

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

**MISC. CIVIL APPLICATION NO.42 OF 2021**

(C/f (C/F Pc Civil Appeal No. 5 of 2020 of the High Court of Tanzania at Moshi and Civil Appeal No. 12 of 2019 of the District Court of Moshi, Original Probate Cause No. 108 of 2018 of Moshi Urban Primary Court at Moshi)

**ABDUL ISMAIL BAYUMI.....APPLICANT**

**versus**

**URSULA CHRISTOS MITROPOLOUS.....RESPONDENT**

**RULING**

*26/5/2022 & 8/7/2022*

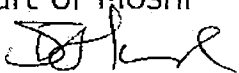
**SIMFUKWE, J**

Abdul Ismail Bayumi, the applicant herein brought this application under **section 5(1) (c) of the Appellate Jurisdiction Act**, where in the Chamber summons, he prayed this court to certify points of law to be determined by the Court of Appeal of Tanzania against the decision of this Court in Civil Appeal No. 5 of 2020.

The application was supported by applicant's sworn affidavit which was contested by the respondent's counter affidavit.

The applicant was represented by Mr. Peter Njau, the learned counsel while the respondent was represented by Mr. Philemon Shio learned counsel.

The background of this application started in the primary court of Moshi

  
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(the trial court) in Probate Cause No. 108 of 2018 in which the applicant prayed to be appointed administrator of his late mother's estate. His application faced an objection from his sister who is the respondent herein. The objection was filed through Misc. Application No. 47 of 2018 on the ground that the same deceased's letters of administration had been granted to the respondent before the District Court of Ilala at Samora Dar es Salaam in Probate Cause No. 21 of 2000. The trial court sustained the objection and held that Probate Cause No. 108 of 2018 was *res judicata* before the court. The applicant was aggrieved. He appealed before Moshi District Court in Civil Appeal No. 12 of 2019 (1<sup>st</sup> appellate court). However, he faced the same preliminary objection of *res judicata*. The 1<sup>st</sup> appellate court also dismissed the appeal on the ground that the matter was *res judicata*. Still aggrieved, the applicant filed his appeal before this court. Also, luck was not his portion, the appeal was dismissed. Knowing that this matter originated from the primary Court of Moshi and the same cannot be referred to the Court of Appeal of Tanzania without being certified by this Court that there are points of Law worth determination by the Court of Appeal, the applicant filed the instant application.

The applicant's advocate started his submission by narrating the gist and reason of this application which I have already covered in my introduction.

Supporting the application, Mr. Njau submitted that, as sworn by the Applicant in his Affidavit, he is intending to appeal against the illegalities before the 1<sup>st</sup> appellate court which was maintained by this court. Thus, for such illegalities to be corrected by the Court of Appeal, the applicant applied for Certification that there is a point of law in issue.

The applicant's advocate referred to paragraph 9 of the Applicant's affidavit and argued that the illegalities have been dully narrated therein

which the applicant called upon the court to certify a point of law for the Court of Appeal to determine as to *Whether the appellate Judge was correct by holding that the 1<sup>st</sup> Appellate Court was correct to rule that the matter was Res-judicata in determining the preliminary objection which the same court had overruled that it had no legs to stand.*

Elaborating this point of law, the learned advocate stated that, it is known that the impact of overruling a preliminary objection is as good as denying the same which deserve to be dismissed. However, in the instant matter, the Magistrate overruled the preliminary objection that it had no legs to stand, but then proceeded to dismiss the appeal prematurely. That, this position was also maintained to be the correct position by this court by treating the same as typing error. Thus, from this point the applicant prayed this court to certify the point of law to be considered by the Court of Appeal of Tanzania specifically on the issue of res judicata.

