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. 66 OF 2022

NURDIN MOHAMED CHINGO ..... APPLICANT

VERSUS

SALUM SAID MTIWE ..... 1ST RESPONDENT

HADIJA SAID MTIWE ..... 2ND RESPONDENT

(Arising the judgment and decree of this Court (Mlacha, J) dated 21st December, 2020 in PC Civil Appeal No. 129 of 2019)

RULING

28th July and 10th August, 2022

KISANYA, J.:

This Court is invited to certify the points of law involved in its decision dated 21st December, 2020 in PC Civil Appeal No. 129 of 2019 for determination by the Court of Appeal. The application is preferred under section 5(2)(c) of the Appellate Jurisdiction Act, Cap. 141, R.E. 2019 (the AJA) and supported by an affidavit deposed by the applicant, Nurdin Mohamed Chingo. In opposition, there is a joint counter affidavit affirmed by the respondents, Salum Said Mtiwe and Hadija Said Mtiwe.

The essential facts leading to this application are depicted from the affidavits and documents appended thereto as follows. The Primary Court of

Kariakoo granted the letters of administration of the estate of the late Mariam Salum Mtiwe (henceforth "the late Mariam") to Ibrahim Mohamed Chingo. The said appointment was made through Probate and Administration Cause No. 109 of 2007. Upon demise of the said Ibrahim Mohamed Chingo, the administration of estate of the late Mariam moved to the applicant.

The proceedings that led to the appointment of the applicant was subject to revision filed in the District Court of Ilala in Revision No. 13 of 2013. As the record of the Primary Court in *Mirathi No.* 108 of 1999 went missing, the District Court held the view that there was a need to order for trial *de-novo*. It turned out that the applicant went on executing his duties as the administrator of the estate of the deceased. In so doing, he sold house No. 49, Plot No. 11. Block 18, Aggrey Street, Kariakoo, Dar es Salaam (henceforth "the house") and distributed the estate to 11 heirs.

It is common ground that, the said house was originally owned by Salum Said Mtiwe who died in 1950. The late Salum Said Salum left behind two daughters namely, Mariam Salum Mtiwe and Ayesh Salum Mtiwe who inherited and equally owned half shares of the house. The respondents herein are the children of the said Ayesh Salum Mtiwe who is also a deceased.

Now, as the applicant sold the house, the respondents moved the Primary Court to call him (the applicant) in order to make an account of the estate of the late Mariam. Apart from claiming that they own half of the house in dispute, the respondents contended that the late Mariam Salum passed the house to them. They tendered in evidence an affidavit affirmed by the said Mariam in 1996. Making reference to Islamic Law, the Primary Court held that the respondents could not inherit through the affidavit of the late Mariam and that the latter had no right to pass to the respondents who are distant relatives of the late Mariam compared to the 11 heirs listed by the applicant.

Dissatisfied, the respondents unsuccessfully appealed to the District Court. On the second appeal, this Court was satisfied that the proceedings of the primary court which appointed the applicant an administrator of the estate of the late Mariam were nullified by the District Court of Ilala in Revision No. 13 of 2013. It went on to hold that the sale of the house and the report showing the way the estate was distributed were null and void. This Court was further convinced that the house was owned by Salum Said Mtiwe. It was also the findings of this Court that the Islamic Law was applied wrongly by the trial court. That finding was based on the reasons that, the late Mariam left an affidavit showing her intention on the distribution of the house and not a WILL. In the result, the letters of administration and all

what the applicant did after 8th December, 2016 were declared illegal and a nullity, whereas the respondents were declared the lawful owners of the house

Feeling that justice was not served, the applicant filed a notice of appeal to the Court of Appeal. He then lodged the present application. The points of law to be served were deposed in paragraph 8 of the supporting affidavit as follows: -

1. *The judge erred in law for failure in making a findings (sic) that there was an order for trial de novo while in fact there was none and if there was any, the honourable judge could not have proceeded to determine the appeal on merit.*
2. *The judge erred in law for failure to determine the rightful heirs in the whole estate and the manner in which inheritance descents.*
3. *The judge erred in law for attaching weight and accepting a document which neither qualifies as a will nor as a valid affidavit.*
4. *That, the judge failed to properly interpret the law relating to inheritance under Islamic laws.*

In the conducting of this matter, Mr. Samson Mbamba and Ms. Pendo Ngowi, learned advocates represented the applicant, whereas Mr. Francis Makota, learned advocate represented both respondents.

