IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 145 OF 2020

(Arising from (PC) Civil Application No. 145 of 2020

FATUMA DIANE BERETE.....APPLICANT

VERSUS

MARYAM YAHYA HUSEIN.....RESPONDENT

RULING

Date of last Order: *22/07/2020*
Date of Ruling: *16/10/2020*

MLYAMBINA, J.

The brief facts of this application as properly gathered by the Applicant is that, on 28/02/2020 this Court dismissed on merit the appeal by the Applicant herein. The Appellant having been aggrieved by the decision of this Court on appeal lodged on 10/03/2020 a Notice of Appeal to appeal to the Court of Appeal. As the matter originates from a Primary Court, an appeal to the Court of Appeal has to be instituted upon the High Court certifying that there is a point of law involved. Hence, the Applicant has made this application under the application under the provisions of *Section 5 (1) (c) and 5 (2) (c) of the appellate Jurisdiction Act, Cap 141 of the laws*. The application is by way

of Chamber Summons supported by the affidavit of Fatumata Diane Berete affirmed on 24/03/2020.

The provisions under which the application have been made do not prescribe in precise terms what is required of a party to establish that a point of law is involved. The law states:

> *5 (2) of 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 © of part III of the Magistrates Courts Act unless the High Court citified that a point of law is involved in the decision or order.*

Head (c) of part of III of the Magistrates Courts Act concerns exercise by the High Court of its appellate jurisdiction in matters originating from Primary Courts. The appeal to the High Court in this matter originated from Kinondoni Primary Court. Consequently, in order for an appeal to lie to the Court of Appeal the High Court is required to certify that points of law are involved in the appeal. As properly submitted by the Applicant, the High Court at this stage is at most only required to acertain the points raised by the Applicant in the application.

According to the Applicant, there are eight (8):

1. Whether as a matter of law paternity to a child cannot be brought into question after death of a person said to be the father of that child?
2. Whether a Primary Court is seized with jurisdiction to determine heirs of estate of a deceased person at the time of determining an application for appointment of an administrator of the estate of the deceased person?
3. Whether an appellate Court is entitled to looking to extraneous factual matters which do not from part of the record of the trial Court in deciding an appeal before it?
4. Whether the propriety and validity of the marriage of the respondent in this matter was not raised by the Appellant in Probate Appeal No. 34 of 2018 instituted in the District Court of Kinondoni?
5. Whether as a matter of la the provisions of *Section 33 (1) of The Law of Marriage Act* were complied with resulting into a valid marriage between the deceased and the respondent?
6. Whether on intestacy and in the absence of an adoption order a child can under Islamic law inherit without proof of biological parentage of a father?
7. Whether a trial Court as of a Mather of law empowered to make orders identifying heirs of the estate of the deceased in

the course of appointing administrators (s) prior to the exhibition of inventory and accounts of estate by the appointed administrator (s)?

8. Whether the trial Primary Court was under the circumstances of this case entitled to reject to making an order for carrying out DNA TEST of the parentage of the deceased to the two children borne by the respondent.

It was submission of the Applicant that the foregoing constitutes point of law not only for purposes of deciding right between the parties in this matter but also are of public importance as regards determination by Courts of law of paternity to a child after death of a person said to be the father of that child. The reason being that, a right to a share of inheritance to an estate of a deceased father is founded on many factors amongst which is the paternity of that father biologically if and when it is said there was any marriage with the mother of the child.

More so, a right to inheritance to such deceased father is subject to legitimacy of the child to the father. The deceased in this case prophesied Islamic faith of which a right to inherit an estate of a deceased father is also subject to the child being born in lawful marriage recognized as such. The respondent's marriage to the deceased is seriously disputed in this matter. It therefore brings

up a serious point of law on intestacy and in the absence of an adoption order whether a child can inherit and estate of a deceased father whose biological nexus with the child is disputable or unproven.

The Applicant was of submission that right from the institution of the proceedings in the Primary Court. The Applicant herein had disputed and actually challenged the paternity of the deceased to the children claimed by the respondent to be fathered by the said deceased to the extent of and by requiring carrying out of DNA TEST. The trial Primary Court at first noted that the issue of DNA test could be pursued by person (s) appointed in the administration of the estate but later without according the said administrator (s) opportunity of so pursuing made an order recognizing the said children as among rightful heirs of the estate e and as such pre-emptying the carrying of DNA TEST to the prejudice of the estate of deceased which might fall into and be inherited by underserving persons.

It was submitted by the Applicant that there is a serious point of law on whether an appellate Court sitting on appeal is entitled to look into extraneous matters which did not form part of the record of the trial Court as such having not considered such matters at all.

This raises very important point of law on limitation of powers and jurisdiction Appellate Courts when siting on appeal.

Further, the Applicant was of submission that there is a point of law involved and of public importance on whether the provisions of *Section 33 (1) of the law of Marriage Act* can be looked into in order to ascertain propriety and validity or others wise of an alleged marriage especially with a deceased person whose estate is sought to be inherited by persons whose right to inheritance arises only from existence of a lawful marriage and which is disputed. It is sought to ask the Court of Appeal to interpret the law on whether such validity of marriage can be brought into question posthumously.

