

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
TANGA DISTRICT REGISTRY
AT TANGA

MISC. CIVIL APPLICATION NO. 15 OF 2022

*(Originating from District Court of Tanga in Probate Appeal No. 2/2016 original Tanga Urban
Primary Court Probate and Administration Cause No. 220/2015)*

SWABAHA MOHAMED SHOSI.....APPLICANT

-VERSUS-

SABURIA MOHAMED SHOSI.....RESPONDENT

RULING

Date of judgment: 21/10/2022

L. MANSOOR, J.

The applicant, under the legal representation of Advocate Hassan Abdallah Kilule, applied for certification that there is a point of law worth the determination of the Court of Appeal of Tanzania. The application was brought by way of chamber summons supported by an affidavit. The respondent protested the application by filing a counter affidavit deposed by advocate Warehema Kibaha.

But before going further I must point out that the genesis of this application is the administration of the estate of the late Mohamed Shosi who died intestate on 01/10/2016.

Following his death, a clan meeting was convened and the respondent was endorsed to petition for grant of letters of administration. On 5/1/2016 the grant was issued to the respondent by the Tanga Urban Primary Court.

Few days after the grant the applicant lodged a caveat claiming to be the wife of the deceased and protested the appointment of the respondent as administratrix of the estate of the late Mohamed Shosi Yusuph.

After hearing both parties, the trial primary court dismissed the objection. The applicant unsuccessful appealed to the district court in Dc Probate Appeal No. 2 of 2016. Aggrieved again she appealed to the High Court Via Civil Appeal No.18 of 2020 the appeal was also dismissed. Now the applicant is intending to appeal to the Court of Appeal hence this application.

Paragraph 6 of the affidavit sworn by the applicant itemize four points for certification: -

- 1. That whether children of tender age of 3 years (Mwanafua Mohamed Shosi) and (Leya Mohamed Shosi) 8 years were legally competent to appear and sign the minutes of the family meeting that was considered and was the basis of*

the grant of the letter of Administration to the respondent and that it was not in violation of section 4 of the Age of Majority Act CAP 43 RE 2019

- 2. Whether in his judgment her (sic) the primary Court Magistrate was not functus officio in considering the second clan meetings as a further basis of his original judgment.*
- 3. Whether lack of alleged clan meeting to show that it was intended for the appointment of the administrator was not fatal.*
- 4. Whether police report DSM/KIN/CID/PE that the respondent had forged documents that she was appointed to administer the deceased estate even before grant was properly rejected.*

When replying to counter affidavit, the applicant added another point of law hence making a total of five points of law to be certified. The added point of law to be considered is;

- 5. Whether the existence of two conflicting judgments of the primary court bearing the same date and signed by the same magistrate is legally proper.*

Hearing was conducted by written submissions and Mr. Hassan Kilule, learned Advocate argued on behalf of the Applicant while Mr. Warehema Kibaha, learned Advocate argued for the Respondent.

Counsel for the applicant began submitting that Mwanafua Mohamed Shosi and Leya Mohamed Shosi had no capacity to sign the minutes of the family meeting held on 16/12/2015. They were then all minors. Afua Mohamed Shosi was only 3 years while Leya Mohamedi Shosi was 8 years.

Submitting on whether the trial magistrate was *functus officio*, the learned counsel stated that, when delivering the ruling of 5/2/2016, it was wrong for the trial magistrate to consider another family meeting held on 26/1/2016. He says, the magistrate was *fuctus officio* as he had already considered the other family meeting of 16/12/2015 in his earlier ruling of 5/1/2016. He cited the case of **Zee Hotel Management Group and Others v. Minister of Finance and Others [1997] TLR 265 (CA)** where it was held that;

'The judge was functus officio once he had given his original order and in the absence of an application for

*a review of his earlier decision, he had no authority to
so review it'*

As to whether the alleged clan meeting was intended for the appointment of the administrator, the counsel says the family meeting had no any agenda for endorsing the respondent to petition for grant of letters of administration.

