

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

MISC. CIVIL APPLICATION NO 53 OF 2021

(Arising from the decision of the court in (PC) Probate Appeal No 5 of 2020)

GABRIEL JOSEPH (Administrator of the estates of the late

JOSEPH CHACHA MUKOHI APPLICANT

VERSUS

MABROSE GWASI MUKOHI 1ST RESPONDENT

CHRISPINUS MASWI MUKOHI 2ND RESPONDENT

FERDINAND JOSEPH MUKOHI 3RD RESPONDENT

RULING

8th and 18th March, 2022

F. H. MAHIMBALI, J.:

The applicant being aggrieved by the decision of this Court in Pc Probate Appeal No. 5 of 2020, intends to appeal to Court of Appeal of Tanzania. As it is the appeal that emanates from the decision of primary court, its leeway to Court of Appeal is only possible if the same is certified by this Court that there exists points of law worth of determination by the Court of Appeal. The application is thus brought

under section 5 (2) (c) of the Appellate Jurisdiction Act, Cap 141 R.E .
2019.

What are the said proposed points of law that this Court is enjoined to consider for certification, are four in number, namely:

- a) The High Court assumed powers of nullifying the appointment and appointment of new Administrators without jurisdiction.
- b) That the order nullifying all activities performed by the applicant is irregular and in violation of the law.
- c) That the decision of this honourable court is affecting persons who were not parties to the proceedings and were not afforded the right to be heard.
- d) That after this Honourable Court had ruled that the parties were not afforded the right of being heard in the District Court, this honourable was not seized with further powers of determining the rest of grounds of appeal.

During the hearing of this application, Mr. Thomas Brash, learned advocate appeared for the applicant whereas Ms. Happiness Roberth learned advocate represented the respondents in contest of the application.

Submitting in support of the application, Mr. Thomas Brash learned advocate submitted that the applicant intends to appeal to the Court of Appeal of Tanzania against the decision of this court in PC – Probate appeal no. 5 of 2020 dated 24th September, 2020. He submitted that there is Notice of Appeal, the Judgment of the High Court which is intended to be appealed against, the decision of this court granting extension of time to file certification on points of law and decision of this court granting filing of Notice of Appeal out of time are amongst the necessary documents annexed with this application for consideration of the Court. In consideration of annexures “F”, “G” and “I” and the mentioned points of law in paragraph 11 of the applicant’s affidavit, Mr. Brash humbly prayed that the Court to grant the application by issuing the said certificate certifying existence of points of law in the impugned decision of the High Court.

Resisting the application, Ms Happiness Roberth learned advocate for the respondents, argued that as per submission by the learned counsel for the applicant, what is mentioned to be points of law for certification by this Court as featuring under paragraph 11 of the applicant’s affidavit, there is nothing submitted in support of the called points of law for the said certification as per law. She pondered that

there has been no any serious deliberation by the learned counsel on how the said called points of law are points of law and worth of determination by the Court of Appeal. A mere mentioning as done, is not the deliberation that is needed as per law. She argued that, a mere basing of this application on annexures "G" and "I" is misleading. The learned counsel is misguided. These are two different applications: Extension of time and certification on point of law. As argued in the previous application on extension of time, there ought now to be clear deliberation to points of law as determining grounds for the certification on points of law. This means, points of law as mentioned at paragraph 11 (a-d) are not explained for this court to determine properly. The issue of jurisdiction of the Court, right of affected persons, violation of law, right to be heard, have not been explained by the applicant's counsel on how they are important to be certified in respect of this application against the judgment of this Court. Following his failure to explain the said grounds of certification to CAT, then there is nothing worth certifiable by this court, she submitted. In concluding, she argued that, if after the grant of the previous applications on extension of time was enough, then there was no need of this subsequent application. Failure of the applicant to submit on the application, has equally made

her failed to argue substantively as there was nothing to counter, argued Ms Happiness Roberth learned counsel for the respondent.

In his rejoinder submission, Mr. Thomas Brash clarified that as per adopted counter affidavit, paragraphs 1 – 10 of the applicant's affidavit are not contested, as there is no any dispute. At the paragraphs 11 – 12, this being an affidavit, it is a sworn written Evidence. So, what is annexed with the affidavit is part of the evidence as per submission. He clarified that, what he submitted is a combination of many things: affidavit, annexure and counsel submission. He insisted that when he made reference to annexure "G" (decision of Kahyoza J), he was referring to make two issues:

- Proof of what has been done.
- Ratio decidendi by the said appellate judge.

He submitted that, what was allowed in the previous application, must have connection to the current application as well. At paragraph 8 of annexure "G", Hon. Kahyoza, mentions the issue of jurisdiction. A point of law was already stated on that day.

- The violation stated in annexure "C", is relevant to the application.

He made insistence that at paragraph 7 of the applicant's affidavit, this court was well informed on the extent of explanation on points of law. That the application on certification on point of law is not an appeal by itself. Nullifying the party's legal representative, he considered it as a legal violation warranting a point of law worth of determination by the Court of Appeal.

On this, he prayed that this application be allowed and there be certification on points of law as prayed.

