

THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM

MISC CIVIL APPLICATION NO. 107 OF 2021

(Arising from the Judgement of the High Court of Tanzania, Dar es Salaam District Registry, in PC. Civil Appeal No. 27 of 2020; Arising from Civil Appeal No. 67 of 2019 delivered by Temeke District Court and Originated from Probate Cause No. 358 of 2017 delivered by Mbagala Primary Court.)

SALUM ABDALLAH LIGAGABILE ----- APPLICANT

VERSUS

HASARA SAID PAZI ----- RESPONDENT

Date of last Order: 01/04/2022

Date of Ruling: 22/04/2022

RULING

MGONYA, J.

Before this court, is the Application made under **Sections 5 (2), (c) of the Appellate Jurisdiction Act, Cap. 141 R.E 2019**, that has been brought by a certificate of agency. The chamber summons in respect of this Application is supported by an affidavit affirmed by the Applicant. The Applicant herein is seeking for a leave upon a certification on point of law to appeal to the Court of Appeal against the decision of this Honorable Court on **PC Civil Appeal No. 27 of 2020** delivered on the **4th February 2021**.

The appeal was for a Petition for letters of Administration from both parties herein who sought to be appointed joint Administrators of the estate of the late Zakia Selemani Madenge @ Zakia Selemani Msumi. Both parties were appointed as jointly Administrators of the deceased estates by the Primary Court, further chose the Islamic Laws to govern their administration. The Primary Court sought opinions from BAKWATA on matters of who were rightful heirs and beneficiaries of the deceased estate because of the rivals between the paternal and maternal relatives of the deceased who did not survive neither with a widower nor a child. Following the opinions from BAKWATA, the court declared that the Respondent to be the rightful heir of the deceased estate. The Applicant dissatisfied and appealed to the District Court and this Court before Hon. Mlacha, J. on **PC Civil Appeal No 27 of 2020** where the same failed.

In his affidavit deposed that, soon after the said decision was delivered at the trial court, the applicant through his Counsel on 8th March 2019, lodged this application under a certificate of urgency pleased the Court's leave to appeal to the Court of Appeal on points of law as they appear hereunder:

a) That the High Court Judge erred in law to dismiss the appeal without considering that the District Court of Temeke order in Civil Appeal No. 108 of 2016, which nullified the proceeding of the Probate

Cause No. 222 of 2016 and ordered retrial denovo before another Magistrate and new set of assessors was violated by having a new probate cause being determined by another Magistrate but the issue of assessors were not considered without any justification for noncompliance to the order, but this court has dismissed the appeal without considering such legal position;

b)That the High Court Judge erred in law by dismissing the appeal based on the opinion of BAKWATA which was not recorded in the court proceeding and judgement as to who is a beneficiary to the deceased estate;

c)That the High Court Judge erred in law by considering the opinion of BAKWATA as a final order or decision without considering that BAKWATA is not a Judicial body and its decision cannot be challenged by way of appeal in the Tanzania Judiciary system;

d)That the High Court Judge erred in law by dismissing the appeal leaving the deceased estate to be collected by person who had no relation with

the deceased person, leaving the deceased relative behind;

e) That the High Court Judge erred in law by dismissing the appeal without considering that the legal process of initiating the probate cause had not considered;

f) That the High Court Judge erred in law by fail to give reasons on the legality of the rejecting of the Will left by the deceased; and

g) That the High Court Judge erred in law by dismissing the appeal without analyzing the historical background of the dispute as the Respondent and his relative have not proved anywhere as to how they relate to the deceased.

When the matter was scheduled for hearing of the Application, **Mr. Alex Enock** appeared for the Applicant while **Mr. Hamisi Katundu** learned Counsel appeared for the Respondent respectively.

Basically Mr. Alex Enock submitted that his application has been preferred under **section 5(2) (c) of the Appellate Jurisdiction Act, Cap 141**. The counsel prayed to adopt on affidavit and form part of their submission. He clarified that, the High Court did not regard issues of laws and the order of a

District Court by having new probate cause being determined by another Magistrate and a new set of assessors. The trial court further did not paying attention to the issue of Assessors and on the appeal also was not considered without any justification for non compliance.

Also, the counsel averred that, the Court dismissed the appeal based on the opinion of BAKWATA where determined the issue of beneficiary and the same was not recorded in the court proceedings and judgement as to who is a beneficiary to the deceased estate. And that the trial court embodied BAKWATA to be part of the judicial body while is not.

Further, the Applicant's Counsel submitted that the High Court Judge considered the opinion of BAKWATA as a final order or decision while knowing that is not a Judicial body and its decision cannot be challenged by way of appeal in the Tanzania Judiciary system. In that regard, the Applicant prayed for leave and certificate on point of law over the controversy be addressed to the Court of Appeal.

