

**IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA**

(CORAM: JUMA, C.J., MKUYE, J.A. And MLACHA, J.A.)

CIVIL APPLICATION NO. 357/08 OF 2023

AMINA JOSEPH MUGANDA APPLICANT

VERSUS

**ZAINABU JUMA MASOUD (Administratrix of the Estate
of the Late HASHIMU JAWADU ZUBAIL) RESPONDENT**

**(Application to strike out a Notice of Appeal filed by the Respondent against
the Ruling and Order of the High Court of Tanzania at Mwanza)**

(Rumanyika, J)

dated the 26th day of February, 2021

in

Civil Revision No. 02 of 2021

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RULING OF THE COURT

19th & 22nd February 2024

MLACHA, J.A.:

By notice of motion made under rule 89(2) of the Tanzania Court of Appeal Rules, 2009 (the Rules), supported by an affidavit of the applicant, the Court is asked to make an order striking out a notice of appeal lodged on 10th March, 2021 by the respondent, in respect of the decision of the High Court of Tanzania at Mwanza made in Civil Revision No. 2 of 2021 (Rumanyika, J., as he then was). The respondent is resisting the application and has lodged an affidavit in reply.

For a better understanding of the matter and the basis of the decision which will follow, a bit of the factual background is essential. It is produced as follows: The respondent, Zainabu Juma Masoud was appointed by the Primary Court of Nyamagana District at Mkunguni in Administration Cause No. 16 of 2019 to administer the estate of the late Hashimu Jawabu Zubail. Following her appointment and in the cause of executing her functions as the administratrix, she sold the house of the deceased occupied by the applicant, who is the widow of the deceased. It was explained that the respondent did so to raise funds to pay a debt of TZS. 15,000,00.00 left behind by the deceased for which she was the beneficiary. She also wanted to pay back burial expenses. It was alleged that there was a loan agreement between her and the deceased which was the basis of the stated amount. The applicant lodged an objection at the Primary Court without success. Her appeal to the District Court in DC Probate Appeal No. 10 of 2020 was dismissed. She was left with her child aged one year and a half, homeless.

Following her predicament, the applicant approached the High Court in Civil Revision No. 2 of 2021. The High Court made a decision on 26th February, 2021 revising the proceedings and vacating the orders of the lower courts. The sale was set aside and the house was returned to the applicant. Aggrieved by the decision of the High Court, the respondent lodged a notice of appeal to this Court on 10th March, 2021. She also filed

Miscellaneous Application No. 27 of 2021 at the High Court seeking a certificate on points of law to enable her to appeal to this Court. This application was heard and dismissed on 31st May, 2021. Undaunted, she filed revision No. 413/08 of 2021 seeking to challenge the ruling which denied her a certificate on point of law. The Revision was found to miss some key documents and was accordingly struck out. She did not end there. She has now filed Civil Application No. 975/08 of 2023 seeking extension of time to file another Revision to challenge the order of the High Court refusing to certify a point of law. We were told that this application is still pending.

Convinced that following a failure to obtain a certificate on point of law, the notice of appeal had no other business before the Court and in view of reluctance on the part of the respondent to withdraw it, the applicant lodged the present application praying for an order for striking it out.

At the hearing, the applicant was represented by Mr. Buruhani Musa, learned counsel, while the respondent had the services of Mr. Steven Kitale, also learned counsel. The applicant filed written submissions to support her case pursuant to rule 106 (1) of the Rules. The respondent did not file any reply submissions.

Amplifying what is in the affidavit and submissions, Mr. Musa told the Court that after the dismissal of the application for certifying points of law, there was no chance of appeal to the Court any more on the part of the respondent who was supposed to withdraw the notice of appeal. She could not do so but instead started other processes. The counsel complained that the notice of appeal is used as a shield to protect the respondent unjustly and prevent the applicant from getting her right. He urged the Court to strike out the notice of appeal to allow other processes to continue.

In reply, Mr. Kitale adopted the contents of the affidavit in reply as part to his submission and contended that, for a notice of appeal to be struck out under rule 89(1) of the rules, there are two basic things which must be considered: **One**, where there is no appeal and **two**, where essential steps in the appeal have not been taken. Making reference to paragraphs 3, 4, 5 and 6 of the affidavit in reply, he submitted that the respondent has a pending appeal and took steps by filling Revision No. 413/08 of 2021 which was struck out. And as of now, there is Civil Application no. 975/08 of 2023 seeking extension of time to file Revision to challenge the order refusing to grant a certificate on a point of law which is still pending. The counsel argued that, the existence of the two applications amounts to taking steps within the meaning of rule 89 (2) of the Rules. He urged the Court not to grant the application.