The other major prayer by the Applicant is that the Applicant be granted leave to appeal to the Court of Appeal of Tanzania against the decision of this Court *in PC Civil appeal no. 102 of 2019* dated 28th February, 2020.

It has to be noted that the application was brought by way of chamber summons made under *Section 5 (1) (c) and 5 (2) (c) of the Appellate Jurisdiction Act, Cap 141 (R.E. 2002).*

It must further be not that the application has been disposed by way of Written Submission the respondent in reply, apart from

resisting the application, she raised two preliminary legal points of objection, namely:

1. The application is incompetent for being omnibus.
2. The application is incompetent for incomplete citation of law.

In arguing the first point of objection, the respondent cited inter alia the case of **Zaidi Baraka And Others v. Exim Bank Misc.** Commercial Application No. 28 of 2015 (unreported) in the Court held at page 12 at follows:

> *Guided by the principle enunciated in the **Case of Rutagatina** which is a decision of the Court of appeal and binding to this Court , I honestly find omnibus applications which joins two, or more district applications or reliefs governs (sic) by different provisions of the law; and their determinations requires different yardsticks, and different jurisdictions, are discouraged, and the Court has a duty to decide on their fate.*

As properly replied by the Applicant, the objection is misconceived on the reason that jurisdiction to determine an application for a certificate that a point of law is involved is vested in this Court. Similarly, the jurisdiction to grant leave to appeal to the Court of Appeal is vested to this Court as a matter of first bite. That is the

provisions of Section 5 (1) *(c) and 5 (2) (c) of the Appellate Jurisdiction Act (supra)* respectively.

In any aspect, this matter originated from Primary Court. Leave is un-necessary application. The important application is that of certifying if a point of law is involved.

The other reason of finding the objection hopeless is that the two prayers have been made under the same law. Reference can be made to the decision of this Court in the case of **Ally Abasi Hamis v. Majira Hassan Ally Kanji,** Misc. Case Application No. 140 of 2017 (unreported). Moreover, the two applications relate and so it is convenient to this Court to grant in one application their combination also serves time of this Court and of the parties as it serves to avoid multiplicity of cases. In the case of **MIC (T) Ltd v. Minister for Labour and Youth Development and Another,** Civil Appeal No. 103 of 2004 (Court of Appeal of Tanzania Dar es salaam (unreported) there was a combination of three prayers and the Court of Appeal had these to observe:

> *Courts abhor multiplicity and encourage applications which may conveniently be combined. The current application is one of those which may conveniently be combined because*

one follows the other. There is no law prohibiting combination of prayers.

Also, in the case of **Amina Issah v. White Sands Hotel,** Civil Revision No. 55 of 2010 (unreported) my brethren his Lordship Juma, J. (as he then was) had these to observe:

*I will go along with what Mapigana J said in **Tanzania Knitwear Ltd v. Shamshu Ismail** (1989) TLR 48 that combination of two prayers under one application is not bad in law since Courts abhor multiplicity.*

In view of the foregoing, combination of the two prayers by the Applicant is not fatal. The cited decision of **Zaidi Baraka** is distinguishable to this case because the defect in that application was fatal. It combined two applications which one could be determined by the High Court, that is an application for extension of time to lodge Notice of Appeal under *Section 11 of the appellate Jurisdiction Act* (*supra*) and the other application could only be entertained by the Court of Appeal, that is to say an application for stay of execution.

As regards the second point of objection, it is now a settled position of law by this Court that citation of applicable law along with inapplicable law is no more fatal. It is also a settled law by this

Court that non citation of the provision of law to the Court with competent jurisdiction is not fatal. It would be fatal if the cited law is wrong altogether. Otherwise the Court can order the Applicant to insert that relevant provision or subsection and proceed to determine the merits of the case. Reference may be made to the case of **Alliance Tobacco Tanznaia Ltd and Another v. Majuma Hamis and Another,** Misc. Civil Application No. 803 of 2018 High Court of Tanzania Dar es Salaam (unreported) also the case of **CRDB Bank PLC v. Intersystem Holdings Ltd and Another, Commercial case** No. 107 of 2009 High Court of Tanzania (unreported).

On the merits of the application, the sole duty of this Court at this stage is only to certify if there are points of law involved. Having considered the raised issues, I find among other issues, the following are issues worth to be determined by the Court of Appeal:

1. Whether as a matter of law the provisions of Section 33 (1) of the law of marriage act were complete with resulting into valid marriage between the deceased and the respondent.
2. Whether on intestacy and in absence of an adoption order a child can under Islamic law inherit without proof of biological parentage of a father.

3. Whether the trial Primary Court was under the circumstances of reject making an order for carrying out DNA TEST of the parentage of the deceased to the two children borne by the respondent.

I therefore so certify and proceed to grant the application for certification with no order as to costs.

Y. J. MLYAMBINA

JUDGE

16/10/2020

Ruling delivered and dated 16th day of October, 2020 in the presence of Counsel Marietha Mollel holding brief of Dennis Msafiri for the Applicant and Flora Jacobo for the Respondent.

Y. J. MLYAMBINA

JUDGE

16/10/2020