Another point of law which this court was sought to be certified as point of law is Whether the 1<sup>st</sup> and 2<sup>nd</sup> appellate Courts were correct to receive evidence of fact at the hearing of preliminary objection and later rely on it to dismiss the Appeal. Mr. Njau expounded this issue by stating that the case in the lower courts as well as before this court ended by way of preliminary objection that the matter was res judicata. That, during the hearing of the said preliminary objections which were conducted by way of written submissions, the Respondent's Counsel attached evidence on his submission which was relied upon by both courts in their decision. Mr. Njau commented that the same was done to the surprise of the applicant herein thus it is as good as saying that the appeal was heard by way of Preliminary objection since the appeal was as to whether the District Court was proper to hold that the matter was res judicata. That, instead of

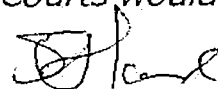
determining the appeal, the Respondent raised the objection of res judicata over the appeal of res judicata which finally denied the Applicant right to be heard.

Basing on the pointed illegalities above as also mentioned under paragraph 9 of his affidavit, Mr. Njau was of the view that it is prudent that the applicant be availed an opportunity to address those illegalities before the Court of Appeal of Tanzania which has the duty to correct them. To put emphasis on his contention, he cited the case of **Arunaben Chaggan Mistry versus Naushad Mohamed Hussein & 3 others Civil Application No. 6 of 2016**, where at page 10 last paragraph, the Court of Appeal held that:

*"The legal position is settled. When there is an allegation of illegality, it is important to give an opportunity to the party making such allegation to have the issue considered."*

Mr. Njau submitted further that, it is a procedural requirement of the Law that for any third appeal there has to be a Certificate on point of Law accompanying it whose purpose is to act as screening process to leave for only deserving cases for the attention of the Court only on matters of legal significance and public importance, as it was held by the Court of Appeal in the case of **ALI VUAI vs SUWEDI MZEE SUWEDI, [2004] T.L.R,** at page 110, that:

*"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*



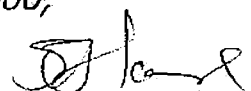
*unless the High Court certifies that a point of law is involved in the decision or order;"*

On the strength of above cited authority, it was Mr. Njau's argument that the 3<sup>rd</sup> appeal cannot reach or be entertained by the Court of Appeal without certificate on point of law involved in the impugned decision. He also opined that; the Applicant has established points of law involved in his intended appeal. He opined that, considering the fact that the applicant has already been granted leave to appeal to the Court of Appeal since 25/2/2021, then the aspect of Res judicata, and the issue of receiving evidence at the hearing of the preliminary objection amount to good points of law which deserve to be certified by this Court to get attention of the Court of Appeal.

Basing on such arguments, the applicant's advocate believed that, they had established points of law to be determined by the Court of Appeal. He prayed the court to allow this application with costs by certifying points of law worth consideration by the Court of Appeal of Tanzania against the decision of this court in Civil Appeal No. 5 of 2020 delivered on 24/7/2020.

Replying the first point of law in respect of illegality, Mr. Philemon Shio criticised the applicant's counsel for failure to read the whole judgment and understand the same. He stated that in Civil Appeal No. 12 of 2019 the objections were not overruled rather it was just a slip of the pen when J.G. Mawole-RM ruled that:

*"In the foregoing to find the objection made by the respondent worth to have no legs to stand. I find the matter res-judicata as the same was already decided by the District Court of Ilala in Probate Cause No. 21/2000,*



*and / therefore dismiss this appeal in its entirety..."*

The learned counsel for the respondent continued to submit that, in making the above contradiction clear, Hon. Mkapa J. explained clearly the case and also gave the reasons why the case is termed to be res judicata as seen under Page 6 and 7 of the said judgment in PC Civil Appeal No. 5 of 2020, That, in her judgment, Hon. Mkapa J, at page 5 clearly explained on the controversy and ruled that:

*'...First, it is my considered view that the word 'no' was just a slip of a pen as the following sentence negates the magistrate's position if at all she meant to overrule the objection: That means she did sustain the preliminary objection raised and not overruled it as alleged by the appellant."*

Therefore, Mr. Shio blamed the counsel for the Applicant for failure to take time to read the said judgment in its entirety and went on to file this application to certify point of law to be considered by the Court of Appeal.