Having heard both submissions, the vital question now is whether this application is meritorious as per law. In essence, applications on certification on points of law are serious applications. It is not expected there to be a certification on points of law worth of determination by the Court of Appeal in the absence of serious deliberation of the same. In the case of **DORINA N. MKUMWA VERSUS EDWIN DAVID HAMIS**, Civil Appeal no. 57 of 2017, the Court of Appeal regarding application on certificate on point of law, emphasised that: -

"It is therefore self-evident that applications for Certificates of the High Court on points of law are serious applications. Therefore, when High Court receives applications to certify point of law, we expect Rulings

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....."

That said, the issue for determination now is whether there has been a serious deliberation in the application for this Court to grant the certification on points of law. Whereas Ms. Happiness counters it for want of serious deliberation, Mr. Brash is of the view that there should be a connection between points of law argued in the previous applications by the same applicant who applied for extension of time to file Notice of Appeal out of time and subsequently, an application for extension of time on certification of points of law.

Whereas I agree with the fairly settled law that on an application for extension of time, once an issue of illegality in the decision to be challenged is pointed out, that amounts to good cause for the grant of application. However, in an application for certification on point of law there is a legal demands of a serious deliberation of the same. So, once extension of time is granted to file an application for certification on a

point of law, the latter application attracts a serious deliberation. (see **Mohamed Salum Nalid vs Elizabeth Jeremiah**, Civil Reference No. 14 of 2017 CF **Dorina N. Mkumwa vs Edwin David Haruna** (supra).

In digest to page 9 of annexure "I" (an application for extension of time on certification of point of law) one of the reasons deposed by the applicant is that there is an illegality. The law is settled that illegality in itself is a sufficient ground for extension of time. This was held in the case of **Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** (1992) TLR 182, where the Court of Appeal stated: -

"In our view when the point at issue is one alleging illegality of the decision being challenged, the Court has a duty, even if it means extending the time for the purpose, to ascertain the point and, if the alleged illegality be established, to take appropriate measures to put the matter and there cord straight."

Also, in the case of **MOHAMED SALUM NAHDI VS ELIZABETH JEREMIAH**, Civil Reference No. 14 of 2017 at page 7 it was held that:

"We say so because the law is fairly settled that in applications of this nature, once an issue of illegality in the decision is sought to be challenged is raised, that amounts to good cause

and the court, even if every day of delay is not accounted for, would grant extension sought so as to rectify the illegality on appeal..."

In that former application (which I dealt with on extension of time to file an application for the certification which is annexure "I"), I was satisfied by the applicant's submission that there is an illegality pointed out which in law is a sufficient reason /cause to grant the application for extension of time.

However, in that former application, when granting application for extension of time, I observed that Mr. Brash not only has he accounted for each of the delayed days, but has also been able to point out the illegalities to be determined by the Court of Appeal.

In annexure "G" which was a twin application with an application in annexure "I", while granting application for filing Notice of Appeal out of time, Hon. Kahyoza J, agreed that there was an illegality pointed out which is whether "the High's order of appointing its own administrator offended rule 9(2) of the probate rules".

Mr. Brash is of the firm view that, by annexing those rulings (annexure "G" and "I") is part of deliberation of the application. He argued so while making a stress on a point that so long as affidavit is

sworn evidence, all that is annexed is part of the affidavit thus self-proved evidence so long as it is not countered.

In essence, I agree with Ms Happiness Roberth that for an application of certification on point of law to be granted, there must be a serious deliberation by the applicant. Equally, I agree with Mr. Brash that what is annexed in the affidavit is part of the affidavit and therefore evidence. However, for it to be worth of consideration it must be self-proved not seriously countered or disestablished by the adverse party. Now, considering the ruling in annexure "I" there ought to be a task by Mr. Brash. Here is what I ruled:

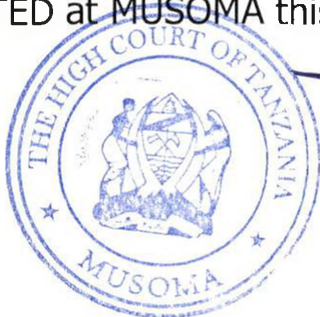
"whether the said illegalities pointed out are worth of determination by the Court of Appeal, will be considerably deliberated in the subsequent application after the grant of the same" (see page 10-11 of the said annexure "I").

I am thus of the firm view that, what is annexed which is also part of his sworn affidavit, has an order that imposed obligation to the applicant of proving the same in the subsequent application which is now this current application that there should be a serious deliberation on the same. That has not been done so to speak.

Having said so, but acknowledging what is said in annexure "G" at page 8 suggesting that the point of law had already been deliberated by this Court when granting application for filing Notice of Appeal, it is convincing that this Court can now import that deliberation and weigh, if it can certify that there is a point of law worth of determination by Court of Appeal. In consideration of that deliberation, I am satisfied that there is point of law worth of consideration by the Court of Appeal which is "whether the High Court's order of appointing its own administrator, offended rule 9(2) of the probate rules". Otherwise, the legal position is, there must be a serious deliberation on an application for certification on point of law for it to be certified for consideration by the Court of Appeal as rightly argued. Other points of law proposed by the applicant are hereby rejected for want of deliberation.

It is so ordered.

DATED at MUSOMA this 18 day of March, 2022.



F. H. Mahimbali

JUDGE

Court: Judgment delivered in the presence of Mr. Thomas Brash, advocate for the applicant, Ms. Happiness Roberth, advocate for the respondent and Mr. Gidion Mugo – RMA

Right to appeal is explained.



F. H. Mahimbali

JUDGE

18/03/2022