appellant, the respondent holds the view that whatever that may have happened with respect to this decision is an issue of fact which was settled through evidence adduced by the parties at trial.

With respect, I hold the view that the position held by the respondent is flawed. The question as to whether the legal burden of proof shifts from the person who alleges existence of a certain fact to his adversary is not a matter which can be resolved by looking at the adequacy of the evidence so far adduced by the parties. It is a question of whether the law allows such shift and, if so, under which circumstances. This question cannot be determined by simply reviewing the evidence adduced by the parties. The respondent's contention would only make some plausible sense if the parties' contention touched on the probative value of the evidence so far adduced. In my view, an answer to this question would require a review of the law with a view to ascertaining, if what is alleged by the appellant indeed occurred, and whether such indulgence reflected the appropriate

position of the law. This, in my unflustered view, is a question of law and not a question of fact.

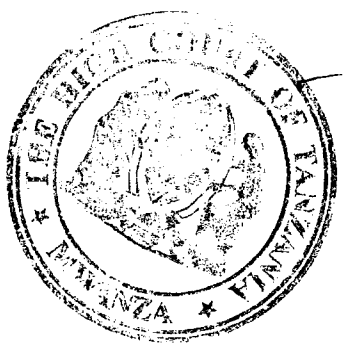
It is my conviction, therefore, that a point of law exists worth enough to constitute a point of consideration by the Court of Appeal by way of appeal that is contemplated by the applicant. According, I certify the following as a point of law worth consideration by the Court of Appeal:

> ***"Whether the burden of proof in civii cases can shift from a party who alleges the existence of a fact to the issue."***

In consequence thereof, I grant the application as prayed, and let the costs of the matter be in the cause.

Order accordingly.

DATED at **MWANZA** this 9th day of July, 2020.



M.K. ISMAIL

JUDGE

Date: 09/07/2020

Coram: Hon. M. K. Ismail, J

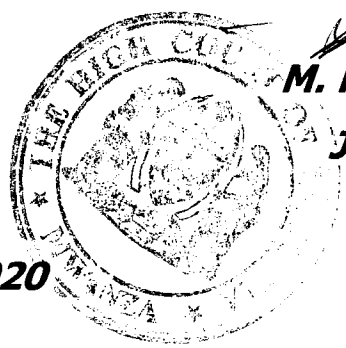
Applicant: Mr. Mussa Nyamwelo, Advocate

Respondent: Mr. Erick Katemi, Advocate

B/C: B. France

Court:

Ruling delivered in the presence of Messrs Nyamwelo and Katemi, learned Counsel for the applicant and respondent respectively, in the presence of Ms. Beatrice B/C, this 09th July, 2020.



M. K. Ismail

JUDGE

At Mwanza

09th July, 2020