

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
THE DISTRICT REGISTRY OF MBEYA
AT MBEYA

MISC. CIVIL APPLICATION NO. 49 OF 2020.

(From the Decision of the High Court of Tanzania, at Mbeya in Probate appeal No. 2 of 2020 and in the District Court of Momba District, at Chapwa, in Probate Appeal No. 1 of 2019, Originated in the Primary Court of Momba District, at Tunduma Urban, in Probate Cause No. 32 of 2014).

BI. ASHA RASHID IKAJI.....APPLICANT

VERSUS

KHALIFA MOHAMED NOTI.....RESPONDENT

RULING

11.02 & 15. 04. 2021.

UTAMWA, J:

The applicant in this application, BI. ASHA RASHID AKAJI applied for the following orders;

- i. That, this honourable court be pleased to grant a certificate that there are points of law involved in the appeal for the applicant to appeal to the Court of Appeal of Tanzania (CAT) against the judgment delivered by this court (Hon. Dr. A.J. Mambi, J.) in probate Appeal No. 1 of 2020.
- ii. Costs of this application.

The matter originated in Probate and Administration Appeal No. 01 of 2019, in the District Court of Momba District, at Chapwa and in Probate Cause No. 32 of 2014 in the Primary Court of Momba District, at Tunduma Urban. The application is preferred under section 5 (1) (c) of the Appellate Jurisdiction Act, Cap. 141 R.E 2019. It was supported by an affidavit of the applicant herself.

The respondent KHALIFA MOHAMED NOTI (as administrator of the estates of the late DIMA MOHAMED NOTI) resisted the application through a counter affidavit sworn by himself. The application was argued by way of written submissions. The applicant appeared in person and unrepresented whereas the respondent was represented by Ms. Marry Mgaya, learned counsel.

In the affidavit supporting the application, it was essentially stated that, being aggrieved by the judgment of this court mention above (the impugned judgment), the applicant filed a notice of appeal to the CAT. He also applied for the certified copies of the proceedings, judgment and decree of this court. The affidavit further stated that, the grounds for appealing are based on points of law related to the following issues to be considered by the CAT:

1. Whether it was proper to decide in favour of the respondent while his submissions were filed out of the scheduled time.
2. Whether it was proper to decide in favour of the respondent while inventory report was filed over six months later contrary to the law.

In her written submissions, the applicant adopted the contents of the affidavit supporting the application. She further argued that, she

objected the respondent's application for administering the estates of the deceased since she (applicant) was among of the beneficiaries. The objection was based on the manner the properties were divided/distributed. She complained that the respondent left some properties undistributed including 47 cows, plot of land located at Dodoma region, money Tanzania Shillings (Tsh.) 12,000,000/= obtained from the sale of a Tractor and a motor vehicle make Scania with Registration No. T 699.

The applicant also contended that, the appeal before this court, i.e. Probate Appeal No. 2 of 2020, was disposed by way of written submissions. Nevertheless, the respondent/the appellant in that appeal filed his written submissions in chief out of time. She thus, argued that, the same (written submissions) ought to have been disregarded in composing the impugned judgment. She cited the case of **Godfrey Kimbe v. Peter Ngonyani, Civil Appeal No. 41 of 2014** following the decision in the case of **National Insurance Corporation of (T) Ltd and Another v. Shengena Limited, Civil Application No. 20 of 2020** to support her contention.

Moreover, the applicant submitted that, the inventory filed in the Trial Primary Court offended the provisions of Rule 10 of the Primary Court (Administration of Estates) Rules, GN No. 49 of 1971 and section 11 of the Fifth Schedule to the Magistrate Courts' Act, Cap. 11 R.E 2019. The said provisions of law require the Administrator of an estate appointed by a primary court to collect property, pay debts (if any) and divide the remaining assets and close the probate matter within four months after appointment. She added that, the respondent was not granted extension of time to file the same after the expiry of the time

prescribed by the law. To buttress this argument, she cited the decisions of this court in the cases of **Hadija Said Matika v. Awesa Said Matika, PC. Civil Appeal No. 2 of 2016, at Mtwara** (unreported) and **Beatrice Kamanga and Amanda Kamanga v. Ziada William Kamanga, Civil Revision No. 13 of 2020, at Dar es Salaam** (unreported).

In his counter affidavit, the respondent started attacking the affidavit of the applicant. He deponed that, the affidavit shows that, the applicant is Christian and resident of Momba district in Songwe region. However, these facts are not true. This is because, the applicant is Muslim, and resides at Kondoa in Dodoma region. Alternatively, he opposed the application on the grounds that, the applicant is not intending to appeal since the alleged Notice of Appeal and letter requesting for the certified copies were not served to him. The counter affidavit also deponed that, the issues proposed by the applicant for determination by the CAT do not constitute points of law. It further stated that, the applicant intends to embarrass the respondent while he is taking care of the two families of the deceased.