The matter was heard by way of written submissions. The learned counsel for the parties filed their respective submissions for and against the application. I will consider their contending submissions and arguments in the course of determining the grounds or issues pertaining to this application.

Before determining the merits of this application, I find it necessary to address the preliminary issues raised by the respondents' counsel. It was Mr. Makota's submission that the application is incompetent due to the following reasons: *One,* the applicant will not be affected by the intended appeal. *Two,* the notice of appeal subject to the intended appeal was not properly served to the respondent in terms rule 84(2) of the CAT Rules. *Three,* the chain of inheritance defeats the applicant to be the beneficiary of estate of the late Mariam Salum Mtiwe.

I am in agreement with the applicant's counsel, that the said issues cannot be determined at this stage. Much as the notice of appeal was duly filed, the duty of this Court is to consider whether there are points of law worth of determination by the Court of Appeal. The above stated issues are to be dealt with in the intended appeal to the Court Appeal. This Court has no mandate to determine the same.

With regard to the merit of the application, it is common ground that this application is made under section 5(2) (c) of the Appellate Jurisdiction Act (supra). The law is settled that, the duty of the Court determining the application for certificate on point of law is to assess or examine whether the proposed point is indeed a point of law worth for consideration by the Court of Appeal. I am fortified by the case of **Dorina N. Mkumwa vs Edwin David Hamis**, Civil Appeal No. 53 of 2017, CAT - Mwanza (unreported) where it was underscored 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"*

Further to the above, the law is settled on what constitutes a point of law to include unprecedented issue, jurisdiction or misinterpretation of the law to mention but a few. See also the case of **Mohamed Mohamed and Another vs. Omari Khatib,** Civil Appeal No. 68 of 2011 (unreported) in which the Court of Appeal had this to say on the issue under consideration:-

> *"... for instance, where there is a novel point, where the issue raised is unprecedented, where the point sought to*

be certified has not been pronounced by the Court before and is significant and goes to the root of the decision, where the issue at stake involves jurisdiction, where the court(s) below misinterpreted the law etc..."

In another case of **Magige Nyamoyo Kisima Kisinja vs Merania Mapambo Machiwa**, Civil Appeal No. 87 of 2018 (unreported), the Court of Appeal held as follows:

"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."

Being guided by the above authorities, I will address each point proposed by the applicant in order to satisfy myself on whether it is related to law and thus, worth of determination by the Court of Appeal.

The first point of law is to the effect that this Court erred in law in finding that there was an order for trial de novo, and that, if such order existed, the appeal ought to have not been determined on merit. As alluded earlier, the decision of this Court was premised on the finding that the District Court had, through Revision No. 13 of 2013, made an order for retrial of the proceedings which led to appointment of the applicant as the administrator

of estate of the late Mariam. This is reflected at page 13 of the typed judgment which reads: -

> *"It is my finding that there was an order for retrial denovo which had the effect of nullifying the proceedings of the primary court which appointed the respondent an administrator of the estate of the late Mariam Salum Mtiwe. If the respondent ceased to be the administrator of the estate of the late Mariam Mtiwe on the date of ruling i.e 8/12/2016, it follows that everything done by him at any date after this date was illegal. This means that even the sale of the house which appear to have been done quickly after being appointed and the report which he filed in court on 09/03/2017 showing the way he had distributed the estate to his brothers and sisters were all illegal null and void."*

It is further on record that, before arriving at the said finding, this Court had observed as follows:

> *"I think there is something missing in the last paragraph of the judgment. I think that in absence of a drawn order, one can be faced with difficulties like what is currently facing the counsel for the respondent. While not supporting the work of the magistrate which is a result of a rush work or failure to edit his work, I think it will not be correct if we say that the proceedings were left intact."*

Therefore, much as this Court was satisfied that the District Court did not make a specific order for retrial of the probate cause, the issue whether the trial court was right in holding that there was an order for retrial arises. If it is taken that there was an order for retrial of the proceedings which led to the appointment of the applicant as administrator, the record bears it out that the present appeal originates from the nullified proceedings of the primary court. As hinted earlier, it was the findings of this Court that the respondent moved the primary court to call the applicant in order to account on how he distributed the estate. Considering that this Court went on determining the appeal which arose from the nullified proceedings, I agree with Mr. Mamba that the following issue arises: *One,* whether it was proper for the High Court to determine the appeal on merits instead of directing the primary court to rehear the proceedings which led to the appointment of the applicant. *Two,* whether the High Court proceeded with distribution and division of the estate. *Three,* whether it was proper for the High Court to nullify the sale of the house without according the purchaser the right to be heard. It is my humble view all of the above issues are of law.

