

TANZANIA / JUDGMENT

elirehema jons severe vs powergen renewable energy limited another 2022 tzhc 1025 12 april 2022

COURT
TZHCDECIDED
12 April 2022

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE DISTRICT REGISTRY
OF ARUSHA AT ARUSHA MISC. CIVIL APPLICATION NO. 61 OF 2021 (C/F High Court of Tanzania
at Arusha PC Civil Appeal No. 37 of 2020 and The District Court of Arusha at Arusha Civil Appeal
No. 44 of 2019 and the Arusha Urban Primary Court Civil Case No. 205 of 2019) ELIREHEMA JONS
SEVERE..... APPLICANT VERSUS POWERGEN RENEWABLE
ENERGY LIMITED..... 1st RESPONDENT JIMMEX CO
LTD..... 2nd RESPONDENT

RULING

01/03/2022 & 12/04/2022 KAMUZORA, J. The Applicant has brought this application under Section 5(2)(c) of the Appellate Jurisdiction Act, Cap 141 R. E 2019 seeking for a certificate on points of law and leave to appeal against the decision of this court in PC. Civil Appeal No. 37 of 2020 whose decision was pronounced on 30th July 2021. The application is supported by an affidavit sworn by Advocate Lobulu Osujaki. The 1st Respondent contested the application through a counter affidavit sworn by Advocate Anna Ngoty and the matter proceeded expert against the 2nd Respondent. Page 1 of 10 The brief facts leading to this current application as may easily be gathered from the court record is such that, before the two lower courts, the Arusha Urban Primary court as well as the District Court of Arusha in Civil case No. 205/2019 and Civil Appeal No 44/2019 the decision was made to the effect that, the 1st Respondent was not a bonafide purchaser of the vehicle as he did not conduct due diligent before purchasing the vehicle from the 2nd Respondent. The High Court vide PC. Civil Appeal No 37/2020 did set aside the decision issued by both subordinate courts and declared the 1st Respondent as a bonafide purchaser of the car with registration Card No. 7507860 with registration number T. 984 AAU make Toyota Hilux. Dissatisfied with the decision of this court the Applicant desires to appeal to the Court of Appeal hence this application seeking for a certificate on point of law and leave to appeal as required by the law. Hearing of the application was by way of written submission and each part filed its submission as scheduled. During hearing of the application, the Applicant was represented by Advocate Lobulu Osujaki while the Respondent enjoyed the service of Advocate

Anna Ngoti. Page 2 of 10 In the Chamber summons filed by the Applicant, the following points were outlined as being considered as points of law to be certified by this court to the Court of Appeal: -

1. Whether the Honourable High Court Judge erred in both law and fact in interpretation of the provisions of Law of Contract Act [Cap 345 R. E 2019] and in holding that acts of the 2nd Respondent binds the Applicant herein as there was a principal-agent relationship between the Applicant and the 2nd Respondent.
2. Whether the honourable judge of the High Court erred in law and in fact in interpretation of the decision of Court of Appeal of Tanzania in Suzan S. waryoba V Shija Dalawa, Civil Appeal No 44 of 2017 and in Stanley Kalama Mariki Vs Chihiyo Kuisia w/o Nderingo Ngomuo [1981] TLR 143 and in holding that the 1st Respondent herein was a bonafide purchaser. Submitting in support of the application Mr. Lobulu argued that the Applicant being aggrieved by the decision issued by this court sitting as the second appellate court has no automatic right to appeal to the Court of Appeal of Tanzania and has to first seek and obtain leave and certification on point of law. He supported his argument with the case of Simon Kabaka Daniel Vs Mwita Marwa Nyang'any & 11 others

[1989] TLR 64 and the case of Ali Vuai Ali v Suwedi Mzee Suwedi

[2004] TLR 110. Page 3 of 10 Regarding the first point under the chamber summons, the Applicants counsel submitted that the High Court Judge erred in misinterpretation of section 134 and 178 of the Law of Contract Act [Cap 345 R.E 2019] as under the two agreements executed between the Applicant and the 2nd Respondent that is Exhibits KM1 and KM2 (admitted at the trial court) in its context and contents there is nowhere that it created the principal and agency relationship among them. In elaborating the aspect of principal agency relationship, Mr. Lobulu cited the book authored by David Kelly, Ann Holmes & Ruth Hayward, Business Law 4th Edition Cavedish Published Limited 2002. On the 2nd point he submitted that, The High Court Judge erred in interpretation of the decision of the Court of Appeal in the case of Suzan S. Waryoba Vs Shija Dalawa, Civil Appeal No 44 of 2017 and in Stanley Kalama Mariki Vs Chihiyo Kuisia w/o Nderingo Ngomuo [1981] TLR 143 and in holding that the 1st Respondent was a bonafide purchaser. He contended that, the two cases were applied out of context as the acts of selling the car between the Respondents was done in a dubious deal without involving the Applicant. He was of the view that, the Court of Appeal will be called to address whether the Page 4 of 10 bonafide purchaser can be entertained where negligence and or fraud is manifest in the transaction in dispute. Basing on the decision of the Court of appeal in the case of Elly Peter Sanya Vs Ester Nelson, Civil Application No. 3/2015 cited with approval by this court in the case of Enila Naskel Kyando Vs Veronica Sabali, Misc. Application No 221/2019, the Applicant sought to be granted leave and certificate on point of law so that the matter can be determined by the Court of Appeal of Tanzania. In contesting the application Ms. Anna Ngoty in her reply submission stated that, the High Court is the final court on matters of facts and is required to certify questions of law only as opposed to questions of facts. She