On the point of the two conflicting judgement, the counsel submitted that both judgement bears the same date and signature of the same magistrate. The counsel says the first judgement issued to the applicant reads;

*'..... nyumba moja Korogwe na kiwanja Mtonga,
pia kiwanja barabara ya 2 kuna mnara na pia ana
gari 1 na kuongeza kwa marehemu wazazi wake
wote wawili walifariki'*

Whereas the other judgment issued to the respondent reads;

*'..... nyumba moja Korogwe na kiwanja
Mtonga, pia kiwanja barabara ya 2 kuna mnara na
pia ana gari 1 na kuongeza kwa marehemu
wazazi wake mmoja alifariki mmoja yupo hai'*

The counsel says the validity and existence of the two judgments needs attention of the court of appeal. He referred to the case of the **Registered Trustees of Chama cha Mapinduzi and Another v. Paskazia Rwebogora and Another Land Case Appeal No. 70 of 2016** where the court quashed and set aside the proceedings.

Submitting on the forged documents, the learned counsel stated that, prior the grant, the respondent forged documents to show that she was an administrator of the deceased estate. With the forged document he entered a new tenancy agreement with Airtel company in Dar es Salaam and collected rent arrears from the company.

In view of the above submission the applicant prays for the Court to make a finding that there are sufficient points of law for certification.

In reply the respondent stated that the applications contain only points of facts and not point of law worth enough for certification.

The counsel says the issue of minority is baseless, it is a point of fact and not of law. He also avers that the issue of the second clan meeting is just a mere flat allegation.

As to the 3rd issue, the counsel says the appointment was proper. The clan meeting minutes confined to the subject matter of endorsing the respondent to be appointed the administrator of her biological demised father.

On the 4th issue, the counsel said, the existence of the two conflicting judgment is a mere clerical mistake and is curable under section 96 of the Civil Procedure Code.

Submitting on the issue of forgery the counsel averred that the police file DSM/KIN/CID/PE182 is way back of 01.12.2014. The report was a mere allegation and the applicant failed to establish the investigation progress. He further stated that about 8 years have lapsed but yet the respondent has never been arraigned before any competent court for trial. The counsel therefore beseeches this Court to dismiss the application with cost for lack of merit.

The certificate on point of law is necessary for one to appeal to the Court of Appeal if the matter emanates from the primary

court however grant of certificate is certainly not automatic. In **Harban Hajimosi and Another v Omari Hilal Self and Another [2001]** at page 412 it was held that:

"...a certificate on point of law is necessary with appeals relating to matter originating in primary court. The practice of the High Court is to frame such a point or to approve and adopt one framed by the intending Appellant to certify it to the Court of Appeal."

In **Agnes Serein v Musa Mdoe [1989] TLR 164** CAT held that:

"The question whether there was any evidence at all to support the decision is a question of law which can properly be certified for the opinion of this Court."

Let it be noted that there is no specific provision of the law which makes it mandatory for the clan/family meeting minutes to be a mandatory requirement before appointing a person as administrator or administratrix of the deceased's estate. The procedure in appointing administrators in Primary Court is

governed by the law and it is specifically provided under Paragraph 2 (a) of the Fifth Schedule to the Magistrate Courts Act. See the case of **Oliver Bernard v. Kornel Bernard Pc Civil Appeal No. 6 of 2020 High Court (unreported)**. Clan meeting only assist the court in appointing the administrator. See the case of **Hadija Said Matika v. Awesa Said Matika Pc Civil Appeal No. 2 of 2016 High Court (unreported)**. I therefore find no point of law for certification in all the three points relating to family minutes.

I also find no merit on the point of forgery. The same is a point of fact. This fact was never proved by any decision of a competent court. It is trite that an accused cannot be condemned unless his/ her guilty has been proved.

I may therefore say, basing on the principle of law of certification this Court is required to certify questions of law as opposed to questions of fact.

Therefore, the question *Whether the existence of two conflicting judgments of the primary court bearing the same date and signed by the same magistrate is legally proper*, is a point of law worthy of certification.

In view thereof, this application is granted. Each party shall bear its costs.

DATED AND DELIVERED AT TANGA THIS 21ST DAY OF OCTOBER 2022



A handwritten signature in blue ink, appearing to read "Latifa Mansoor".

LATIFA MANSOOR
JUDGE
21ST OCTOBER 2022,