

IN THE HIGH COURT OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

MISC. CIVIL APPLICATION No. 55 OF 2021

(Arising from the PC Probate Appeal No.14 of 2020)

MATRIDA MZIBA MASYEBA-----APPLICANT

VERSUS

MANASE LAMECH PYUZA-----RESPONDENT

RULING

Last Order date: 1/9/2021

Ruling Date: 26/10/2021

M. MNYUKWA, J.

This is an application for certification of points of law. The decision for which the certification on points of law is sought to be granted was from HC. Probate Appeal No 14 of 2020 delivered by Hon. Manyanda, J. on 28th April 2021, arising from Probate Appeal No. 05.2020 in the District Court of Nyamagana, originally from Probate and administration cause No. 79 of 2012 of Mkuyuni Primary Court.



By way of Chamber summons the application is preferred under section 5(2)(c) of the Appellate Jurisdiction Act Cap. 141 RE: 2019 and Rules 45(a) and 46 (1) of the Court of Appeal Rules GN. No 368 of 2009 supported by the sworn affidavit of MATRIDA MZIBA MASYEBA, the applicant. The respondent MANASE LAMECH PYUZA opposed the application by filling a sworn counter affidavit. By leave of the Court, the matter was argued orally. The application was argued by way of audio teleconference where both parties were remotely appeared. The applicant was represented by the learned counsel Zacharia Nyarombo while the respondent defended himself.

On the chamber application, the applicant advanced the following prayers: -

- i. That this court be pleased to certify points of law in respect of an intended Appeal against the decision of this court in Probate Appeal No. 14 of 2020
- ii. Each party bears its own costs
- iii. Any other reliefs this court may deem fit and just to grant.

The applicant on paragraph 5 of her sworn affidavit, listed seven (7) points of law that he prays this court to certify.



Submitting first, the applicant counsel prays this court to adopt the affidavit sworn in by the applicant to form part of his submissions.

On the first point, she would like the court to certify that the honorable court erred in law by failure to address the reasons for appeal instead discussed the flow of events until he reached the decision. She addresses that failure by the judge to address the grounds of appeal contravenes the law as provided for under Order XX Rule 4 and 5 of the Civil Procedure Code, Cap. 33 RE. 2019 which requires the judgment to include the concise statement of the case and points of determination. The decision of each point and reasons for the decision. So she prays the court to certify the point of law for consideration by the Court of Appeal.

On the second point, the applicant submitted that the honorable judge erred in law for declaring that the applicant separated with her deceased husband without being afforded with any proof. It is her submission that under sections 110(1) and 112 of the Law of the Evidence Act Cap. 6 RE: 2019 that the one who alleges must prove his allegation as the issue of separation was believed without proof. Since there was no proof she prays this point to be certified so as to be determined by the Court of Appeal.



On the third ground, the applicant avers that the honorable judge erred to involve the divorcee of the deceased and rule out that the deceased had three wives. She went on that all the courts below ruled that Dotto Abdallah was a divorcee and married to another man twenty years ago and blessed with children in her new marriage. She went on that section 120 of the LMA Cap. 29 RE: 2019 provides that the right of the divorcee to benefit from her former husband ceases when she remarries. She, therefore, claims that the involvement of the divorcee as part of the heirs is against the law. She prays this court to certify the above point so as the court of appeal can give the position of the law if it is legal to involve the divorcee in the estate of the deceased.

Submitting on 4th and 5th points together, she avers that the honorable judge erred in law by appointing administrator general without revoking the administration of Mr. Manase and appointing Mr. Manase to be a supervisor of the estate of the late John Lamech Pyuza without the same revoking his administration. She avers that the court should first revoke his appointment as the administrator of Mr. Lameck before appointing the Administrator General and a supervisor. Citing section 49(2) of the Probate and Administration of Estate Cap. 352 RE: 2019, she avers that the law requires the appointment of the



administrator to be revoked before appointing another administrator. She, therefore, prays this court to certify this point of law so as to be determined by the court of appeal.

On the sixth point, she prays for certification so as the Court of Appeal to give out the position of law on whether the interests of the surviving spouse in matrimonial properties acquired during their lifetime are subject to distribution to the legal heirs before setting aside the properties of the surviving spouse acquired during their life time. She avers that, as it was held in the famous case of Bi Hawa Mohamed vs Ali Seif 1983 TLR 146, the properties of the surviving spouse should be set aside first before distributing the estate of the deceased as it is also provided for under section 26 of the Indian Succession Act. She, therefore, prays this point to be certified.