Mr. Shio also contended that; determination of res Judicata can be made by looking at the pleadings and judgment in comparison to the latter application. That, the court after going through the claims, cause of action, reliefs and issues that's when it can reach into a decision that the matter is res judicata or not.

Mr. Shio while elaborating why the matter was res judicata, he said that the same parties were litigating on the same matter, same cause of action with the aim of being issued with the same order from the court. That, the respondent applied for administration of the estate of her late mother in the year 2000 through Probate and Administration Cause No. 20 of 2000. The Applicant applied for the same in the year 2018 through

Probate Cause No. 108 of 2018 in which the Respondent after being aware of the former matter, objected and her objections were upheld. That, such trend went on, hence the instant application by the Applicant

In the circumstances, Mr. Shio was of the view that for interests of justice and without wasting time of the court by floodgate of cases, it is very clear that the matter was res judicata as all elements were met and well elaborated by both trial magistrates and the judge. Thus, this cannot amount to illegality as raised by the Applicant's counsel. Also, the same cannot be raised as a point of illegality worth to be determined by the Court of Appeal. He prayed the court to struck out this application and the decision of the trial court, 1<sup>st</sup> and 2<sup>nd</sup> appellate court to be upheld.

Submitting in respect of the second point of law that; "whether the 1<sup>st</sup> and 2<sup>nd</sup> appellate courts were correct to receive evidence of facts at the hearing of preliminary objection and later rely on it to dismiss the Appeal; the respondent's counsel referred to the case of **MUKISA BISCUITS MANUFACTURING COMPANY LTD V, WEST END DISTRIBUTORS LTD, [1969] EA 696** as was cited with approval in the case of **SALIM O. KABORA VS TANESCO & 2 OTHERS Civil Appeal No. 55 of 2014** which defined what a preliminary point of objection is and prescribes when it can be raised and when it should not be raised. The relevant part states that:

*"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial*

*discretion.*“

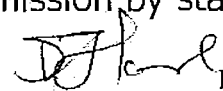
Basing on the above cited cases, it was submitted that, the 1<sup>st</sup> and the 2<sup>nd</sup> appellate courts were both correct by upholding that the matter was res judicata. That, the 1<sup>st</sup> and 2<sup>nd</sup> appellate courts relied both in the pleadings and the judgments presented. Even by looking, nowhere in the records it showed there were some facts that were ascertained rather they were looking at the pleadings and the judgments regarding the same case in reaching at their decisions.

Mr. Shio's argument in respect of right to be heard was that raising the same while there was a preliminary objection on pure point of law that was capable of disposing of the matter is not a matter to be raised as point of law so as to be ascertained by the Court of Appeal, rather it is a matter of fact that requires evidence to be ascertained. That, the issue as to whether the applicant was given an opportunity to be heard or not needs evidence to establish it. It can therefore not be certified as the point of law as apparently it is a point of fact.

Mr Shio condemned the applicant's advocate for failure to establish point of law worth to be certified by this Court for consideration by the Court of Appeal of Tanzania regarding the second point.

Mr. Shio also pointed out that the nature and practice of primary courts in conducting cases is different with that of the appellate courts. That, in appellate courts when parties present pleadings, submissions etc. they attach their pleadings with the judgments or proceedings on the same case as judicial notice and not new evidence as ascertained by the counsel for the Applicant.

The respondent's advocate concluded his submission by stating that this

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application lacks merit and prayed the same to be dismissed with costs since the applicant's advocate failed to advance genuine reasons for the court to certify as pure points of law to be ascertained by the Court of Appeal of Tanzania.

In rejoinder, Mr. Peter Njau reiterated what had been submitted earlier in chief. He added that the issue of res judicata is contentious between the parties and was the issue of controversy before the 1<sup>st</sup> and 2<sup>nd</sup> appellate courts. He insisted that the issue of res judicata is pure point of law. He faulted the respondent's advocate for failure to address in his submission the case laws plus the authorities cited in their submission. It was Mr. Njau's assumption that failure to address the same is as good as admitting the applicant's application as well as submissions.

