

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF MWANZA)

AT MWANZA

MISC. LAND APPLICATION NO. 51 OF 2021

(Arising HC Civil Revision No. 04 of 2021, from the judgment of PC Probate Cause No. 109 of 2021.)

IDDI SHABANI APPLICANT

VERSUS

MSENGUZI SHABANIRESPONDENT

RULING

31st August & 2nd November, 2021

ISMAIL, J.

The applicant's quest through this application is for certification of a point of law that justifies consideration of the impending appeal. This application intends to move the Court to certify that a point of law, worth a consideration by the Court of Appeal of Tanzania, exists. The decision sought to be impugned arises from HC Civil Revision No. 04 of 2021, which culminated in the nullification of the appeal proceedings in Probate Appeal No. 1 of 2021.



The origin of these proceedings is PC. Probate Cause No. 109 of 2011 whose decision was delivered on 31st December, 2020, in which the trial Court (Ilemela Primary Court) ordered that a landed property standing on Plot No. 411 Block "L" Pasiansi, Ilemela Mwanza be sold and have the proceeds shared among the heirs or beneficiaries. The decision was not to the applicant's liking, hence his decision to appeal, through Probate Appeal No. 1 of 2021. Midway through the disposal of the said appeal, the Court invoked its revisional powers and called the record of the matter, and, after hearing the parties, nullified the said appeal proceedings and gave the trial decision a thumbs up. The Court confirmed the sale order. The view held by the applicant is that the decision to nullify the probate appeal proceedings was erroneous because there was no revisable order or any illegality or irregularity that would justify invocation of the revisional order.

The application is supported by an affidavit affirmed by the applicant himself, setting out grounds on which the prayer for certification of a point of law is based. The application has been strenuously opposed by the respondent, through a counter-affidavit affirmed by the respondent. The view held by the respondent is that the decision sought to be challenged on appeal is correct and raises no serious issues against which an appeal may

lie. He took the view that the decision of the Court is correct and unblemished.

At the instance of the parties, disposal of the application was done through written submissions both of which were filed consistent with the schedule of filing.

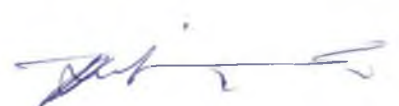
Submitting in support of the application, Mr. Kassim Gilla, learned counsel for the applicant, submitted that certification on a point of law is a necessary step that is aimed at determining whether a point of law exists for determination by the Court of Appeal. The counsel argued that, noting that the matter originates from the Primary Court, then application of the imperative requirement of section 5 (2) (c) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019, through the filing of the instant application, is inevitable. He argued that such step constitutes a screening process that is consistent with what was held in ***Ali Vuai v. Suwedi Mzee*** [2004] TLR 110; and ***Harban Haji Mosi & Another v. Omar Hilal Seif & Another*** [2001] TLR 409.

Referring to paragraphs 4 (a), (b), (c), of the supporting affidavit, Mr. Gilla contended that the decision sought to be appealed against is

problematic as revision in that respect was preferred prematurely. This is in view of the fact that the said revision was carried out against a non-existent order. The learned counsel further argued that the order for sale of the deceased's estate was made in contravention of the provisions of Rule 2 (a-h) of the 5th Schedule to the Magistrates' Court's Act, Cap. 11, in which powers of primary courts in the administration of deceased's estates are expressly spelt out. Mr. Gilla prayed that the application be granted as prayed.

In the respondent's rebuttal submission, Mr. Joseph Mugabe, learned counsel, shrugged off the applicant's contention. He argued that the application is lacking in merit, since the provisions of section 30 (1) (a) of Cap. 11 vest supervisory powers in the Court. These powers, the counsel argued, include those of calling for and inspecting the record of any proceedings, even where no decision has been made, if doing so will not deflect the cause of justice. He saw nothing erroneous in the Court's intervention, knowing that execution of the trial court's decision had stalled since 2011.

Mr. Mugabe further contended that the granting of the application will serve to exacerbate the delay and subject the estate to endless litigation and



delay the cause of justice to the beneficiaries of the estate. He prayed that the application be dismissed with costs.

The singular question that can be distilled from these rival submissions is: Has the application met the threshold requisite for certification of a point of law warranting the attention of the Court of Appeal?

The legal position, as it currently obtains, is to the effect that appeals against decisions in matters originating from the primary courts can only lie to the Court of Appeal of Tanzania upon certification, by the Court, that a point of law of sufficient importance exists. This requirement, which serves as a condition precedent for exercising the right of appeal, is a sifting process that ensures that only worthy matters find their way to the apex Court. As stated by the applicant's counsel, this is a requirement under section 5 (2) (c) which provides as hereunder:

"(2) *Notwithstanding the provisions of subsection (1)–
no appeal shall lie against any decision or order of
the High Court in any proceedings under Head (c)
of Part III of the Magistrates' Courts Act unless the
High Court certifies that a point of law is involved
in the decision or order.*"

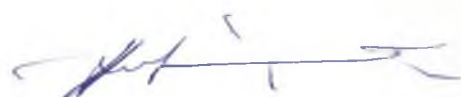
Part III of Cap. 11 deals with matters whose original jurisdiction was, as is the instant matter, exercised by the primary court, and appeals or revisions have been taken to higher courts. Conformity with the quoted provision has been judicially underscored in numerous decisions, including those that have been cited by Mr. Gilla.

See also: ***Omari Yusufu v. Mwajuma Yusufu & Another*** [1983] TLR 29; ***Dickson Rubingwa v. Paulo Lazaro***, CAT-Civil Application No. 1 Of 2008; and ***Marco Kimiri & Another v. Naishoki Eliau Kimiri***, CAT-Civil Appeal No. 39 of 2012 (all unreported).

In the subsequent decision of ***Abdallah Matata v. Raphael Mwaja***, CAT-Criminal Appeal No. 191 of 2013 (DDM-unreported), the Court of Appeal accentuated the requirement of certifying the point of law, when it held:

"In order to lodge a competent appeal to the Court, the intended appellant has to go through the High Court first with an application for a certificate that there is a point of law involved in the intended appeal. It is only when the appellant is armed with the certificate from the High Court, that a competent appeal may be instituted in this Court."

The applicant has come up with four areas of contention that he perceives to be points of law which are sufficient to serve as a ticket to the



Court of Appeal. These areas of concern have been discounted by the respondent as being of no legal significance to the parties. They are, in his view, a choreographed way of endlessly pursuing the proceedings relating to this matter. While I appreciate the respondent's concern and subscription that litigation must come to a speedy end, it is not lost on the fact that issues raised by the applicant bear some sufficient importance which make them valid points of law that can engage the minds of the Court of Appeal. Issues relating to jurisdiction or lack of it; absence of a revisable order; and absence of illegality or irregularity as the basis for intervention are, in my considered view, weighty and of sufficient importance to pass for determination by the Court of Appeal.

Consequently, as I grant the application, I certify the following points of law:

- 1. Whether it was proper for the High Court to entertain an application for revision without there being a revisable order or decision in respect of Probate Appeal No. 01 of 2021;*
- 2. Whether it was proper for the High Court to nullify the proceedings of the District Court in the absence of illegality and/or irregularity in respect of Probate Appeal No. 01 of 2021; and*

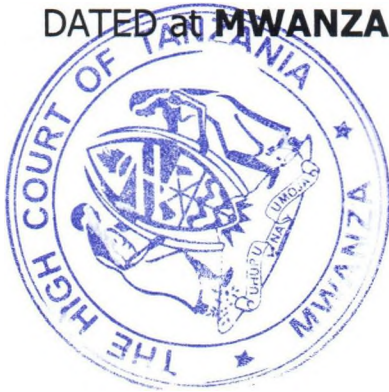
3. *Whether the High Court had jurisdiction to issue and confirm an order for sale of the deceased's estate having found that the applicant herein had failed to discharge his duties as an administrator of the estate.*

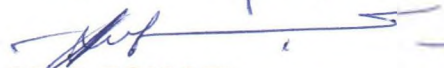
In the upshot of all this, I find merit in the application and I grant it.

Costs to be in the cause.

Order accordingly.

DATED at **MWANZA** this 2nd day of November, 2021.




M.K. ISMAIL
JUDGE