

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**  
**(DAR ES SALAAM DISTRICT REGISTRY)**  
**AT DAR ES SALAAM**

**MISCELLANEOUS CIVIL APPLICATION NO.673 OF 2019**

(Arising from the Judgement and Decree of the High Court of Tanzania in Civil Appeal No. 69 of 2013 dated 18<sup>th</sup> February, 2016; emanated from (DC) Civil Revision No. 3 of 2010 at Morogoro District Court; Originated from Probate Causes No. 41/2009 and No. 253/2009 at Morogoro Primary Court)

**1. Abdul Omary**  
**2. Thabit Mawanja**

}-----**APPLICANTS**

VERSUS

**Shaban Salehe Zero**

-----**RESPONDENT**

**RULING**

*Date of last order: 21.04.2020*

*Date of Ruling: 05.06.2020*

**Ebrahim, J.:**

The applicant herein has lodged the instant application praying for leave on points of law to appeal to the Court of Appeal against the decision of this Court in Civil Appeal No. 69/2013 (Hon. Shangwa, J (as he then was). The application is supported by the affidavit of

advocate Pacience Y Maumba, Counsel for the applicant. The application has been brought under the provisions of **Section 5(2)(c)** of the **Appellate Jurisdiction Act, Cap 141 RE 2002 and Rule 45(a) and Rule 47 of the Court of Appeal Rules, 2009 as amended by GN No. 362 of 2017.**

This matter originates from a probate case filed way back in 2009 at the Primary Court of Chamwino, Morogoro vide Civil Case No. 41 of 2009. The Probate Court appointed the 2<sup>nd</sup> applicant to be the administrator of the estate of the late Fatuma Omari Fikiri (the grandmother of the respondent). The deceased died intestate in 2001 at Morogoro. The 1<sup>st</sup> applicant was appointed by the same court to administer the estate of the late Salehe Shaban Zero (the father of the respondent). The Respondent was dissatisfied with such decision and he successfully lodged a revision, Civil Revision No. 3 of 2010 at the District Court of Morogoro. The District Court of Morogoro revoked the appointment of the above appointed administrators and handed all the properties to the respondent. The applicants were aggrieved and their grievances got the attention of the High Court vide Miscellaneous Civil Revision No. 1 of 2011. Hon Twaib J, (as he then was) nullified the

ruling and orders of the District Court dated 2<sup>nd</sup> August 2010 in Civil Revision No. 3 of 2010. The honourable Judge restored the appointments of the administrators in respect of the estates of the late Fatuma Fakihi and Salehe Shabani Zero. He further remitted the file to District Court and ordered Civil Revision No. 3 of 2010 to be determined by another magistrate and ordered investigation of the allegations of legitimacy of the respondent. He also ordered the interested parties to be joined in the proceedings. Civil Revision No. 3 of 2010 was assigned to hon. M.J. Yusuph – RM who after hearing the submissions from both parties declared the respondent and his half-brother to be the legal heirs of the estate of the late Fatuma Fakihi and Salehe Shaban Zero. The applicants were aggrieved and they unsuccessfully appealed to this court. Hon Judge Shangwa (as he then was) held that the respondent is entitled to inherit in the estates of his grandmother Fatuma Fakihi and of his late father. The applicants were aggrieved again hence the present application for certificate on point of law.

The instant application has been argued by way of written submission as per the order of the court and a schedule set thereat. Both parties adhered to the set schedule.

The applicants are represented by advocate Maumba while the respondent is represented by advocate Patricia Mbosa.

In his submission, counsel for the applicant referred to paragraph 21 of the affidavit and outlined the points of law that they seek the intervention of the Court of Appeal. Those points of law are:

1. Whether an illegitimate child can inherit without a will
2. Whether an illegitimate child under Islamic law can inherit the estate of his grandmother while there are existing relatives from the same blood; and
3. Whether the court can declare legitimacy of a child without the parties being heard by adducing evidence, or without inquiries.

In cementing the 3<sup>rd</sup> point, Counsel for the applicants cited the case of **Churanijilal and Company Versus A.H. Adam** (1950) 17 EACA 92 on the principle that a person is entitled to be availed opportunity to defend the case. He further cited the case of **Sango Bay Estate Ltd and Others Vs Dresdner Bank** (1971) EA 17 in showing that there is serious point of law concerning inheritance.

In reply, Counsel for the respondent referred to the three points of law raised in the affidavit and argued that those are facts which have been proved by the contents of paragraphs 9,12,13 and 17 of the affidavit on their admission of the knowledge that the late Salehe Shabani left two issues and the administrator divided his estate to those issues. She contended therefore that it is not reasonable to let Court of Appeal to determine on the matter which has already been decided at the family level. She prayed for the dismissal of the application with costs.

In rejoinder, Counsel for the Applicants mainly insisted that the issue as to whether the respondent is an illegitimate child; or whether he has right to inherit both estates is a legal matter to be determined by the Court of Appeal.

It is trite law that, the contentious points worth taking to the Court of Appeal on matters originating from the Primary Court is where the point of law is involved from the decision or order of the High Court as provided in **Section 5(2)(c) of the Appellate Jurisdiction Act, Cap 141, RE 2002**. This principle of law was well enunciated in the case of **Ali Vuai Ali V. Suwedi Mzee Suwedi - Civil Appeal No. 38 of 1996 (unreported)**;

and also considered in the case of **Maulid Makame Ali V. Kesi Khamis Vuai, Civil Appeal No. 100 of 2004 (CA)**.

Undoubtedly, the purpose of such certificate considering that it is the third appeal is to ensure that only deserving matters of law and not facts which have already been dealt with goes to the Court of Appeal.

Looking at para 21 of the applicant's affidavit it is obvious that the points of law that they seek for the guidance and determination of the Court of Appeal are rounded on the issue as to whether an illegitimate child in islamic law can inherit the estate of his grandmother and father.

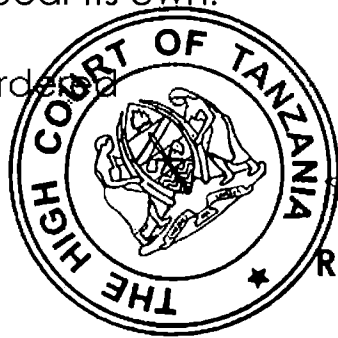
Counsel for the respondent urged the court not to consider the application on the basis that the facts have already been determined at the family level. However, I find that the points raised particularly on whether an illegitimate child can inherit the estate of his grandmother in the presence of other blood relatives cannot be ignored by this court and termed as an issue of fact. I find that this is a pertinent issue that needs the intervention and guidance of the Court of Appeal. As to whether there has been partly distribution hence be regarded as an admission of knowledge of legitimacy of the respondent, it is my considered views that it is not within my ambit to discuss those arguments at this stage of application.

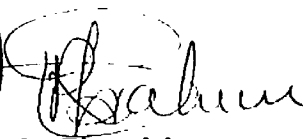
It is on that background I find that, there are pertinent issue(s) of law of inheritance by the illegitimate child as put by the Applicants that needs determination by the Court of Appeal. I therefore grant the application and issue the certificate on point of law for the applicants to appeal to the court of appeal in accordance to the prescribed time by law.

Considering the family relation of parties, I give no order as to costs.

Each party to bear its own.

Accordingly ordered



  
R.A. Ebrahim  
Judge

**Dar Es Salaam**

**05.06.2020**