

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA DISTRICT REGISTRY

AT BUKOBA

MISC. CIVIL APPLICATION NO. 01 OF 2022

(Arising from the Probate & Administration appeal No. 02 of 2021 of the High Court of United republic of Tanzania, Appeal No. 21 of 2020, Misc. Application No. 04 of 2020 and Civil Appeal No. 50 of 2019 of Bukoba D/C and Originating from the Civil Case No. 05 of 2013 of the Kassambya Primary Court)

JUSTICE NJUNWA MAJULA.....APPLICANT

VERSUS

EUSTIDIA LWEIKIZA MAJULA..... RESPONDENT

RULING

24/02/2022 & 28/03/2022

NGIGWANA, J.

Before me is an application for leave to appeal to the Court of Appeal of Tanzania and more so, this court is invited to certify that there is a point of law involved worth to be considered by the Court of Appeal of Tanzania. The application is brought under the chamber summons supported by the Affidavit deposed by one Justice Njunwa Majula, the applicant.

In the chamber summons, the applicant seeks to move this court through the provisions of Section 5 (1) (c) and 5 (2) (1) of the Appellate Jurisdiction Act Cap. 141 R: E 2019 so that the court may grant the said prayed reliefs.

In that regard, paragraph 3,4 and 5 of the Applicant's Affidavit are relevant as they contain the reasons why leave as well as certification of point of law is necessary for appeal purpose. The Applicant therefore averred that, is challenging the High Court decision over the matter which originates from

primary court, hence this court has to certify that there is a point of law involved.

Paragraph 5 contain two points of law which the applicant seeks this court to certify as follows: -

- (a) *Whether the revocation of the appointment of the respondent to execute her duties and filling the inventory on the provided time by the trial court was unjustified.*
- (b) *Whether the distribution exercise of the deceased person's property conducted in 1982 by the clan members was not valid.*

In the Counter Affidavit filed by the respondent on 18th February, 2022 the respondent disputed that there are no points of law to be certified by this court for consideration by Court of Appeal of Tanzania.

When the matter came for oral hearing, Advocate Lameck Erasto was for the applicant whereas Advocate Ibrahim Mswadiku was for the respondent.

Invited to take the floor, Advocate Lameck Erasto started by giving history of the matter. That this case originates from the Primary Court of Kassambya in Civil Case No. 5 of 2013 within Misenyi District where the respondent was appointed as Administrator of the estate of late Eustace Rweikiza.

That in 2019, the applicant lodged Misc. Application for revocation of the respondent as administratrix to the appointing court, after she was ordered to file inventory in four months' time as required by law and she failed. The appointment of the respondent was accordingly revoked by the same trial court.

The respondent was aggrieved and therefore appealed to the District Court of Bukoba through Appeal No. 52/2019 but the decision of the trial court was upheld. Tirelessly, she appealed to the High Court through Probate Administration Appeal No. 20 of 2021 which reversed the concurrent findings of the two lower courts.

Advocate Lameck, further submitted that since the impugned decision of this court originates from Primary Court, it is the requirement of the law that this court has to certify that there are points of law involved worth for consideration by the Court of Appeal of Tanzania.

He referred to me one case **of Richard Julius Rukambura vrs Isack Ntwa Mwakajila and Another**; Civil Appeal No. 11 of 1995, Court of Appeal of Tanzania (unreported).

Advocate Lameck, therefore, for the first point, he was to the effect that the High Court decision (Kilekamajenga, J) have reversed the concurrent decisions of the two lower courts by ordering the administratrix to file inventory in one month while the two lower courts had revoked the appointment of the respondent (administratrix) after she had failed to administer the estates and file inventory in the time as ordered by the appointing court, that according to him, it was an error and hence a point of law to be certified by this court to go to the Court of Appeal for determination.

Concerning the second point, which he wants this court to certify, the Advocate for the applicant stated whether it was proper for this court's decision to deny the testimony of the applicant that Joseph Majula after being appointed by the Kashai Primary court in Probate and Administration

Cause No. 8 of 1977 after the death of the deceased in 1976 distributed the estates among the heirs customarily and while there was evidence that the clan members were involved in the said distribution in 1982.

He concluded that since he has already filed a notice of appeal in time, he therefore prayed this court to grant leave after certifying that there are points of law involved.

