

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

MISC. CIVIL APPLICATION NO. 65 OF 2020

(C/F the High Court of Tanzania (PC) Civil Appeal No. 34 of 2016, Misc. Civil Application No. 124 of 2019, Emanating from District Court of Arumeru, Misc. Civil Application No. 3 of 2016, Originating from Enaboishu Primary Court, Probate and Administration Cause No. 18 of 2010)

MOSES HOSSEA APPLICANT

Versus

ANNA HOSSEA RESPONDENT

RULING

27th May & 6th August, 2021

Masara, J.

The Applicant has preferred this application under the provision of section 5(2)(c) of the Appellate Jurisdiction Act, 1979, Cap 141 [R.E 2012], moving the Court to certify that there is a point of law involved in the decision of this Court in Civil Appeal No. 34 of 2016 which was delivered on 29/09/2017. The application is supported by an affidavit deposed by Mr. Edmund Ngemela, counsel for the Applicant. The application is contested in a counter affidavit deposed by Anna by Hosea, the Respondent.

When the application came up for hearing, Mr. Ngemela, learned advocate represented the Applicant, while Mrs. Christina Y. Kimalè, learned advocate, entered appearance for the Respondent. It was resolved that the application be disposed of through filing written submissions.

Submitting on the Application, Mr. Ngemela urged this Court to certify that there is a point of law involved in Civil Appeal No. 34 of 2016 which calls for adjudication by the Court of Appeal. The point for certification was couched in the following phrase: *"that the deceased at the time of his death was professing Christianity while his probate was entertained by Primary Court which in law*

lacks jurisdiction". He insisted that the point is contentious as it involves jurisdiction of the trial Primary Court. Basing on his submission the learned counsel for the Applicant urged the Court to allow the application with costs.

Contesting the application, Mrs. Kimale faulted the course taken by the Applicant's advocate. She stated that the alleged point of law was not pleaded in the Affidavit of the counsel for the Applicant, that it is only reflected in the chamber summons. Similarly, Mrs. Kimale challenges the application on the ground that the affidavit in support of the application stated nothing on the mode of life of the deceased, because bearing a Christian name by itself is not conclusive proof that the deceased abandoned traditions and customary. She insisted that the Applicant's affidavit is vague rendering the Court impotent to grant the orders sought since the Applicant failed to properly move the Court to determine and certify that there is a jurisdictional point of law involved.

Mrs. Kimale also challenges the affidavit in support of the application contending that it contains facts which are not true. Specifically, she mentioned paragraphs 4 and 8 thereof stating that the Applicant's counsel misled the Court under paragraph 8 by submitting that he filed Misc. Civil Application No. 34 of 2016 while there is no such application. That, to the contrary, what was filed was Civil Appeal no. 34 of 2016 that ended in the Respondent's favour. Under paragraph 4 of the affidavit, Mrs. Kimale submitted that the Applicant's counsel misled the Court by stating that he filed application for extension of time to apply for leave to appeal to the Court of Appeal while the said extension of time was already sought and granted on 12/6/2019. In a further expose, Mrs. Kimale explained in details what she believes to be the status of life of the deceased.

I have carefully considered the affidavits of the parties for and against the application and the submissions of the learned advocates for the parties. The

issue to determine in this application is whether the Applicant has demonstrated a point of law worth certification of this Court.

Mrs. Kimale challenged the application due to the fact that the prayer sought in the chamber summons was not reflected in the affidavit in support of the application. I have revisited the application. In the chamber summons, the Applicant seeks the following relief, to wit:

"that the Deceased at the time of death being believing in Christian faith; the District Court vide application before (sic) erred in law in not deciding that Enaboishu Primary Court erred in law when tried Probate Case without considering that it was not vested with jurisdiction."

In the supporting affidavit, the Applicant's advocate narrated historical background leading to this application. I have carefully examined the affidavit deposed by Mr. Ngemela, I am inclined to agree with Mrs. Kimale that the point of law sought to be certified for the intended appeal is not canvassed in any of the paragraphs deposed in the affidavit. As a matter of principle, an affidavit is evidence of what is prayed in the chamber summons. In the case of ***Registered Trustees of the Archdiocese of Dar es Salaam Vs. The Chairman Bunju Village Government and 4 Others***, Civil Appeal No. 147 of 2006 (unreported), the Court of Appeal uttered the following on what should be contained in an affidavit:

*"To start with, it is not in dispute that no reasons for the failure to appeal in time were given in the affidavit in support of the application before the High Court. Since, as correctly submitted by Mr. Mhango, **an affidavit is evidence we think it was expected that reasons for the delay would be reflected in the affidavit. In the absence of reasons, it occurs to us that there was no material evidence upon which the judge could determine on the merit of the application before him.**"* (Emphasis supplied)

Reading from the above authority, the Applicant did not state the point of law that he intends this Court to certify in the affidavit in support of the application.

In the absence of the point of law to be certified in the affidavit, this Court has no basis upon which it can proceed to certify the purported point. Correctly, as submitted by Mr. Kimale, the Court is not properly moved to certify what the Applicant believes to be a point of law which calls for adjudication by the Court of Appeal. Its inclusion in the Chamber Summons was not called for.

I have also considered another issue raised by Mrs Kimale regarding the competence of the intended appeal. She stated that the alleged point does not arise from the decision to be appealed against. It is on record that the judgment in Civil Appeal No. 34 of 2016, which the Applicant intends to challenge before the Court of Appeal was preferred by the Applicant after being dissatisfied by the decision of the District Court of Arumeru in Misc. Civil Application No. 3 of 2016. In the District Court of Arumeru, the Applicant sought for extension of time to file revision in the same Court. The Application was dismissed. It is against that dismissal that led the Applicant to prefer Civil Appeal No. 34 of 2016. This Court dismissed the appeal on the ground that the application which was sought to be challenged in the appeal had correctly been dismissed by the District Court as it was functus officio. The impugned decision did not determine the merits in respect of Probate and Administration Cause No. 18 of 2010 which was determined by Enaboishu Primary Court.

Section 5(2)(c) of the Appellate Jurisdiction Act, Cap. 141 [R.E 2019] imposes mandatory requirement on this Court to certify that there is a point of law in the decision intended to be appealed in the Court of Appeal in appeals originating from Primary Courts only. This was also elucidated by the Court of Appeal in the case of ***Ali Vuai Ali Vs. Suwedi Mzee Suwedi*** [2004] TLR-110, where the following was 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."

Essentially, Misc. Civil Application No. 3 of 2016 did not originate from Primary Court as contemplated by Mr. Ngemela. It was an application for extension of time which originated from the District Court of Arumeru. Therefore, that appeal cannot in the purview of section 5(2)(c) of AJA be among the cases that requires certification by this Court that there is a point of law which needs to be adjudicated by the Court of Appeal. Similarly, it is safe to state that in the impugned decision, nothing was determined relating to the point of law that the Applicant invites the Court to certify. Notably, in Civil Appeal No. 34 of 2016, what was determined was only appeal in respect of extension of time, and not appeal against the appointment of the administrator of the deceased's estate. Accordingly, the point of law I am invited to certify which touches the mode of life that the deceased lived before his death does not arise.

For the above reasons, the Applicant has not satisfied this Court on the existence of a point of law to be certified for determination by the Court of Appeal. The purported point of law forwarded to me for certification is rejected. Consequently, the application is devoid of merits. It is hereby dismissed in its entirety. Considering the relationship between the parties and for the interest of justice, I make no order as to costs.

Order accordingly.




Y. B. Masara
JUDGE

6th August, 2021