

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

(DAR-ES-SALAAM DISTRICT REGISTRY)

AT DAR-ES-SALAAM

MISC CIVIL APPLICATION NO.396 OF 2021

**(Arising from the ruling and drawn order of the High Court of Tanzania
of Dar-es-salaam District Registry original Kariakoo Probate Cause
No. 81 of 2006 in Probate and Administration Cause No. 48 of 2020
Between Abdullatif Mohamed Hamis)**

FATNA MOHAMED as legal representative of the late Mohamed Hamis Abdallah
(Deceased)..... **APPLICANT.**

Versus

ABDULLATIF MOHAMED HAMISRESPONDANT

RULING

MRUMA, J.

This application is made under section 5(1)(i) of the Appellate Jurisdiction Act [CAP 141 R.E. 2019] and Rule 45(a) and (b) of the Tanzania Court of Appeal Rules, GN No. 368 of 2019 and section 95 of the Civil Procedure Code, Cap 33 R.E 2019 together with any other enabling provisions of the law. The application is seeking for leave for Applicant to

the appeal to the Court of Appeal of against the ruling of this Court (Mlacha J) delivered on 28th July, 2021. The Applicant contends that the said ruling is tainted with irregularities which the Court of Appeal should be called upon to determine. He listed the following as illegalities complained of;

- (i) Whether it was legally correct for the Court upon findings that the petition was wrongly filed and dismisses the petition, to give order in favour of the Respondent.*
- (ii) Whether it is legally correct for the Court to determine the matter which it was not called for in the petition.*
- (iii) Whether it is legally correct for the Court to determine new matter without affording the applicant the right to be heard.*
- (iv) Whether it is legally correct for the Court upon finding that the house had been sold and the proceed of sale had been distributed to the beneficiaries before judgement of hon. Sheikh J, to give orders that the administratrix should add the respondent as an heir and give him his share of the house.*
- (v) Whether it is legally correct for the Court to sit as review Court of the judgement of honourable Shekh J, in P.C Civil Appeal No. 31 of 2009.*

In these proceedings the Applicant was represented by Ms Yusta Kambuga together with Ms Stella J. Manongi learned counsel, and the Respondent enjoyed legal service from “para-legal.”

Before the hearing of this application counsel for the Respondent raised a preliminary objection contending that this Court has no jurisdiction to grant the prayer sought in the chamber summons. In support of his objection he stated that appeal against decision of the High Court to grant or refuse to grant letters of administration and are governed by section 72(1) of the Probate and Administration of Estate Act [Cap 352 R.E 2020]. For easy reference he cited and quoted the said section which reads;

“ An appeal shall lie from an order granting or refusing probate or letters of administration made in contentious cases as if such order were a decree, and from any other order made in such cases if an appeal would lie therefrom in a suit according to the provisions of the Civil Procedure Code VII or any enactment replacing the same.”

It was further submission of the Respondent’s counsel that the above quoted section provides for an automatic right of appeal to Court of Appeal when read together with, section 5(1) (a) Appellate Jurisdiction Act of Cap 141 R.E. 2019 which clothes the Court of Appeal with

jurisdiction to entertain appeals in Civil suit. The learned counsel stated that, in the circumstances where there is an automatic right of appeal provided by the law as he explained above, this honourable Court has no jurisdiction to grant leave to appeal to Court of Appeal. He asserts that, the High Court can only grant leave in circumstances where there is no automatic right of appeal to Court of Appeal.

Responding to the Respondent's submissions, the Applicant's counsel submitted that the Respondent has misconstrued the provisions of section 72(1) of the Probate and Administration of Estates Act Cap 352 R.E 2019 and section 5(1)(a) of the Appellate Jurisdiction Act Cap 141 R.E 2019. The learned counsel argued that, the Civil Procedure Code is procedural law applicable in the High Court and subordinate Courts therefore for the matter which originates from the High Court an aggrieved party who intends to appeal to the Court of Appeal should invoke the provisions of the Appellate Jurisdiction Act and its procedures which are provided under the Court of Appeal Rules.

The learned counsel quoted section 5(1)(a) of the Appellate Jurisdiction Act Cap 141 R. E 2019 Which state that;

"..... against every decree, including an ex parte or preliminary objection decree made by the High Court in a suit under the Civil Procedure Code, in exercise of its original

jurisdiction "an stated that , based on above provision, it is clear that automatic right of appeal is for decree made by the High Court in a suit under Civil Procedure Code and the decree from the matter at hand being originated from a Probate cause, it does not fall within the ambit of section 5(1)(a) of Cap 141 R.E 2019.

For those reasons, it is the Applicant's counsel argument that the preliminary objection raised by respondent has no merit and should be dismissed.

In rejoinder the Respondent disputed every aspects of the applicant's written submissions. He stated that this court issued the order while exercising its original jurisdiction under Probate and Administration of Estate Act and that as it was not an appeal, Revision or reference, then according to the provision of section 5(1) (a) of the Appellate Jurisdiction Act Cap 141 R.E 2019, the applicant has an automatic right of appeal and hence this Court has no jurisdiction to grant the orders sought in the chamber summons.

Having gone through the submission of both parties and through perusal of court records, I find that, there is only one for determination. The points is;

(1) Whether this matter originates from this court or from the Primary Court and if it originates from primary court whether leave is required before going to the court of Appeal.

The answer to the this issue is easy. The records reveals that the present proceedings originates from the Probate and Administration cause No. 81 of 2006, of the Primary Court of Kariakoo. It is trite law that, appeal originating from Primary Court to Court of Appeal requires certification of a point of law by the High Court as provides; under section **5(2)(c) of the Appellate Jurisdiction Act which provided that;**

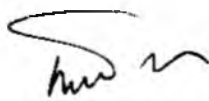
*Notwithstanding the provisions of subsection (1)-
(c) no appeal shall lie against any decision or order of the High Court in any proceedings under Head (c) of Part III of the Magistrates' Courts Act unless the High Court certifies that a point of law is involved in the decision or order; [Emphasis supplied]*

The same position applies to the case at hand because the matter originates from the Primary Court of Kariakoo in Probate cause No. 81 of 2006.

The Law is very clear that appeals which originates from Primary to Court of Appeal requires certification of a point of law from the High Court. Thus I would agree with the counsel for the Respondent that an appeal

from this court to the Court of Appeal on matters originating from Primary court does not need leave of this court but needs certification of points of law.

That said, I find that this application is misconceived in that it seeks leave to appeal to the Court of Appeal instead of seeking a certificate of points of law. Accordingly it is struck out. As this is a probate matter I make no orders as to the costs.


A.R.MRUMA

JUDGE

10/8/2022