

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

MISC. CIVIL APPLICATION NO. 92 OF 2021

*(Originating from the decision of the High Court of Tanzania at Arusha
Honourable, Justice M.R Gwae Dated 19th October 2021 in Civil Revision No. 2 of
2021)*

THERESIS NEMES LASWAYAPPLICANT

VERSUS

GRACE JOSEPH SWAIRESPONDENT

RULING

05/07/2022 & 30/09/2022

KAMUZORA, J.

The applicant in this matter brought an application for certificate of point of law and the decision was made by this court to that effect. But in course of proofreading the copies, it was discovered that the decision referred the matter that was not intended for certification. The pleadings and the submissions by the parties referred two decisions; Revision No. 2 of 2021 and Civil Appeal No. 3 of 2020. While under the chamber summons the Applicant prayed for certification on point of law in respect of the decision in Civil Revision No. 2 of 2021, in the supporting affidavit the applicant referred the decision made in PC Civil Appeal No. 3 of 2020. The decision in this application was made based on Civil Appeal No. 3 of 2020 instead of Revision No. 2 of 2021. In

considering that the decision made contained inconsistencies and could not assist the parties as it was made against decision that is not intended by the applicant, it opted to call the parties to address the court and clarify on the matter before it could correct error which are clear in face of record.

Mr. Jofrey Mollel, learned advocate appeared for the Applicant and Mr. Kapimpiti Mgalula appeared for the Respondent. When asked to address the court, both counsel for the parties admitted that the certificate on point of law was based on Revision No. 2 of 2021 and not Civil Appeal No. 3 of 2020. It is unfortunate that the discussion in this matter was based on Civil Appeal No. 3 of 2020 instead of Revision No. 2 of 2021. After the parties had assured the court on the correct decision to which the certification is sought, I undertook the responsibility to look into the decision in Revision No. 2 of 2021 and see if the points raised fit it points of law that needs determination by the Court of Appeal. The following points were outlined as points of law to be certified by this court to the Court of Appeal: -

- i) Whether it was proper for the Magistrate who was involved in the hearing of the parties in the application to hear the same parties on appeal over the same matter while there were other magistrates.*

- ii) Whether it was proper for the District Court to proceed with the hearing of Civil Appeal No. 18 of 2020 while the order allowing filing of the said appeal out of time was challenged before the High Court in PC Civil Appeal No. 3 of 2020.*
- iii) Whether the Appellant had an opportunity of being heard by the same District Court in Case in Civil Appeal No. 18 of 2020 is disposed ahead of High Court decision in PC. Civil Appeal No 3 of 2020.*
- iv) Whether it was proper for the High Court to find that the District Court's decision in Civil Appeal No. 18 of 2020 was not tainted with material irregularity.*

In order to correctly determine whether the above points are fit to be certified as point of law, I find it important to point out briefly the facts leading to this current application as may easily be gathered from the records. The Applicant successfully petitioned for the grant of letters of administration in Probate and Administration Cause No 17 of 2016 at Karatu Primary whereas the Respondent made an application for the revocation of the said grant and the application was dismissed. Upon the said dismissal the Respondent was time barred to file her appeal hence she preferred an application for the extension of time to the District Court which was granted and it was followed by an appeal, Civil Appeal No. 18/2020 before the District Court.

The Applicant being aggrieved by the decision which granted the Respondent extension of time, she appealed to this court vide PC Civil Appeal No. 3 of 2020 and when the appeal was pending the Applicant prayed before the District Court that the Civil Appeal No. 18/2020 be stayed and the trial magistrate disqualify himself from hearing of the said appeal as he was involved in the hearing of the Misc. Application which granted the Respondent an extension of time.

Upon the refusal of the 1st appellate magistrate to disqualify himself from the conduct of the case then the appellant filed Civil Revision No. 2 of 2021 to this court which was again dismissed. Dissatisfied with the decision of this court the Applicant desires to appeal to the Court of Appeal hence this application seeking for a certificate on point of law as required by the law.

Submitting in support of the application, Mr. Mollel argued that the points outlined under paragraph 13 of the supporting affidavits are the legal issues because in the High Court decision, the judge failed to consider the conduct of the District Court magistrate who was incompatible with the diligent discharge of his judicial duties and therefore inconsistent with the provision of rule 4(7) of the Code of Conduct and Ethics for judicial Officers GN No 1001 of 2020. That, it

should also be considered that, the magistrate had personal knowledge of the facts of the case which violate the provision of Rule 9(1) (c) of GN No 1001 of 2020. He was of the view that, since the High Court left the irregularities unresolved then the Applicant prays that this court to grant a certificate on point of law for the determination by the Court of Appeal.

The counsel for the Applicant further submitted that, the record is clear that the Applicant appealed to the High Court against the decision of the District Court and despite the District Court being aware of the said appeal proceeded in hearing of the appeal instead of staying the appeal a fact which is in contravention of the law as the District Court was out of jurisdiction in entertaining the matter which was already filed in the High Court. That, these anomalies constitute a point of law worth being considered by the Court of Appeal hence the Applicant prays that a certificate on points of law be issues as there are point fit for consideration and determination by the Court of Appeal.

In contesting the application, Mr. Mgalula argued that the application for certification on points of law is without merit as it is a cardinal principle that no appeal shall lie against an interlocutory order which does not determine the finality or merit of the suit. That, the

order intended to be appealed from did not finalise the matter hence the order does not qualify as a point of law. He supported his argument with the provision of section 43(2) of the Magistrates Courts Act Cap 11 R.E 2019.