Concerning the raised illegality, the learned advocate insisted that the respondent was denied right to be heard. He condemned the respondent's advocate for failure to address the same and blamed him for submitting as if he was arguing the appeal rather than certificate on point of law.

The applicant's advocate also averred that the applicant's submission was based on his affidavit and nothing new was added. Even on the records, the illegality was presented over the issue of res judicata but instead of entertaining it, they dismissed the appeal on the ground that the same was res judicata hence raised the issue as to why the appeal in respect of res judicata be dismissed by way of objection that the matter was res judicata which led to the point of right to be heard which is among the points of law sought by the applicant to be certified herein.

In conclusion, the applicant insisted that he had managed to adduce point

of law worth determination by the Court of Appeal. He reiterated his prayer of granting this application.

Having summarised parties' submissions, I now turn to the issue whether there is point of law worth determination by the Court of Appeal. The applicant moved this court under **section 5(2) (c) of Appellate Jurisdiction Act** (supra) which provides that:

*"(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;*

The Court of Appeal in the case of **Magige Nyamoyo Kisinja vs Merania Mapambo Machiwa, Civil Appeal No. 87 of 2018**, at page 7 had this to say in respect of application to certify existence of 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."*

Basing on the above authorities, the law is very clear that it is the High Court which is vested with exclusive jurisdiction to certify point of law.

Therefore, the applicant's counsel was duty bound to present to this court the grounds on point of law worth determination by the Court of Appeal. Under paragraph 9 of the Applicant's affidavit the grounds which the applicant termed as points of laws are:

- a. Whether the appellate Judge was correct by holding that the 1<sup>st</sup> Appellate Court was correct to rule that the matter was Res-Judicata in determine the preliminary objection which the same court overruled that it has no legs to stand. (sic)*
- b. Whether the appellate Judge was correct to hold that there was typing error on the judgement of the 1<sup>st</sup> Appellate Court.*
- c. Whether the 1<sup>st</sup> and 2<sup>nd</sup> Appellate Courts were correct to receive evidence of fact at the hearing of preliminary objection and later rely on it to dismiss the appeal.*
- d. Whether the 1<sup>st</sup> Appellate Court condemned the Applicant's right to be heard in appeal by dismiss the same after rule that the Respondent Preliminary Objection has no legs to stand. (sic)*

The above grounds were elaborated by the applicant's advocate in his submission. To the contrary, the learned advocate for the respondent disputed the grounds but he argued as if he was submitting against the appeal. Mr. Shio tried to place me into the shoes of the Court of Appeal, while in this application my task is only to certify point of law.

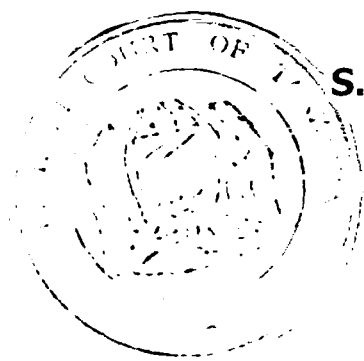
I have taken time to study keenly the affidavit and the submissions of both parties. It seems to me that the above quoted issues raise point of law which deserve to be determined by the Court of Appeal. This is due to the

fact that the case ended both in both courts through the issue of res judicata. Thus, the issue of res judicata is contentious from the 1<sup>st</sup> court to this court. From the above raised points of objection, I am of considered view that, only two points of law are worth determination by the Court of Appeal. Therefore, I hereby rephrase the following points of law from the four points:

- 1. Whether it was proper for the 1<sup>st</sup> appellate court to decide the matter basing on the preliminary objection raised by the respondent that the appeal was res judicata while there was no appeal preferred against the decision of the trial court.**
- 2. Whether the 2<sup>nd</sup> appellate court was justified to uphold the decision of the 1<sup>st</sup> appellate court which decided the appeal basing on preliminary objection as indicated in point No. 1 above.**

In the event, I hereby grant the application with no order as to costs.  
It is so ordered.

Dated and delivered at Moshi, this 8<sup>th</sup> day of July, 2022.



  
**S. H. SIMFUKWE**

**JUDGE**

**8/7/2022**