Moreover, it is stated by the Applicant's counsel that the High Court Judge after considered the opinion of BAKWATA and codified the Primary Court decision went on to dismiss the ground of appeal before it without perusing the impugned decision of the District Court. Since it was an appeal and lower court's records was of the needful for determination of the same, this depicted on page 10 of the High Court judgement.

Therefore, they prayed to be availed leave so that the Court of Appeal can put a light as to the disputed points of law.

On the other side, Mr. Hamisi Katundu an Advocate for the respondent strongly opposed the application or rather prayers made as that the leave should not be granted for the same will amount to wastage of precious time of the court.

The Counsel submitted that the Order of the trial court was duly considered by the High Court in appeal, the court reasoned and determined the point of law which intended to be certified as ground of appeal where the High Court dismissed and can clearly be gleaned at page 10 of the impugned judgement of the High Court.

Further, on the opinion of the BAKWATA which was not recorded in the court proceedings and judgement but used to examined as to who is beneficiary to the deceased estate. The Counsel responded that the matter indeed was referred to BAKWATA by the Primary Court, requested for opinion on the applicability of Islamic Law on the Administration of the deceased's estate.

The Counsel stated to the advance that, it is in record that the Applicant and Respondent who jointly petitioned for Letters of Administration opted that the Law to be applied in the estate is Islamic Law and the court directed the Administrators to BAKWATA for assistance on who is entitled to inherit the deceased and how the distribution is supposed to be done.

Therefore, the Respondent viewed that, the High Court did consider all grounds raised in the petition of appeal before it and humbly prayed that the leave should not be granted and the application be dismissed for want of merit with costs.

Before the court determining this application, it has come to the knowledge that, the grounds on paragraph **5 (d), (e), (f) and (g)** of the Applicant's Affidavit are new grounds which resulted to the Judgement sought to be challenged. They were not genuinely raised in the petition before the High Court when determined the Appeal. It is a view of this Honorable Court that, the High Court before Mlacha, J. was justified in law not to decide on matters which were not raised in the petition of appeal.

In granting the leave to appeal on certificate point of law, the Applicant must show the chances of success and *prima facie* that there are grounds of appeal which deserve serious judicial consideration. Regarding the submissions, the basis of this application is due to the decision of this High Court on **PC Civil Appeal No. 27 of 2020** before Hon. Mlacha, J. while exercising its appellate jurisdiction. The primary duty here is to determine whether the decision needs the interference of the Court of Appeal for determination.

Starting with the ground that the Order of the trial court was not duly considered by the High Court in appeal. This Court had an opportunity to read parties' submissions and the

impugned judgement. At page **10** of the impugned judgement, the Court clearly dismissed the ground of appeal where that the District Court ordered retrial before another Magistrate and a different set of Assessors but one of the earlier Assessor took part in the new proceedings.

Further, the High court proceeded to dismiss the said **PC Civil Appeal No. 27 of 2020** on the reason that the Court did not supplied with the copy of decision of the District Court for reference. The dismissal of the Appeal left the ground undetermined by the Court. Thus attracts certification of this Honourable court in order for the Court of Appeal to put lights on the same.

Basing on the ground that the High Court entertained the applicability of Islamic Law on the Administration of the deceased as opined by BAKWATA which alleged to be not recorded in the court proceedings and judgement. The said opinion was recorded and appeared in the court's proceedings. The trial court's records proved that the parties jointly petitioned for Letters of Administration and opted Islamic Law to be applied in the deceased's estate.

Following the request by the Court, BAKWATA duly interviewed the relatives of both parties and forthwith opined as to who according to Islamic Laws is entitled to inherit the deceased and sent opinion to the Court.

In my firm view, what the High Court did was just to comment on the importance and the role of BAKWATA. The same depicted at **page 7, 8 and 9** of the impugned judgement of the High Court. Therefore, this does not need the interference of the Supreme court of the Land.

This court is thus satisfied with the records and submissions that have been demonstrated by parties. The Applicant did advanced reasons but only one left undetermined is sufficient to warrant the grant for leave sought. I, in the circumstances certify that is a point of law that attracts the attention of the Court of Appeal as per the condition envisaged in **section 5 (2), (c) of the Appellate Jurisdiction Act, Cap. 141 [R.E 2019]**.

I am of the view that, the Application contains a legal issue that calls for attention of the Court of Appeal on the ground that the High Court did not consider the legal effect to the new proceedings before another trial Magistrate and one of the earlier assessor took part.

In the event, therefore, the **Application is hereby granted.**

No order as to costs.

It is so ordered.




L. E. MGONYA

JUDGE

22/04/2022

Court:

Judgment delivered before Honorable **F.H. Kiwonde** **Deputy Registrar** in the presence of Mr. Alex Enock, learned Counsel for the Applicant and Mr. Hamisi Katundu Advocate for the Respondent; and Richard the bench clerk this 22nd April 2022.




L. E. MGONYA

JUDGE

22/04/2022