**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**MWANZA DISTRICT REGISTRY**

**AT MWANZA**

**APPLICATION No. 127 OF 2021**

**(Originated from PC Probate Appeal No. 12 of 2020)**

**ROSE NESTORY KABUMBILE ..... APPLICANT**

**Vs**

**GIBSON KABUMBILE ..... RESPONDENT**

## RULING

12/9/2022 & 21/10/2022

**ROBERT, J:-**

The applicant, Rose Nestory Kabumbile, moved this Court by way of chamber summons seeking for orders that this Honourable Court be pleased to issue a certificate on point of law for consideration by the Court of Appeal of Tanzania and costs of this application to be provided for. The application is grounded on the reasons stated in the affidavit sworn by the applicant in support of this application.

Facts relevant to this application reveals that, the applicant was appointed to be the administratrix of estate of the late Nestory Rwechungura Kabumbile in the Probate Cause No. 162 of 2019 at Mwanza Urban Primary Court and later affirmed in Probate Appeal No. 3 of 2019 at the District Court of Nyamagana. Aggrieved, the respondent appealed

to this Court vide Probate Appeal No. 12 of 2020 where this Court allowed the appeal on grounds that, since the relevant Will could not be traced in the court record then the distribution of the estate of the late Nestory Rwechungura Kabumbile was supposed to be done as if the deceased died intestate. Aggrieved by the decision of this Court in the cited case, the Applicant filed a notice of appeal and applied for certified copies of the proceedings, judgment and decree in order to appeal to the Court of Appeal of Tanzania against the decision of this Court. As the impugned decision of this Court originates from the Primary Court, the applicant moved this Court to certify that a point of law is involved in the decision subject of the intended appeal as required under section 5(2) (c) of the **Appellate Jurisdiction Act**, Cap. 141 (R.E. 2019). According to the pleadings, the proposed point of law that this Court is enjoined to consider for certification is:

> a) *Whether the deceased may be declared to have died intestate when his Will was tendered and admitted at the court of the first instance but a copy of the Will becomes missing from the court file during the second appeal.*

The application is opposed by the respondent, Gibson Kabumbile, who filed his counter-affidavit and stated that the proposed point of law

does not qualify to be a point of law worth of consideration by the Court of Appeal as it requires proof by way of evidence.

When the application came up for hearing, the applicant appeared in person without a legal representative whereas the respondent was represented by Mr. Inhard Mushongi, learned counsel. At the request of parties, the application was disposed of by way of written submissions.

Submitting in support of the application, the applicant argued that this Court was not properly guided to decide that the deceased died intestate while there is evidence on record to establish that he died testate. She submitted further that, before making its findings, this Court should have considered the grounds of appeal which the respondent raised in his petition of appeal. She referred the Court to the second and third grounds of appeal which provides to the effect that:

> *2. That, both the learned Magistrate at Mwanza Urban Primary Court and Nyamagana District Court erred in law and fact by ordering the probate of the deceased to be administered in accordance with the Will left by the deceased without considering ownership of the property contained in the Will.*
>
> *3. That both the trial Court and the first appellate Court erred in law and in fact by ordering the property of the deceased to be administered in accordance with the Will of the deceased without considering the legality of the said Will.*

She maintained that, the two grounds of appeal cited above speak to the effect that the Will of the deceased existed both at the trial Court and the first appellate Court and the parties in this matter were aware of such existence which led to the said grounds of appeal.

She argued further that, the High Court could have dealt with the said grounds of appeal and if the Will existed it could have called up the said Will so as to see its validity instead of ordering the estate to be distributed based on the rules of intestacy. She maintained that under section 25(a) of the **Magistrate Court Act** Cap. 11 (R.E 2019) the High court when exercising its appellate jurisdiction is vested with the powers to take and certify additional evidence. She argued that, the lacunae created by the absence of Will in the Court record could have been remedied had the Court invoked the provisions of section 25(a) of the Magistrates' Courts Act. In the end, she prayed for the application to be allowed.

Resisting the application, the learned counsel for the respondent argued that the raised point of law is not a point of law worth of consideration by the Court of Appeal. He argued that, the Will under which the appointment of the applicant was based was tendered as evidence

though was served to the respondent and that is the reason the said will was not seen by the High Court during the hearing of the appeal.

