

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
IN THE DISTRICT REGISTRY OF ARUSHA  
AT ARUSHA**

**MISC. CIVIL APPLICATION NO. 58 OF 2020**

*(C/F the High Court of Tanzania (PC) Civil Appeal No. 4 of 2019, emanating from Karatu District Court, Civil Appeal No. 10 of 2018 Originating from Karatu Primary Court, Probate Cause No. 37 of 2017)*

**NICOMEDI PETER FULGENCE ..... APPLICANT**

***Versus***

**PROTUS FULGENCE NIIMA ..... RESPONDENT**

**RULING**

*20<sup>th</sup> April & 28<sup>th</sup> May, 2021*

**Masara, J.**

In this Application, the Applicant is praying to be granted leave to appeal and a certification that there are points of law worth determination by the Court of Appeal to the Court of Appeal. The application is preferred under section 5(1) (c) of the Appellate Jurisdiction Act, Cap. 141 [R.E 2002] and Rules 45(a) and 47 of the Tanzania Court of Appeal Rules. The application is supported by the affidavit deposed by the Applicant. The Respondent is opposing the application and has filed a counter affidavit deposed by Mr. Peter Eliuforo Shayo, learned advocate for the Respondent. The application was disposed of through written submissions.

Brief facts antecedent to this Application are as follows: The Respondent petitioned for letters of administration vide Probate Cause No. 37 of 2017 in Karatu Primary Court (the trial Court). The Applicant objected but his objection was dismissed. On 24/10/2017, the Respondent was appointed as

the administrator of the Estate of his late brother, Stanislaus Fulgence Panda. The Applicant unsuccessfully appealed to the District Court of Karatu (the District Court) vide Civil Appeal No. 10 of 2018. Still dissatisfied, he appealed to this Court vide PC Civil Appeal No. 4 of 2019. In the judgment delivered on 21/05/2020, this Court (Mwenempazi, J.) dismissed the appeal upholding the decisions of the two lower Courts. The Applicant was further dissatisfied. He intends to appeal to the Court of Appeal. In order to do so, it is a requirement of the law that he first seeks leave of this Court and, considering that the appeal originates from a primary court, this Court has ~~to certify that the intended appeal is on arguable points of law only.~~

Submitting in support of the application, the Applicant amplified that there are points of law worth consideration by the Court of Appeal. He elaborated three points to be canvassed in the intended appeal; namely, *whether the trial Court had jurisdiction to entertain the matter before it; whether there was a valid oral will left by the deceased and whether there was sufficient reason to revoke the Respondent as the administrator of the deceased's estate.*

The Applicant stated that the trial Court ought to have satisfied itself regarding the customary mode of life of the deceased prior to his death before appointing the respondent to be the administrator. The same mistakes were committed by the two Appellate Courts, according to the Applicant. The Applicant maintained that as the deceased professed Christianity, the trial Court did not have jurisdiction to entertain the matter

before it. Further, he faulted the learned Judge's finding that there was no evidence of the purported oral will, which shows that the Judge was not impartial. He therefore prayed that the application be granted with costs.

Contesting the application, Mr. Peter Eliuforo Shayo, advocate for the Respondent, maintained that the learned High Court Judge considered and decided on all the three points of law raised by the Applicant. According to Mr. Shayo, the Applicant's affidavit does not specify what remedies will be afforded to him by the Court of Appeal. That, under paragraph 5 of his Applicant's affidavit, the Applicant only states that in the event the application is not allowed his rights will be highly prejudiced. In Mr. Shayo's view, ~~the statement shows that the Applicant was driven by feelings and~~ imaginations and not serious legal issues to be determined by the Court of Appeal. He concluded that the Applicant's application is frivolous and an abuse of legal process.

