

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF DAR ES SALAAM**

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 60 OF 2022

IMELDA YAKOBO MLEKWA APPLICANT

VERSUS

ANDREW PETER RESPONDENT

***(Arising from the decision of this Court (Mwaseba, J.)
in PC Civil Appeal No. 1 of 2020)***

RULING

18th and 20th July, 2022

KISANYA, J.:

The applicant is the sister of the late Peter Walelo Mlekwa. Upon petitioning for letters of administration, she was appointed by the Primary Court of Ukonga (henceforth "the trial court") as an administratrix of the estate of the deceased. After sometime, the respondent filed an application for revocation of the letters of administration granted to the applicant. At the end of the day, the trial court granted the application. It went on revoking the applicant's granted letters of administration. In lieu thereof, the respondent was appointed as the administrator of the estate late Peter Walelo Mlekwa.

That decision irked the applicant. She unsuccessfully appealed to the District Court of Ilala in Civil Appeal No. 55 of 2019. Her second appeal to this Court was also dismissed for want of merit on 13th January, 2022 in PC Civil Appeal No. 1 of 2020.

Still aggrieved, the applicant lodged a notice of appeal. Subsequently, she filed the present application seeking for a certificate on point of law. The application was made under section 5(2)(c) of the Appellate Jurisdiction Act [Cap. 141, R.E. 2019] (the AJA) and rule 45(a) of the Court of Appeal Rules, R.E. 2019 (the Rules). Supporting the application is an affidavit of the applicant's counsel one, Mr. Stevens Kosi Madulu.

Pursuant to paragraph 7 of the supporting affidavit, this Court is called upon to certify the following points of law, in verbatim: -

- (i) *Whether the presiding High Court Judge (Hon. Mwaseba-Judge) was correct in law and fact in dismissing the Appellant's appeal and upholding the decisions and order(s) of both lower courts annulling/revoking the appointment of the Applicant to be the Administratrix of the late Peter Walelo Mlekwa's estate without considering that she had mandate from the clan and most of the*

beneficiaries hence she is a fit and trusted person to assume the duties.

- (ii) Whether the appellate High Court decision and Decree of the Court (Hon. N.R. Mwaseba-J) was justified in the circumstances without finding that the evidence on record from both lower courts as well as the submissions of both sides shows that the Respondent if appointed to be Administrator of the estate of the late Peter Walelo Mlekwa has no reputation and capability to act faithfully, diligently and impartially in administering the estate to other rightful beneficiaries (owners) because he will not have the confidence of all beneficiaries or dependants of the deceased.*
- (iii) Whether the decision and Decree of the High Court (Hon. N.R. Mwaseba, J,) was reached fairly and justified in upholding the decisions/orders from both lower courts when the same was not proved on a balance of probabilities a duty required in civil cases.*

When the application was called on for hearing on 5th July, 2022, it was agreed that the matter be disposed of by way of written submissions. Both parties filed their respective submissions in accordance with the Court's order.

Arguing the application, Mr. Madulu prayed to adopt the grounds and reasons set forth in the supporting affidavit and the orders sought in the chamber summons to form part of his submission. Making reference to the points of law deposed in paragraph 7((i),(ii) and (iii) of the supporting affidavit, the learned counsel submitted at length on how this Court erred in its decision. He, therefore, urged this Court to certify the proposed points of law for further determination by the Court of Appeal.

In his reply submission, the respondent commenced by contending that the application was incompetent. His contention was based on the reason that the applicant was intending to appeal against the ruling which was not issued by this Court. He submitted that the Court issued a judgment.

On the merit of the application, the respondent contended that the applicant had argued the proposed grounds of appeal instead of demonstrating how she was affected by the decision of this Court. He argued further that the requirement to certify the points of law is aimed at sparing the Court of Appeal from determining trivial issues and to enable it to give attention to the errors committed by the lower courts. He went on to submit that this Court has no mandate to determine the

grounds as submitted by the counsel for the applicant. Therefore, the respondent invited me to dismiss the application for want of merit.

On my part, the law is settled that in exercising the powers envisaged under section 5(2) (c) of the Appellate Jurisdiction Act (supra), the duty of this Court is to evaluate the question on whether what is being proposed by the applicant is a point of law worth to be certified for determination by the Court of Appeal. This stance was taken in the case of **Dorina N. Mkumwa vs Edwin David Hamis**, Civil Appeal No. 53 of 2017, CAT - Mwanza (unreported) in which the Court of Appeal held 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 conduit to allow whatsoever the intending appellant proposes as point of law to be perfunctorily forwarded to the court as point of law"

Similarly, in another case of **Magige Nyamoyo Kisima Kisinja vs Merania Mapambo Machiwa**, Civil Appeal No. 87 of 2018 (unreported), the Court of Appeal underlined as follows on what constitutes a point of law:-

"We must emphasize that the point to be certified by the High Court must be that of legal nature and significant to warrant the decision of the Court. It is not enough for a party in a third appeal, like in the instant appeal, to simply think the lower court is wrong in its decision to have his case heard by the Court of appeal. Matters of law which the Court is called upon to determine must transcend the interest of the immediate parties in the appeal. Indeed, in some cases matters of law placed before the Court for determination are of public importance especially when an interpretation of the law is involved."

Having considered the submission made by both parties, the pleadings and the above position of law, the issue for my determination is whether the applicant has advanced point(s) of law worth of consideration by the Court of Appeal.

Starting with the proposed first ground, I have noticed that it is premised on the issue whether the High Court Judge was correct in law and fact in dismissing the Appellant's appeal and upholding the decisions and order(s) of both lower courts. The wording of this ground suggests that it is based on the issue of "law and facts". Further to this, Mr. Madulu's submission in support of this ground was to the effect that this

Court failed to consider that the applicant was a fit and trusted person to administer the estate of the deceased while she had been appointed by the clan and most beneficiaries. It is my considered view that the issue whether the applicant is fit and trusted person is of fact and not law. That being the case, the first ground cannot be certified as a pure point of law.

Moving to the proposed second ground, this Court is urged to certify the point whether the decision of the High Court was justified. As depicted from the said ground and submission of Mr. Madulu, this ground is based on the contention that the evidence on record and the submissions from both sides indicated that the Respondent had no reputation and capability to act faithfully, diligently and impartially in administering the estate. This ground is further premised on the reason that the respondent will not have the confidence of all beneficiaries or dependants. As discussed in the proposed first ground, the issue whether other beneficiaries or dependants do not have confidence in the respondent calls for evidence. Thus, such issue is not an issue of law. Its determination depends on whether the alleged fact was proved in evidence against the respondent.

Last for consideration is the proposed third ground in which the appellant fault this Court for upholding the decision of the lower courts while the respondent did not prove his case on the balance of probabilities. In that regard, Mr. Madulu was of the view that the decision of this Court was reached “unfairly and unjustified.” However, the learned counsel did not elaborate more on the said ground. Therefore, I will not dwell into determining the same.

In the event and for the reasons given, I find no point of law to be certified by this Court for determination by the Court of Appeal. Consequently, the application is hereby dismissed for want of merit. This being a probate matter, I make no order as to costs.

DATED at DAR ES SALAAM this 20th day of July, 2022.



S.E. Kisanya
JUDGE