Submitting further, he argued that the applicant did not indicate in her submissions if the contested Will was tendered and admitted as evidence in Court. He referred the Court to the case of **Zanzibar Telecommunication Limited Vs Ali Hamad and Others** Civil Appeal No. 295 of 2019 CAT at Zanzibar (unreported) where the Court of Appeal held that a document which was not tendered and admitted during trial should not be relied upon as evidence. Hence, he maintained that in the present case the Court could not rely on the document which was not properly tendered and admitted as evidence and this is not a point of law worth of consideration by the Court of Appeal.

Coming to the argument that this Court did not consider the grounds of appeal raised, he argued that, looking at the impugned judgment of the High Court, the decision was based on the grounds raised as the first ground was dismissed while the second and third grounds were allowed. She urged the Court to dismiss this application for lack of merit.

In her rejoinder submissions, the Applicant submitted that, the respondent conceded that there was a Will but it was later handed over to the respondent. She submitted further that, the learned counsel for the

respondent is misdirecting himself by arguing that the Court could not rely on the document which was not properly tendered. She maintained that the proceedings in the Primary Court and District Court shows clearly that the said will was properly tendered. She reiterated that in the absence of the will in the Court record, the High Court ought to have called for additional evidence.

She maintained that, the case of Zanzibar Telecommunication Limited cited by the respondent is irrelevant in the circumstances of this case as the evidence in that case was not tendered and admitted at all while in this case the proceedings of the Primary Court and District Court indicates that the said Will was tendered and admitted in Court.

She re-joined further that, section 29(a) of the **Magistrate Court Act** Cap. 11 (R.E 2019) empowers the High Court on appeal to take or order another Court to take and certify additional evidence. Hence it would have been prudent for this Court to order that the Will be brought to the Court for determination of its validity. He faulted the High Court for disturbing the concurrent findings of the two courts below on the issue of Will. On the foregoing, he prayed for the application to be allowed.

Having heard the rival submissions from both parties, the main issue for determination is whether the issue raised by the applicant in paragraph

5(a) of the affidavit is worthy of the grant of certificate on a point of law for determination by the Court of Appeal.

In the case of **Dorina N. Mkumwa vs. Edwin David Hamis** (Civil Appeal No.53 of 2017) [2018] TZCA 221; [10 October 2018], the Court of Appeal observed that:

> *"Therefore, when High Court receives applications to certify a point of law, we expect Rulings showing the serious evaluation of the question whether what is proposed as a point of law, is worth to be certified to the Court of Appeal....."*

In the case of **Agnes Severin vs. Mussa Mdoe** [1989] TZCA 11; [22 September 1989]; 1989 TLR 164 (TZCA) the Court of Appeal observed further that: -

> *"We wish to observe at the outset that this was an unsatisfactory way of certifying a point of law. That certificate is capable of two interpretations. It could mean posing the question whether there was any evidence to support the concurrent decisions of the courts below. It could equally mean to ask the question whether the evidence as adduced was sufficient to support and justify those decisions. How, this distinction is imported. The question of 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. But whether the evidence as adduced was sufficient to support the decision is a question of fact which could not properly be the subject of a certificate for the opinion of this court. For, this court takes the view that if there was some evidence on which the courts below could have arrived at the decision they did, then this court will not interfere, even though had this court itself tried the case it might have come to a different decision. Those who are called upon to certify points of law should, therefore, keep this distinction in mind in order to ensure that only the correct questions are certified for the opinion of this court."*

As observed by the Court of Appeal in the excerpt above, the question whether there was any evidence at all to support the impugned decision is a question of law which can properly be certified for determination by the Court of Appeal.

Looking at the contents of paragraph 5(a) of the applicant's affidavit, it is clear that the applicant intends to challenge how this court decided that the deceased's estate should be distributed as if the deceased died intestate while the deceased's Will was tendered and admitted by the trial court and affirmed by the first appellate Court. On the other hand, the argument by the counsel for the respondent that the said will was not found in the court record because it was served to the respondent and

further that the applicant did not inform the Court if the said will was tendered and admitted is rather contradictory and not helpful in determining if the point of law raised is worth of determination by the Court of Appeal. I find the point raised by the applicant to be a typical point of law which seeks to find out if there is evidence or legal position in support of the impugned decision of this Court to administer the estate of the deceased in accordance with the rules intestacy if the deceased's will was allegedly tendered in Court but could not be traced in the court record.

That said, I find no reason not to grant this application. I therefore certify that a point of law is involved in the decision sought to be challenged as rightly raised by the applicant.

Each party shall bear their own costs in this application.

It is so ordered.

THE HIGH COURT OF TANZANIA
MWANZA

K.N.ROBERT
JUDGE
21/10/2022