In reply Advocate Mswadiku was brief that not all cases originating from Primary Court involves points of law to be taken to the Court of Appeal. He contended that the issue of failure to file inventory cannot warrant revocation and that it was clearly resolved by the High Court decision (Kilekamajenga, J), and finally the High court ordered the respondent to file inventory, the order which she has complied already. Hence Mr. Mswadiku was of the view that there is no point of law to be taken to Court of Appeal.

Concerning the second issue, Mr. Mswadiku submitted that, it was conclusively determined by the Hon. Judge that there was no inventory filed to evidence that distribution of estates was done. That it was further clearly resolved that the clan meeting minutes is not inventory to evidence distribution of estates. It was Advocate Mswadiku submission that anything which has been solved conclusively by the High court, there is no need to be taken to the Court of Appeal. To bolster his stand, He cited the case of **Lucia Kato vrs Doris Evodius**, Civil Application No. 19 of 2021 when High Court was confronted with similar situation.

He finalized that this court is **functus officio** to look into the judgment of its own to see whether it was justified to reverse the concurrent decision of the lower courts or not.

In rejoinder, Advocate Lameck stated that the Primary Court has power to appoint and revoke. That since the respondent was appointed in 2013 but no inventory was filed till in 2019 whom an application for revocation was filed hence the revocation was proper and it was an error in law for this court to have reversed the concurrent findings.

To start with, the application is omnibus as prayers sought in this application are two. The applicant prays for leave as well as certification on point of law in the same chamber summons. Since the law requires leave to appeal to the Court of Appeal, and as well certification of point of law for matters originating from Primary Court. In my view, applying for both is not fatal. Determining only certification on point of law overrides application for leave, and should this court find, there exists points of law, the court will automatically grant leave to the Court of Appeal but the vice versa is not true, because, if there are no points of law involved, will render application for leave superfluous as one cannot be allowed or given leave to appeal to Court of Appeal if no appeal on points of law, hence the best move is only to apply for certification points of law, if the matter originates from primary court. Since the law to date as it appears does not discourage both applications, hence omnibus application in this circumstance is not fatal. From the fore going, I will only determine on the application of certification on point of law which overrides application for leave to appeal to Court of Appeal.

Now, the task of this court is to decide whether the two points registered by the applicant, do real qualify as points of law to warrant certification of this court worth to be considered by the Court of Appeal of Tanzania.

In essence, section 5 (2) (c) of the Appellate Jurisdiction Act Cap 141(Supra) confers jurisdiction on the High Court to grant or refuse such certificate and it is only the High Court which is entrusted with its issuance (See, **Auguster Salanje v. Mussa Mohamed Pemba**, Civil Application No. 4 of 1991 (CA) (unreported); **Mohamed Adinani v. Mohamed Selemani**, Civil Application No. 32 of 1992 (CA) (unreported), **Yustina Leonard Bossi vs Imelda Kibina** Misc. Land Case Appl. No. 59/2019. HCT at Bukoba (Unreported). Furthermore, it is the same certificate on a point of law under section 5 (2) (c) of the same law, that confers jurisdiction to the Court of Appeal to hear and determine the appeal in question.

From the above cited cases, it can be grasped that the High Court has discretion to certify or not to certify the points of law intended to be considered by the Court of Appeal. In **Mohamed Mohamed and Another v Omari Khatib**, Civil Appeal No. 68 of 2011, CAT, at Zanzibar (Unreported) quoting with approval of the holding in **Ali Vuai Ali v Suwed Mzee Suwed**, Civil Appeal No. 72 of 1998 (Unreported) tried to discuss at lengthy the purpose and factors which amount to point of law as quoted herein below:

"...the purpose of a certificate for the class of appeals originating in primary courts was to ensure that deserving cases only reached the Court of Appeal. The exercise is therefore a screening process which would leave for the attention of the Court only those matters of legal significance and public importance."