In her replying submissions, the respondent's counsel argued that, the applicant does not deserve the certificate of point of law. This is because, the issues raised does not constitute the points of law worth to be determined by the CAT. She also contended that, the complaint by the applicant that, submissions in chief were filed out of time is not true and the assigned judge decided on the same. She further argued that, the complaint that the inventory was filed out of time is untenable since the applicant filed the same to comply with the order of the trial primary court. She added that, the complaint regarding filing of the inventory at

the stage of appeal was an afterthought since in the primary court the applicant did not challenge the same until when the applicant had distributed the deceased estates and filed the inventory. She thus insisted for this court to dismiss the application because it intends to embarrass the respondent.

I have considered the affidavit and counter affidavit, the arguments by the parties, the record and the law. Before I consider the merits of the application, I find myself obliged to firstly make a finding on one important issue. It is apparent in this application that, the respondent is questioning the competence of the application in his counter affidavit and the challenge was also raised at the stage of hearing i.e in the replying submissions of the respondent's counsel. In doing so the respondent challenged the affidavit of the applicant which shows that, she (the applicant) is Christian and resident of Momba district in Songwe region. He also challenged the signature appearing in the affidavit for being different from the signature appearing in the notice of appeal. The respondent and his counsel are of the view that, since the applicant is a Muslim but lied to be Christian, and since the signatures are different, this court should not consider the application and should treat the applicant a liar.

In my view, I agree with the respondent that the applicant showed herself as Christian, but affirmed in the affidavit instead of swearing. It is also clear that, the signatures appearing in the affidavit and notice of appeal are different. It is further true that, the applicant raised that concern in his counter affidavit and the applicant did not bother to respond to them. However, I consider these variances as not good points of a preliminary objection. This is because, the same are based

on facts which need to be substantiated by adducing evidence. A preliminary objection must base on a pure point of law and not of facts needing proof of evidence; see the case of **Mukisa Biscuits Manufacturing Company Limited v. West End Distributors [1969] E. A. 701.**

Owing to the reasons given, I hereby discard the challenges regarding the competence of this application.

Having discarded the challenges against the competence of the application, I find the application competent irrespective of the weaknesses complained of by the respondent. I therefore, proceed to consider the merits of the application.

The law does not fix specific factors to be considered by this court in granting applications of this nature. However, I am settled in mind that, the major factor for granting an application of this nature is that, the point of law raised by the applicant must be worth for consideration by the CAT on appeal. Now, the major issue before me is *whether or not the two issues mentioned above constitute points of law worth consideration by the CAT on appeal.*

I will now test the first issue proposed by the applicant. Indeed, the law is clear that, failure by a party to file written submissions within the time prescribed by the court is tantamount to a failure to appear or prepare for hearing by the defaulting party; see the **Godfrey Case** (supra) cited by the applicant and the holding in **Olam Tanzania Limited v. Halawa Kwilaby, Civil Appeal No. 17 of 1999, High Court of Tanzania (HCT) at Mbeya** (unreported). I also underscored the position in my previous decisions including the case of

Chapajembe Amcos v. Ramadhani Rashidi Kabhipe, DC. Civil Appeal No. 10 of 2017, HCT, at Tabora (unreported).

However, in the case under consideration, the issue of filing submissions belatedly was decided by the Hon. presiding Judge who ordered for the matter to be disposed by way of written submissions. In the impugned judgment the Hon. Judge ruled out that, the allegation that written submissions were filed out of time was not true. The same was filed according to the court order; see the last paragraph of page 9 of the judgment. In that regard the first issue proposed by the applicant only raises a matter of evidence. It does not thus, deserve to be considered by the CAT on appeal as a point of law.

Regarding the second issue proposed by the applicant, I am of the view that, the same was also thoroughly discussed by the Hon. Presiding Judge in the impugned judgment. The Hon. Presiding judge clearly found that, when the District Court quashed the decision of the Primary court, the estate had already been distributed and the inventory had been filed. In fact, the record shows that, the respondent was appointed administrator of the estates in 2015, he neither distributed the properties nor filed the inventory until in 2018 when the applicant applied for revocation of the respondent's appointment. Having heard both sides, the primary court decided that, since the respondent had not misused or squandered the estates. It thus, extended time for the respondent to file the inventory. He was granted 14 days in which he complied with. He then distributed the estate according to Islamic law and filed inventory to the trial primary court. In that view, I distinguish the two cases cited by the applicant i.e the **Hadija case** (supra) and the **Beatrice case** (supra). This is because, in the two precedents neither

the respective trial primary courts extended time nor the respective administrators filed the respective inventories. Under these circumstances, I find that, the second issue proposed by the applicant does not deserve to be considered by the CAT on appeal for not raising any point of law.

Owing to the above findings, I answer the major issue posed above negatively that, the two issues mentioned above do not constitute any point of law worth consideration by the CAT on appeal. I consequently dismiss the application in its entirety for demerits. The applicant shall pay costs to the respondent since costs follow the event. It is so ordered.



J.H.K. UTAMWA
JUDGE
15/04/2021

15/04/2021.

CORAM; JHK. Utamwa, J.
Applicant: absent.
Respondent: present.
BC; Ms. Gaudensia, RMA.

Court: ruling delivered in the presence of the respondent, in court, this 15th April, 2021.

JHK. UTAMWA.
JUDGE.
15/04/2021.