submitted that, the two points of law contained under the Applicant's chamber summons are matters which are not the purpose of Section 5(2) (c) of the Appellate Jurisdiction Act Cap 141 R.E 2019 as they are points of facts and not on laws. To buttress her submission, she cited the case of Magige Nyamoyo Kisinja Vs Merania Mapambo Machiwa, Civil Appeal No. 87/2018 CAT at Mwanza, Herbert Kabyemela Vs. Bernadeta Mukayiranga, Misc. Civil Application No. 238/2020 HC at Dar es Salaam and Mohamed Mohamed and another v Omar Khatib, Civil Appeal No 68/2011. Page 5 of 10 Regarding the issue of principal agency relationship, she replied that to ask the Court of Appeal to look at Exhibits KM1 and KM2 to ascertain if there is a principal agent relationship is a purely matter of fact and not law. The counsel for the 1st Respondent concluded that this is a proper case to deny certification on point of law as the proposed points are based on facts not law and prayed for the application to be dismissed with costs. Upon a brief rejoinder submission by Mr. Lobulu reiterated his submission in chief and added that, even in matters of law such as jurisdiction the court cannot determine it unless there is set of facts which are placed before it so that it can apply the statute upon such facts to determine whether the court lacks jurisdiction. Having considered the application together with the submissions presented by both parties, I have discovered that the Applicant's prayer was referring leave and certificate on point of law. However, this application was preferred under the provision of section 5(2) (c) of the Appellate Jurisdiction Act Cap 141 R.E 2019 which is related to certificate on point of law and not leave thus my concentration will be on application for certificate on point of law. Page 6 of 10 I am mindful of the requirement of law that no appeal shall lie against the decision of the High Court originating from the Primary Court unless and until the High Court certifies on point of law that the matter is worth the determination by the Court of Appeal. This is subject to the provision of section 5(2) (c) of the Appellate Jurisdiction Act Cap 141 R.E 2019 used to move this court which read, Notwithstanding the provisions of subsection (1)-

- (c) 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; " I am also aware of the requirement that the High court must be satisfied that what is raised fall within a point of law to be determined by the court. In Dorina N. Mkumwa vs Edwin David Hamis, Civil Appeal 4 No. 53 of 2017, CAT - Mwanza (unreported) where the Court of Appeal held, "Therefore, when the High Court receives application to certify point of law, we expect the ruling showing serious evaluation of the question whether what is proposed as a point of law is worth to be certified to the Court of Appeal. This Court does not expect the certifying High Court to act as an uncritical conduit to allow whatsoever the intending appellant proposes as point of law to be perfunctorily forwarded to the court as point of law" Page 7 of 10 The first proposed point of law is whether the provision of Sections 134 and 178 of the Law of Contract Act Cap 345 R.E 2019 was rightly applied by the High Court. This will stand as point of law if the same is yet to be decided upon by the Court of Appeal to which the interpretation is sought. It is a settled position in a number of decisions by the Court of Appeal that a point sought to be

certified must not have been pronounced by the court and must go to the root of decision or involve issue of jurisdiction or where the court below misinterpreted the law. In this present application what is raised is the misinterpretation of the provisions of the law specifically the provisions of the Law of Contract Act Cap 35 RE 2019. In its decision this court interpreted the sections 134 and 178 of the Act in reaching to its decision and it is its interpretation which is intended to be challenged before the Court of Appeal. It has not been shown by either party if similar issue has been dealt with before thus, in my view, the issue of interpretation of law is a legal issue which to me needs the attention, clarification and adjudication by the Court of Appeal of Tanzania. Therefore, I hereby certify it. Page 8 of 10

The other point raised is the interpretation of the decision of the Court of Appeal of Tanzania in the case of Suzan S. waryoba Vs Shija Dalawa, Civil Appeal No 44 of 2017 and in Stanley Kalama Mariki Vs Chihyo Kuisia w/o Nderingo Ngomuo [1981] TLR 143. This was in relation to the issue on whether the High court erred in law and in fact in the interpretation of the above decision of the Court of Appeal and in holding that the Respondent herein was a bonafide purchaser. This involved the important fact on whether the principal-agent relationship can be applied in transactions with elements of negligence and or fraudulent acts. The court was comparing the facts in those cases to the case at hand to determine if the facts before it was relevant and could be interpreted the same way to mean that there was bonafide purchaser. What was being interpretation in those cases were not point of law rather points of facts because to know if someone was a bonafide purchaser is a matter of evidence not law. But having certified the first point of law, I find this application worth granting. In the event therefore, the certification on point of law is hereby granted on the first point. No order for costs is made. Page 9 of 10 DATED at ARUSHA this 12th day of April 2022 Page 10 of 10

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