After quoting what was expounded in **Ali Vuai's case** the Court further observed as follows:

"In principle, we agree with Mr. Nassor K. Mohamed that not every error of law is fit for certification. We say so because in our understanding and appreciation of the memorandum of appeal we do not discern any serious point of legal significance. At best, the memorandum is an accumulation of alleged errors of law. We may as well say here that further to the decision in Ali Vuai Ali (supra) a point of law worthy being certified for our decision would be, for instance, where there is a novel point, where the issue raised is unprecedented, where the point sought to be certified has not been pronounced by this Court before and is significant or goes to the root of the decision, where the issue at stake involves jurisdiction, where the court(s) below misinterpreted the law etc. In this sense, a mere error of law will not be a good point worthy the certificate."

Before venturing in determining this application, this court must warn itself that its duty is not to correct its own errors in law or facts through the impugned High Court Judgment but rather to see if the applicant has really registered the pure points of law worthy to be considered by the Court of Appeal in the intended appeal and therefore the certified points of law by this court will eventually be the grounds of appeal at the Court of Appeal. See this Court's decision in **Lucia Kato vs Doris Evodius**, Civil Application No.19 of 2021, HCT, at Bukoba (Unreported) also relied by the respondent's counsel.

I have laboriously investigated the record including the affidavits and rival submissions of both parties. By so doing, I have drawn much help from the above cited cases discussed by the Court of Appeal. In my view, both points appear to be points of law worthy to be considered by the Court of Appeal as they raise serious points of legal significance and they show novelty in the eyes of law as far as probate and administration of deceased estates is concerned. I am constrained to hold that the raised issues are unprecedented thus if they are taken to Court of Appeal which is the apex court in this country, the expected stance will enrich the public at large as they appear to be matters of legal significance and public importance. In this stance I have taken, I was also compelled to follow the holding in **Mohamed Mohamed's case** (Supra). I will supply the reasons herein below: With regard to the first point concerning revocation of administratrix by the primary court.

The powers of the primary court in rule 2 (c) under the 5th schedule of the MCA, Cap. 11 empowers the appointing court to revoke the appointed administrator upon sufficient reason. It was on that ground after the application for revocation was placed before the appointing court in 2019 that the administratrix had not filed inventory since 2013 the appointing trial court revoked the respondent. The High court reversed the concurrent decision by maintaining the administratrix and ordered her to finalize the distribution and file inventory in 30 days. The intended appeal will therefore determine whether the High Court decision was legally proper or not.

Coming to the second point, the High court found that after the death of the deceased in 1976 the estate was not distributed as there was no inventory ever filed through relevant forms to the appointing courts in 1982 despite the

fact the respondents proved by minute sheets that they were distributed customarily in before the clan members in 1982 that is why the respondent having been appointed in 2013 failed to file inventory as there were no estates to administer. Both lower courts were at one on that issue. Now the Court of Appeal will determine whether distribution of estates customarily before the clan members without filing inventory to courts is legally valid. The Court of Appeal will give directive on that matter as now appears to be two different schools of thoughts on this issue. This court before my brother Mwangesi, J (As he then was) in **Julius Fundi and Modesta Kamakarwe vs Ernest Pancras**, Probate and Administration Appeal No. 03 of 2013, HCT at Bukoba found that estates distributed customarily in the course of executing a will that proceeding to appoint an administrator who in fact in actual sense would have nothing to administer, is creating chaos and unfounded claims in respect of the estate, as they already have owners.

I am therefore constrained to certify the two points of law registered by the applicant as they do qualify to be taken to Court of Appeal. For the sake of clarity, I now paraphrase and certify them as follows:-

- (a) ***Whether the High court reversing the concurrent decisions on revocation of the appointment of the respondent to execute her duties and who had failed to file the inventory on the provided time by the trial court was legally justifiable.***
- (b) ***Whether the High Court was legally right to have refused to recognize the distribution exercise of the deceased person's property conducted in 1982 by the clan members?***

In the event, for the above reasons, I would allow this application. Leave is therefore granted so that the applicant may go to Court of Appeal armed with the above points of law. No orders to costs entered.

It is so ordered.




E.L. NGIGWANA

JUDGE

28.03.2022

Ruling delivered this 28th day of March 2022 in the presence of the Applicant, Advocate Erieth Barnabas for the applicant, Respondent, Advocate Ibrahimu Maswadick for the respondent, Mr. E. M. Kamaleki, Judges' Law Assistant, Ms. Tumaini Hamidu, B/C.




E.L. NGIGWANA

JUDGE

28.03.2022