Mr. Mgalula further submitted that, the alleged conduct of the magistrate and the denial of right to be heard were never raised and determined by the High Court and the order of the High Court did not contain such allegations. To buttress his submission, he cited the case of **Titus Mwita Matinde Vs. Daniel J. Singolile**, Misc. Civil Application No 3 of 2022, **TUICO vs Mbeya Cement Co. Ltd** [2005] TLR (CA).

The counsel for the Respondent went on and submitted that, the counsel for the Applicant has mixed up things as the matter are matters of facts and not law. That, there was no order from the High Court staying or stopping the proceeding of the District Court and that, there was no even a summons from the High Court. To cement his submission, he cited the case of **Theresis Nemes Laswai Vs. Grace Joseph Swai**, Misc. Civil Application No. 91 of 2021. The Respondent's counsel prays for the application to be dismissed with costs.

Having considered the application together with the submissions by counsel for both parties, I now revert on determination as to whether

the points raised can be certified as point of law worth the determination by the Court of Appeal. In this I will be guided by the Court of Appeal decision in **Dorina N. Mkumwa Vs. Edwin David Hamis**, Civil Appeal 4 No. 53 of 2017, CAT - Mwanza (unreported) where it was held: -

"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"

Based on the above decision, it become important that the application for certification on point of law must undergo a proper scrutiny in determining the existence of point of law in the intended appeal to be dealt with by the Court of Appeal. The mere claim that there is point of law does not raise an automatic right for certification.

I have examined the Applicant's application as well as his submission thereto, the first proposed point of law, is whether it was proper for a Magistrate who was involved in the hearing of the parties in the application to hear the same parties on appeal over the same matter while there were other Magistrates. It is the claim by the Applicant that

there was violation of the principle of natural justice and violation of code of conduct for the judicial officers as the magistrate acted while having interest in the matter. The Applicant pointed the said interest to emanate from the same magistrate hearing and determining Miscellaneous Application and the appeal emanating from the same matter while there were other magistrates.

I find this point worth no certification as point law because, the allegation on breach of code of conduct for the judicial officers is matter of fact and which needs evidence to prove if the magistrate acted while having interest in the matter. The Applicant pointed out that, the said interest emanates from the same magistrate hearing and determining a Miscellaneous Application and later on dealing with the main application. He however did not state exactly the provision of the law which bars the magistrate who dealt with Miscellaneous application from hearing the appeal. I therefore find the first point worth no certification.

The second proposed point by the Applicant is whether it was proper for the District Court to proceed with the hearing of the Civil Appeal No. 18 of 2020 while the Order allowing filing of the said appeal out of time was challenged before the High Court in Revision No. 2 of 2021. This is also not a point of law worth to be certified for

determination by the Court of Appeal. The Applicant did not state if that point was the basis of High Court decision which she intends to challenge to the Court of Appeal. The basis of the High Court decision was on whether an order by the magistrate refusing to recuse himself from the conduct of the case qualify to be subject to revision or appeal. The High Court did not make decision on procedure adopted by the District Court in determining Civil Appeal No. 18 of 2020. I therefore find that this point worth no certification as point of law.

I have the similar stand regarding the third proposed point of law on whether the appellant had an opportunity of being heard by the same District Court in case Civil Appeal No.18 of 2020 is disposed ahead of the High Court decision in PC Civil Appeal No. 3 of 2020. I reiterate that, it was not the basis of the decision of the High Court in Revision No. 2 of 2021 which is sought to be challenged before the Court of Appeal.

On the fourth proposed point of law the issue was whether the High Court was right to find that the decision of the District Court in Civil Appeal No. 18 of 2020 was not tainted with material irregularity. Looking into the High Court decision in Revision No. 2 of 2020, the court was determining the point of objection raised by the Respondent on the

competency of an application for revision in Revision No. 2 of 2021. In the said revision application, the Applicant was challenging the Magistrate's refusal to adjourn the matter and recuse himself from the conduct of the case. This court while interpreting the provision of section 43 (2) of the Magistrate Court Act made a conclusion that such a decision was an interlocutory order which did not determine the rights of the parties conclusively. It is clear from the ruling in Revision No. 2 of 2021 that nothing was discussed by this court concerning the conduct of the District Court in Civil Appeal No. 18 of 2020.

Even if the same was discussed, it is now a settled principle that a decision which does not determine the matter in its finality cannot be subject to appeal. In this, I also refer the decision of the Court of Appeal in **Prime Catch (Export) Limited & 5 others Vs Diamond Trust Bank Tanzania Limited**, Civil Application No. 296/16 of 2017, CAT which decided that, an order not determining the right of the parties is interlocutory.

Similarly, in this matter the decision intended to be appealed against emanates from an interlocutory decision as well pointed by this court. Since interlocutory decision are not appealable and such a

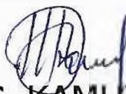
position was well settled by the Court of Appeal itself, the same cannot be certified to the Court of Appeal for determination.

In the upshot I agree with the submission by the Respondent that all points raised by the Applicant worth no certification as point of law for determination by the Court of Appeal. Consequently, I dismiss this application with costs.

Order accordingly.

DATED at **ARUSHA** this, 30th day of September 2022




D.C. KAMUZORA
JUDGE

