

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

KIGOMA DISTRICT REGISTRY

AT KIGOMA

MISC. CIVIL APPLICATION NO. 24 OF 2022

**(ARISING FROM (PC) PROBATE APPEAL NO.4 OF 2021 ORIGINATING FROM
PROBATE CAUSE NO 12 OF 2006 AND APPLICATION NO.4 KASULU URBAN
PRIMARY COURT)**

SIRA PHILIMON APPLICANT

VERSUS

ELIUD PHILIMON RESPONDENT

Date of Last Order: 08.12.2022

Date of Ruling: 16.12.2022

RULING


MAGOIGA, J.

This is an application made under section 5(2) (c) of the Appellate Jurisdiction Act, [Cap 141 R.E. 2019] and Rule 45(2) (c) of the Tanzania Court of Appeal Rules G.N.368 of 2009 as amended by G.N.344 of 2019 for certification on point of law worth for Court of Appeal of Tanzania consideration. The impugned decision to be challenged was delivered on 16.08.2022. The applicant under paragraph 4 of the affidavit in support of this application advanced two reasons; **One**, is whether it was proper for the High Court to raise the matter suo motto and make its decision on the issue without giving parties' right to be heard. **Two**, whether it was legally proper

for the High Court to nullify the decision of the District Court and lower court without addressing to the parties.

In the counter affidavit by the respondent resisted this application and submitted that the two points raised are baseless because the High Court exercised its powers as per the law after noting irregularities justifying what the High Court did and that allowing this application will put the respondent into irreparable loss.

When this application was called on for hearing, the applicant was enjoying the legal service of Mr. Thomas Msasa, learned advocate and the respondent was enjoying the legal services of Mr. Bahati Hamis, learned advocate. Mainly their oral submissions were based on expounding the contents of the affidavit and counter affidavit. Mr. Msasa expounded the two points that; one, the High Court without hearing the parties raised the issue of their appointment and proceeded to nullify their appointment without affording them right to be heard, and second that, the issue of nullifying the decisions of the District Court and that of the Primary court whether the High Court was proper to assume powers of the trial court and appoint an administrator without affording parties' right to be heard.



In response, Mr. Hamis learned advocate for the respondent strongly opposed this application because it is not clear what the applicant prays and had problem grasping any point of law involved worth the consideration of the Court of Appeal. Upon probed by the court whether the High Court had powers to appoint and revoke an administrator(s) appointed by the Primary Court under the provisions of Fifth Schedule to the Magistrates' Court Act, [Cap 11 R.E.2019], the learned advocate for the respondent readily conceded that revocation and reappointment was not proper but was quick to point out given the time and the facts that parties cannot administer the probate together, the High Court was justified of what it did. Consequently, he prayed that the instant application be dismissed with costs.

In rejoinder, Mr. Msasa reiterated his earlier submissions with nothing valuable to add.

Having careful considered the contents of the affidavit, counter affidavit and the oral rival submissions and having read the judgement of the High Court, in my respective opinion, this application is merited. The two points as correctly argued by Mr. Hamis for the respondent are not clear but upon hearing Mr. Msasa in his oral arguments as amply expounded raises serious legal issues that are worth for certification on right to be heard and powers

of the appellate court in probate matters which originates from the Primary Court. Thus, this court doth hereby without much ado certify the two points as argued by the learned advocate for the applicant that:-

1. Whether it was proper for the High Court to raise the issue of appointment of the appellant suo motto and make its decision by nullifying their appointment without giving them right to be heard.
2. Whether the high court had powers to revoke and appoint administrator in proceedings originating from Primary Court as second appellate court.

With that note, this application must be and is hereby granted with no order as to costs as certified above.

Order accordingly.

Dated at Kigoma this 16th day of December, 2022.



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S. M. MAGOIGA
JUDGE
16/12/2022