Another issue deposed in the supporting affidavit is whether the High Court erred in law by failing to determine the rightful heirs in the whole estate and the manner in which inheritance descents. I have shown herein that this Court declared the respondents the lawful owners of the estate

(house). In their respective submissions, both parties were at one that this Court considered the historical background of the said house. According to Mr. Mamba, the above stated point is premised on the reason there is no evidence to support the decision made by this Court. I agree with him that, the question whether there was evidence to support the decision is a question of law worthy to be certified for consideration of the Court. [See the case of **Agness Severin vs Musa Mdoe** (1989) TLR 164]. Thus, it is worth of being certified for consideration by the Court of Appeal.

I have considered further that the respondents' counsel does not dispute that the impugned decision was also based on the ground that the lower courts misinterpreted Islamic law. Indeed, that fact was considered at page 15 and 16 of the typed judgment when this Court held:-

> *"Islamic Law is applied after going through three tests; One, where there is an intention of the deceased expressed in a WILL, or otherwise, two, where the lifestyle of the deceased was such that if had a chance to be asked to give opinion, he should have said that Islamic Law should apply, and three, where the heirs have reached an agreement that it should apply. If any of the tests or a combination of them exists, then the court should apply the law, Failure of the three tests takes the court to customary."*

In view of the above, the applicant intends to fault this Court for failing to properly interpret the law related to inheritance under Islamic Law. Mr. Mbamba submitted that the Court of Appeal will be asked to determine existence of any of the said conditions *sine quo non* in the application of the Islamic law of inheritance. Thus, it is my considered view the said point raises an issue of law which can be certified for the opinion of the Court of Appeal.

The last point is based on the affidavit of the late Mariam in which she gave ownership of the house to the respondents. Apart from holding that the intention of Mariam was contained in the said affidavit, this Court held that the said affidavit was wrongly associated with Islamic Law and that it ought to have been respected. This fact was not disputed by the respondents' counsel. Referring to customary law, the learned counsel argued that the deceased's wishes are respected even if made orally.

In the light of the foregoing, it is clear that the affidavit of the late Mariam formed the basis of the impugned decision. The Court is then called upon to certify that there was neither a will nor a valid affidavit.

At the outset, I agree with Makota that the said affidavit was not considered as a WILL. As to the issue whether the said affidavit was valid, page 9 of the judgment shows the affidavit was disputed by applicant. Apart from contending that it was tainted with illegalities, the applicant's counsel

argued that the affidavit was never mentioned before. That being the case, I hold the view that the issue whether the affidavit of the late Mariam was valid qualifies to be certified for consideration by the Court of Appeal.

In the event, this application is hereby granted. I accordingly certify the following points of law for consideration by the Court of Appeal:

1. Whether the High Court erred in law holding that there was an order for trial de-novo.
2. If the first ground is not answered in affirmative;
   (i) Whether it was proper for the High Court to determine the appeal on merits instead of directing the primary court to rehear the proceedings which led to the appointment of the applicant.
   (ii) Whether the High Court proceeded with distribution and division of the estate under administration.
   (iii) Whether the High Court was justified to nullify the sale of the house without according the purchaser the right to be heard.
3. Whether the High Court's decision that the respondent is the lawful owner of the whole estate (House No. 49, Plot No. 11, Block 18, Aggrey Street, Kariakoo, Dar es Salaam) is supported by evidence.
4. That, the High Court erred in considering an affidavit which was not valid.

5. That, the High Court failed to interpret the law relating to inheritance under Islamic law.

Lastly, I order no costs to any party because this matter arose from probate and administration cause.

DATED at DAR ES SALAAM this 10th day of August, 2022.

S.E. Kisanya
JUDGE