On the seventh point, she prays this court to certify a point of law so as to get the position of the Court of Appeal as to whether if at all the interest of the parents supersede the interest of the surviving spouses and children of the deceased as it is claimed in para 2(vii) of the counter affidavit. She avers that all the three courts did not determine the lifestyle of the deceased and under sections 26, 27, and 30 of the Indian Succession Act, and GN. 436 of 1963 provides the list of



persons who can inherit the deceased estate. She, therefore, prays this court to certify this point for the court of appeal to make its determination.

Responding, the respondent briefly submitted that the trial Judge was correct in his decision as he reached the judgment after considered the evidence submitted by both parties. He avers that the deceased had only one wife whom they swear an affidavit before the court to marry one Anneth Constantine and the deceased left a will that the applicant was a mere woman whom they bigoted children together and Doto Abdallah was not the wife of the deceased. Therefore he insisted that the honorable judge was right in his decision to include the appointment of the administrator general and the supervisor.

He went further submitting on the sixth point that when a man lived with a wife and they have not jointly acquired the properties, the properties that solely belongs to the deceased are not subject to division. On the seventh point, he responded that children and parents of the deceased are the legal heirs and they are entitled to inherit under the law and that it is not proper for the concubine to inherit the properties of the deceased.



In her short rejoinder, the applicant prays this court to certify the points of law fronted as prayed in the affidavit.

I have given careful consideration to the arguments for and against the application herein advanced by both parties, and the central issue for determination and consideration is *whether there are contentious points of law raised in this application that requires determination by the Court of Appeal.*

In support of the application for certification, I hereby reproduce verbatim issues that the applicant stated in paragraph five of her affidavit as she believed to be the pertinent questions for determination by the Court of Appeal of Tanzania:-

- (i) That the learned judge erred in law by failing to address the grounds of appeal and instead discussed the flow of events.*
- (ii) That the learned judge erred in law by declaring that the appellant had separated with her deceased husband before his demise without any evidence and proof.*
- (iii) That the learned judge erred in law by involving a divorcee as the wife of the deceased*
- (iv) That the learned judge erred in law appointing the Administrator General as the administrator of the estate of*



the late John Lameck Pyuza without revoking the appointment of the respondent.

(v) The learned trial judge erred in law in appointing the respondent as a supervisor of the estate of the late John Lameck Pyuza contrary to the Law and without revoking his appointments as the administrator.

(vi) Whether the interest of the surviving spouse in matrimonial properties is subject of distribution in the estate of the deceased spouse.

(vii) Whether the interests of the parents of the deceased supersede the interests of the surviving spouse and children of the deceased.

I have perused the applicant's grounds in support of the certification and the pertinent questions that he seeks the Court of Appeal of Tanzania to determine. In determining this application this court is mandated under section 5 (2) (c) of the Appellate Jurisdiction Act, 1979 which state that:-

"No appeal shall lie against any decision or order of the High Court in any proceedings under Heading (c) of Part III of the Magistrates' Courts Act, 1963 unless the High Court certified that a point of law is involved in the decision or order."



It is crystal clear from the wording of the section that the question of whether or not a point of law is involved in the decision or order sought to be appealed against is the responsibility of this Court.

Reading the applicant's affidavit, I have noted that the applicant's grievances were against this Court decision. Reading, paragraph 5 of the affidavit, the applicant has demonstrated what she believes to be points of law the same I have reproduced as they appear in the applicant's affidavit.

The applicant's affidavit which was drawn and filed by Mr. Ngassa Maduhu, learned advocate invited me to certify that there are some points of law that call for the attention of the Court of Appeal of Tanzania. I have taken time to study the affidavit and specifically paragraph 5 thereof. First, It seems to me, according to the applicant's affidavit, on paragraph 5 (vi) and (vii) the applicant does not only challenge the decision of this court but also challenges the distribution of the estate of the deceased though the administrator is yet to be appointed.

Secondly, the record shows that, the applicant's affidavit was drawn and filed by Mr. Ngassa Maduhu learned advocate, but unfortunately, it is more likely of the petition of appeal rather than establishing points of law to be certified by this court. it is clear that a


point of law does not need facts to prove its existence but what has been averred under paragraphs 5 (i) to (v) are not points of law worth for certification.

In my considered opinion, after revisiting the judgment of this court and the pleadings and carefully going through the applicants' affidavit, the said affidavit does not demonstrate any points of law that were involved in the intended third appeal which calls for the attention of the Court of Appeal of Tanzania.


In the upshot, the application for certification on point of law is hereby dismissed for the reason that there is no any point of law raised by the applicant which attracts the attention of the Court of Appeal of Tanzania. No order as to costs

Order accordingly.




M.MNYUKWA
JUDGE
26/10/2021

Ruling delivered on 26th day of October, 2021 via audio teleconference whereby all parties were remotely present.


M.MNYUKWA
JUDGE
26/10/2021