I have thoroughly considered the affidavits and submissions by the parties herein. It is indeed a requirement of the law that no appeal shall lie against a decision of the High Court originating from primary courts unless the High Court certifies that there are legal issues worth consideration of the Court of Appeal. The Applicant has also asked for leave. Leave is granted where the intended grounds of appeal raise issues of general importance or novel points of law or a prima facie or arguable appeal. Leave cannot be not granted where the grounds of appeal are frivolous, vexatious or hypothetical. This position has been reiterated in a number decisions including in ***Simon***

***Kabaka Daniel Vs. Mwita Marwa Nyang'anyi & 11 others*** (1989) TLR

64 where it was stated:

*"In application for leave to the Court of Appeal the application must demonstrate that there is a point of law involved for the attention of the Court of Appeal..."*

The same applies to applications to certify that there are points of law to be considered by the Court of Appeal in the intended appeal. In the case of ***Ali Vuai Ali Vs. Suwedi Mzee Suwedi*** [2004] TLR 110, the Court of Appeal held:

~~*"According to section 5(2) (c) of the Appellate Jurisdiction Act 1979, a certificate on a point of law is required in matters originating in Primary Courts; it is provided therein that an appeal against the decision or order of the High Court in matters originating in Primary Courts would not lie unless the High Court certifies that a point of law is involved in the decision or order."*~~

In the application under consideration, the Applicant's affidavit does not outline the points of law to be determined by the Court of Appeal. However, the said points are outlined in the annexed intended Memorandum of Appeal and in the Applicant's written submission. It is also noted that the Applicant stated in the chamber summons that he applies for leave and certificate that there are points of law involved in the decision intended to be appealed against. Considering the fact that the Applicant is a lay person and appeared without legal representation; and considering that there is no prejudice suffered by the Respondent for the failure to outline the points in the affidavit; I find no compelling reasons not to allow the application. With the introduction of the overriding objective, courts are urged to do away with

procedural technicalities in deciding cases, and give paramount consideration to substantive justice, especially where the procedures not adhered to do not prejudice the other party. Considering the points raised in the intended memorandum of Appeal, I do hold that they meet the threshold needed for leave to be granted to the Applicant. Consequently, leave is granted to the Applicant to appeal to the Court of Appeal.

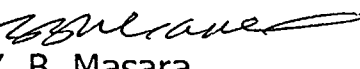
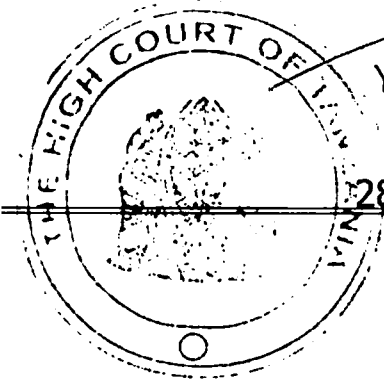
Regarding the points of law to be certified, I note that the Applicant has raised three points that he intends to canvass before the Court of Appeal. A careful examination of the trial Court judgment and records, the District Court judgment and the judgment of this Court reveal that the point of contention revolved around the points raised. Whereas the first two points fall in the realm of legal points, the third point; to wit, whether there was valid reason to revoke the Respondent's appointment, does not appear to be a legal point worth the determination of the Court of Appeal. It appears to me to be a factual issue which will call for the re-evaluation of evidence. I therefore reject this ground and certify the first two points as they are purely legal points.

From the foregoing, this Court doth certify the following points for determination by the Court of Appeal in the intended appeal:

- a) whether the trial Court had jurisdiction to entertain the matter before it considering the mode of life of the deceased; and*
- b) whether there was an oral will and, if so, whether the same adhered to the legal principles.*

Guided by the above excerpts, the Application is granted. The Applicant shall file his intended appeal to the Court of Appeal within 30 days from the date of this ruling. Costs of this Application to be considered alongside the outcome of the intended appeal.

Order accordingly.

  
  
Y. B. Masara  
**JUDGE**  
28<sup>th</sup> May, 2021