In rejoinder, Mr. Musa reiterated his earlier position and stressed that, once one is denied a certificate on a point of law by the High Court, the matter ends there; the notice of appeal becomes useless and has to be withdrawn. He argued that the ruling of the High Court refusing to certify a point of law cannot be revised.

Having examined the record and the rival submissions in this application, our main task now is to determine whether, following the dismissal of application No. 27 of 2021, on 31st May, 2021, refusing to certify a point of law, the notice of appeal now pending is still valid in law.

We will start by examining the law. The relevant law is section 5(2)(c) of the Appellate Jurisdiction Act, Cap. 141, R.E. 2019 (the Act). It reads as under:

"5(2) Notwithstanding the provisions of subsection (1)-

(a) N/A

(b) N/A

*(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.**"(Emphasis added)*

Head (c) of the Magistrates' Courts Act, Cap. 11 R.E. 2019 deals with appellate and revisional jurisdiction of the High Court in relation to matters

originating from primary courts. The law requires those matters to come to this Court after obtaining a certificate on a point of law. What follows after the High Court had refused to certify a point of law is what is at stake.

Interpreting section 5(2)(c) of the Act, we stated the following in **Eustace Kubalyenda v. Venancia Daud**, Civil Appeal No. 70 of 2011:

*"However, when it comes to granting of a certificate on a point of law for a third appeal, **the legislature made it the exclusive preserve of the High Court.** On this there is no concurrent jurisdiction and accordingly no room for a second bite. **The legislature, therefore, wanted the refusal order of the High Court to be final.** Under the scheme of the Act, this **Court has no jurisdiction to grant a certificate on point of law or compel or direct the High Court to do so.** This stance was taken by the Court in Civil Application No.1 of 1986 between **Haruni Chacha and Mugabe Gikaro.** It was held therein that rejection by the High Court of an application under section 5(2)(c) of the Act is final and no appeal against it lies to this Court. We subscribe fully to that holding." (Emphasis added)*

See also **Mathew Mlay v. Rashid Majid Kasenga**, Civil Application No.354/17 of 2020; **Shaban R. Kavitenda v. Yasin S. Kavitenda**, Civil Application No.252/01 of 2020; and **Sogoka Raphael v. Florentina Raphael**, Civil Application No. 336/08 of 2023 (all unreported).

In view of what we have tried to demonstrate through the above authorities, we would agree with the counsel for the applicant that once the application for a certificate on a point of law has been refused by the High Court, on matters originating from the primary courts, the case ends there. As there is no other avenue in the matter, the decision of the High Court becomes final. The notice of appeal is rendered useless and has to be withdrawn by the appellant. The respondent can, if no step is taken by the appellant, move the Court under rule 89 (2) of the Rules to strike it out.

As correctly observed by counsel for the respondent, rule 89 (2) has two scenarios; one, where no appeal lies or two, where some essential steps in the proceedings have not been taken or has not been taken within the prescribed time. This application lies on first category. As there is no appeal any more, the notice of appeal has to be removed to give way to the respondent in the appeal to reap the fruits of her decree. If it is not withdrawn, then, it has to be struck out by an order of this Court.

It is our observation that, filing a revision against the ruling of the High Court refusing to certify a point of law, amounts to questioning the mandate of the High Court in the matter or trying to force it to do what she thinks is right. We do not have such jurisdiction and if there is any such

application filed as alleged, in our respectful view, on the facts before us, amounts to an abuse of the court process.

That said, in terms of rule 89(2) of the Rules, the notice of appeal lodged on 10th March, 2021 by the respondent, in respect of the decision of the High Court made in Civil Revision No. 2 of 2021, is marked struck out.

As the parties are related, we make no order as to costs.

DATED at **MWANZA** this 21st day of February, 2024.

I. H. JUMA
CHIEF JUSTICE

R. K. MKUYE
JUSTICE OF APPEAL

L. M. MLACHA
JUSTICE OF APPEAL

The Ruling delivered this 22nd day of February, 2024 in the presence of the Applicant appeared in person and Mr. Akram Adam holding brief for Mr. Steven Kitale, learned counsel for the respondent, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL