

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

MISC. APPLICATION NO. 104 OF 2021

(Arising from PC Civil Appeal No. 09 of 2021 of the High Court, Mwanza, (Hon. TIGANGA J.), dated 12/7/2021; from Civil Revision No. 69 of 2020 of Nyamagana District Court, Originating from Probate Cause No.111 of 2014 of Mwanza Urban Primary Court of Nyamagana)

ASHA SALUM FARAJI APPLICANT

VERSUS

SILWANI GALATI MWANTEMBE..... RESPONDENT

RULING

27th April & 1st July 2022

ITEMBA, J

Asha Salum Faraji has filed the present application seeking this court to grant a certificate on a point of law to enable her to file an appeal to the Court of Appeal of Tanzania against the decision of this court (Hon. Tiganga, J) in PC Civil Appeal No. 9 of 2021 issued on 12th July 2021.

The subject matter of this application is a Plot no. 43, Block 'B' at Selemani Street within Mwanza City with square feet 6330, herein Plot no.43. So far, the ownership of the said plot has passed through three generations. The brief background of this application is that the said Plot no.43 was owned by Alhaji Salum Faraji who died in 1979. About 35 years later, his daughter



Asha Salum Faraji, the applicant herein, filed a Probate cause no. 114/2014 in respect of the estate of Alhaji Salum Faraji and she was appointed an administratrix.

However, it is in record that, after the deceased's death, the plot no. 43 had passed hands from the deceased to his three children through inheritance. The said children are Kisaka Salum, Ambali Salum and Hashim Salum. Among the three brothers, Hashim Salum and Ambali Salum died in 1995 and 2010 respectively. The surviving brother, Kisaka Salum filed a probate cause no. 139/2012 and was appointed an administrator of estate of his late two brothers. He maintained 50% of the share of the plot and the other 50% was allocated to one Salum Hashim the son of Hashim Salum.

Later on, Kisaka Salum died. Upon his death, one of his children named Salamada Kisaka was appointed an administratrix of his estate through Probate cause no. 41/2014. It follows therefore, the three children were allocated the 50% share of Plot No. 43 by having 16.6% each.

Under joint ownership of the said heirs, Plot No.43 was sold to Siliwani Galati Mwantebe, the respondent herein, who later transferred the plot to his name on 13/7/2018. Soon thereafter, the applicant complained to the



court that Plot no. 43 was part of the estate of Alhaji Salum Faraji and it cannot be sold without her notice.

Following such complaints, it was submitted by the said heirs, with evidence before the trial court that, Plot No. 43 was subject matter in Probate cause no. 139/2012 and had already been distributed to them. Therefore, the trial magistrate having been satisfied with the said evidence, excluded Plot. no. 43 from the estate of the late Alhaji Salum Faraji in Probate cause no. 111/2014 and further referred the matter for revision to the District Court. On 17/6/2020. A ruling was issued by the District Court declaring the transfer of Plot no. 43 by Lulu Kisaka, Salmada Kisaka and Said Kisaka, illegal.

The respondent herein, who was the *bonafide* purchaser of Plot No. 43, was aggrieved by the said ruling and filed a revision application no. 69/2020 before the District Court of Nyamagana. The district court allowed the application. It observed that Plot no. 43 had already been excluded from the estate of the late Alhaji Salum Faraji and already been inherited by the heirs therefore, the trial court cannot make any orders against it. Still dissatisfied, the applicant appealed to this Court vide PC Civil Appeal No. 9 of 2021. This court dismissed the appeal maintaining the district court's

decision. The applicant is further dissatisfied and intends to appeal to the Court of Appeal. Considering that this appeal originates from Primary Court, the applicant is moving this court to certify that the intended appeal has arguable points of law.

The application is supported by the applicant's affidavit which in paragraph 5 stipulates the following grounds for application.

- i. 'Whether it was legally correct for the High Court to decide that it was correct for the District Court to admit and entertain the Revision filed by the respondent while he (the respondent) was not a party before the Primary Court in probate no. 111/2014.*
- ii. Whether it was legally correct for the High Court to decide that a person who was not a party to the original case but has interest in the suit property may file Revision in accordance with Section 4(3) of the Appellate Jurisdiction Act, Cap 141 R.E 2019 while the same application is made under section 22 of the Magistrate Courts Act, Cap 11 R.E 2019.*
- iii. Whether it was legally correct for the High Court to join hands with the District Court in dealing with the issue as to whether it was proper to include the house on Plot no. 43 block 'B' in the estate of the late Alhaj Salum Faraji in Probate cause No. 111/2014 while the said house has already been excluded by the order of the same Primary Court dated 22/02/2015 in the same case'*



The respondent's counsel objected the application, he filed a counter affidavit deposed by Silwani Galati Mwantembe, the respondent.

When the matter was called up for hearing the applicant was represented by Mr. Mathias Mashauri and the respondent had the services of Dr. George Mwaisondola both learned counsels.

Arguing in support of the application, the counsel for the applicant prayed for the contents of the applicant's affidavit to be adopted. In both his chamber summons and submissions, the applicant's counsel explained that the application is for a certificate on point of law and not for leave to appeal although he had cited the provisions which deals with application for leave as well. He referred the grounds of application in paragraph 5 (i) to (iii) of the applicant's affidavit and stated that it is undisputed that Plot no. 43 Block 'B' was the property of Al Haji Salum. He added that upon his death, the administrator of estate was the applicant herein and that in Probate cause no. 111/2014, Plot no. 43 Block 'B' was excluded in the list of properties. He further submitted that one Salum Hashim who was appointed an administrator of estate in Probate Cause no. 139/2012, did not include Plot No. 43 Block 'B' in the first place. That, the Plot no. 43 was included in the probate later on, while the applicant therein Salum Hashim knew that all this



time there has never been an administrator of estate of the said property. He therefore asked the court to certify that there are points of law to be referred to the Court of Appeal based on the grounds stated in the applicant's affidavit.

In reply, Dr. Mwaisondola opposed the application and submitted that this being an application for certificate on point of law there must be legal arguments raised as opposed to mere facts. He stated that both the District Court and the High Court have dealt with those issues of facts already. That, the one who filed the application for revision before the District Court was the respondent and the applicant later filed the appeal before the High Court and there was only one ground of appeal which was 'whether it was proper for the District Court to entertain the respondent who was not a party in the main case' and that even the Judgment was based on the same ground of appeal. Therefore, he argued that, all the three grounds in paragraph 5 of the affidavit were discussed and disposed by the High Court. Dr. Mwaisondola added that ownership of Plot no. 43 was not an issue before the High Court. Referring to the case of **British Broadcasting Corporation v Eric Sikujua Ng'maryo**, Court of Appeal, Civil application No. 138 of 2004 (unreported), he argued that for the certificate on point of



law to be issued there must be a new or novel point of law and that the grounds appearing in Paragraph 5(i,ii,iii) of the applicant's affidavit do not contain a novel point of law as the law is clear through case laws, that if a person has interest in the property and he is not a party, the avenue available is revision. Either, he did not cite those case laws.

In a brief rejoinder, Mr. Mashauri submitted that the application is for certificate on point of law and not for leave to appeal. He admitted that it was the respondent who applied for revision before the District court and that the applicant appealed to the High Court. He added that there were about nine grounds of appeal one of them being exclusion of Plot no. 43, from Probate cause no. 111/2014, thus the applicant had a right to be heard on such ground.

Having heard both parties and having gone through the records, the issue is whether this application has merit. Section 5(2) (c) of the Appellate Jurisdiction Act Cap, 141 R.E (2019) provides that;

(2) Notwithstanding the provision of subsection (1)-

(c) 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

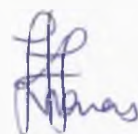


*Act unless the High Court certifies **that a point of law is involved in the decision or order***

I am also mindful of the requirement that the High Court must be satisfied that what is raised fall within a point of law to be determined by the court. In the case of **Dorina N Mkumwa v Edwin Davis Hamis, (Civil Appeal no. 53 of 2017) [2018] TZCA 221**, the Court of Appeal decided that:

'Therefore, when the High Court receives application to certify point of law, we expect the ruling showing serious evaluation of the question whether what is proposed as a point of law is worth to be certified to the Court of Appeal. This Court does not expect the certifying High Court to act as an uncritical conduct to allow whatsoever the intending appellant proposes as point of law to be perfunctorily forwarded to the Court as point of law.'

It follows therefore, these grounds of application will stand as a point of law if they are yet to be decided by the Court of Appeal of which the consideration is sought. In respect of the three grounds raised in paragraph 5 (i) (iii) and (iii) of the applicant's affidavit and arguments by both parties, in other words, the first issue is "*Whether a revision application can be filed by a person who was not a party to a probate cause*". It has not been shown by either party that this first issue has been already determined by the Court of Appeal. However, it was submitted by the counsel for the respondent that




this issue was determined by both the District Court and the High Court and the findings of the court is what stands to be the legal position. Having gone through the records, the High Court Judgment by my brother (Hon. Tiganga J,) at page 17 and 18 he analysed this issue and answered it in affirmative. The High Court referred to the case of **Arcopar (O.M) S.A v Harbet Marwa & Family Investment Limited & 3 others** Civil Application No. 94/2012 CAT (Unreported) which underlined the principle that a person who was not a party to the case before the High Court if he feels that he has interest in the suit property and cannot appeal, his only remedy is to approach the court of appeal by way of revision under section 4(3) of the Appellate Jurisdiction Act [Cap 141 R.E 2019]. Further, it has been the Court of Appeal position that proceedings which commences in the absence of the necessary party denies that party a right to be heard, this constitutes a major defect which goes to the root of the case and thus renders the proceedings null and void. See the cases of **National Housing Corporation Vs. Tanzania Shoe Company and Others** [1995] T.L.R No. 251, **Ndensamburo Vs. Attorney General** [1997] T.L.R 137 and **Bank of Tanzania Vs. Said A. Marinda & Attorney General**, Civil Application No. 74 of 1998, CAT at Dar es Salaam (Unreported).



This issue has been properly evaluated by the High Court and it has based on the principal of laws which are established in a number of case laws. Therefore, I do not find this as a point of law worthy to be referred to the Court of Appeal for determination.

The second issue which is related to the first one refers to High Court's interpretation of **Arcopar (O.M) S.A v Harbet Marwa & Family Investment Limited & 3 others** (supra). The applicant's ground is whether the legal principle which was meant for the High Court and which was referring the Appellate Jurisdiction Act (supra) can apply to the District Court where the Magistrate Court Act is applicable. In his decision the High Court Judge stated and I quote;

'The issue therefore is whether section 4(3) of the Appellate Jurisdiction Act materially provide in a similar wording as section 22(1) of the Magistrate Court Act? Ignoring the words which specifically mention the High Court and Court of Appeal, we find the purpose of the two provisions are similar, as both are providing, each court with supervisory powers to make sure that, orders, decisions and proceedings made by respective lower courts, are correct, regular legal and proper. That said, this court can therefore



justifiably borrow a leaf of interpretation of section 4(3) of the appellate Jurisdiction Act, and apply the same in interpreting section 22(1) of the Magistrate's Court Act.

I believe that what the High court did was to adopt and apply the already established principle by the Court of appeal decision. The court could not adopt just the principle in isolation of the reasoning which involved the citing of the Appellate Jurisdiction Act. In the second ground, I find that there is no legal point worth of certification.

The third issue is in relation to whether the High Court properly upheld the District decision of excluding the House in Plot no. 43 in the estate of the late Alhaj Salum Faraji in probate cause no. 111 of 2014 while the said house had already been excluded by the order of the same primary court. Records show that exclusion of the Plot no. 43 was done following submission of evidence that the Plot had already been dealt with in Probate cause no 139/2012.

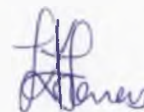
In the case of **Agnes Severin vs. Mussa Mdoe** [1989] TZCA 11; [22 September 1989 TANZLII]; 1989 TLR 164 (TZCA) it was observed that: -



*'The question **whether there was any evidence at all to support the decision is a question of law which can properly be certified for the opinion of this court. But whether the evidence as adduced was sufficient to support the decision is a question of fact which could not properly be the subject of a certificate for the opinion of this court.** For, this court takes the view that if there was some evidence on which the courts below could have arrived at the decision they did, then this court will not interfere, even though had this court itself tried the case it might have come to a different decision. Those who are called upon to certify points of law should, therefore, keep this distinction in mind in order to ensure that only the correct questions are certified for the opinion of this court.'*

Looking at the contents of paragraph 5(iii) of the Applicant's affidavit the applicant aims to challenge the way in which the High court assessed the lower courts' evidence in arriving at its findings of excluding plot no 43 B. The trial court records through the ruling dated 22/1/2015 shows states and I quote"

'Mahakama baada ya kupitia shauri na. 139/2019 imejiridhisha kuwa ni kweli nyumba na. 43 ilikwisha orodheshwa katika mirathi no. 139/2012 na kufanyiwa mgao kwa warithi KISAKA SALUM na SALUM HASHIM, hivyo haikutakiwa kuingizwa katika mirathi nyingine ambayo ni mirathi no. 111/2014'



Summarily, the paragraph translates that after the trial court perusing the records in Probate cause no. 139/2012 it was satisfied that the plot no. 43 was already dealt with and distributed therein. Therefore, in this 3rd ground, the question raised by the applicant is not '*whether or not there was any evidence at all*' but '*whether the evidence was sufficient for the court to reach its findings*'. According to the principle in **Agnes Severin** this issue of sufficiency of evidence does not amount to a point of law. I therefore decline to certify this ground as a point of law as it does not qualify as one.

That being said, I find that all the three grounds of application have no merit. The application is hereby dismissed in its totality.

No order for costs is made.

DATED at **MWANZA** this 1st day of July, 2022.



L. J. ITEMBA
JUDGE