

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

**(DAR ES SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**MISC. CIVIL APPLICATION NO.498 OF 2022**

*(Arising from PC Civil Appeal No.89 of 2021 High Court at Dar es Salaam,  
Originating from Civil Appeal No.14 of 2021 Ilala District Court; originating in  
Probate Cause No. 105 of 2017 Kariakoo Primary Court)*

**FAIZA MOHAMED HASSAN (Administratrix of  
the estate of the late Ajuza Abdallah Makbel).....APPLICANT**

**VERSUS**

**HASSAN MOHAMED HASSAN.....RESPONDENT**

**RULING**

*12/12/2022 & 27/02/2023*

**POMO, J**

Under section 5(2)(c) of the Appellate Jurisdiction Act, [Cap. 141 R.E.2019] this court is moved by the Applicant to certify what she contends to be three points of law allegedly worthy consideration and determination by the Court of Appeal of Tanzania against the decision of this court in PC

Civil Appeal No. 89 of 2021 delivered on 30<sup>th</sup> October, 2022 Hon. J.L. Masabo, J.

The Application is supported by the affidavit deposed by Faiza Mohamed Hassan the Applicant herein. The contended points of law sought to be certified by this court are stated under paragraph 7(i) – (iii) of that affidavit and they read as follows: -

*"Para. 7 - That, the applicant is dissatisfied by the decision of the Hon. Court. There are several points of law to be considered and adjudicated upon by the Court of Appeal of Tanzania for which Certificate on the Points of Law by this Court is required for determination of those points of law by the Court of Appeal. These are:*

- i) Whether the deceased's Will was valid and properly witnessed*
- ii) Whether it was proper for the presiding Judge to invalidate the Will on a new ground where the parties neither addressed on it nor given opportunity to address on the same*
- iii) Whether the Court in probate matter has no jurisdiction to determine ownership of a property where a dispute arises to its ownership". End of quote*

The respondent did not file any counter affidavit to the Applicant's affidavit

The background to the dispute can briefly be stated as follows. The parties herein are blood relatives in that they are sister and brother. Their mother one Ajuza Abdallah Makbel passed away sometimes on 5/11/2014 as evidenced by the death certificate C.No.1000024888. The death was followed by the filing of Probate Cause No. 105 of 2017 before Kariakoo Primary Court whereby the Applicant herein was appointed Administratrix of the estate of their deceased mother. In so appointing, it held the Last Will left by the deceased to be a valid Will despite being objected to by the Respondent herein

The Respondent was aggrieved by the trial court decision. He successfully appealed to the district court of Ilala vide Civil Appeal No.14 of 2021 whereby the first appellate court reversed the trial court decision by declaring the said Last Will left by the deceased to be invalid

Now, it became the turn of the Applicant to be aggrieved. She appealed to this court the appeal which was registered as PC Civil Appeal No. 89 of 2021. On 30<sup>th</sup> September, 2022 judgment of this court was delivered

whereby the Applicant's appeal was dismissed for being unmerited and the first appellate court findings was upheld.

The Applicant is still aggrieved hence this application seeking for certification of points of law considered to be worthy consideration and adjudication by the Court of Appeal of Tanzania, the points, as above alluded, are contained under paragraph 7(i)-(iii) of her affidavit in support of the Application.

On 14/12/2022 when the Application was called for hearing, the Applicant was present represented by Mr. Ignas Punge, the learned counsel. Also, the Respondent was present enjoying legal service of Emmanuel Hyera, the learned counsel. By consensus, it was agreed the application be disposed by way of written submissions, the order the parties complied with. I am grateful to the counsel's industrious submissions they have made in support and opposing the Application.

Submitting in support of the application, Mr. Punge argued, in respect of the first ground the Applicant is seeking its certification, that the learned judge was wrong to invalidate the Last Will contending it was a properly witnessed Last Will. That, all the conditions set in preparing the Last Will

were met including competent witnesses to it. That even the officer from Registration, Insolvent and Trusteeship Agency (RITA) testified before the trial primary court that the Last Will met the required standard.

As to the second ground, Mr. Punge argued that it was an error on the part of the learned High Court judge to invalidate the Last Will basing on an issue the court raised *suo motu* and determined without affording parties right to be heard on it first. That, SAMIHA ALLY SALUM who witnessed the execution of the Last Will was just a friend to a testator and not blood relative. The decision of the Court of Appeal in **SALHINA MFAUME AND 7 OTHERS VS TANZANIA BREWERIES CO LTD, CIVIL APPEAL NO.111OF 2017 CAT at DSM (Unreported)** was referred to.

Arguing the last ground, which is to the effect as to whether courts determining probate matter has no jurisdiction to determine ownership disputes of properties involved in probate matter, Mr. Punge submitted that courts are vested with such power and the learned judge was not right in holding otherwise. He then referred this court to the decision of the court of Appeal in **MGENI SEIFU VS MOHAMED YAHAYA KHALFAN, CIVIL APPLICATION NO.1/2009 CAT AT DSM (Unreported)**.

In the end, Mr. Punge concluded his submission by praying the points raised be certified as points of law worthy consideration and determination by the Court of Appeal of Tanzania

Replying to the Applicant's submission, Mr. Hyera argued, in respect of the appellant's first ground, that the Applicant is misleading the court as SAMIHA ALLY SALUM who witnessed the Last Will is not a friend to the testator but blood relative. Equally so, the second witness to it is a blood witness which is against the law on Last Wills to be witnessed by two blood relatives.

Responding to the submission in respect of the second ground, Mr. Hyera argued that the issue of validity of the Last Will was never raised ***suo motu*** by the court rather formed the grounds of appeal in the first appellate court and was also argued in the Applicant's appeal before the High Court. To him, this is an issue which is raised but not supported by the court records.

As to the last ground, which is whether the court in probate matter has no jurisdiction to determine ownership of a property where a dispute arises as to ownership, Mr. Hyera argued that the issue was raised in second appeal

during rejoinder submission. That, it was the issue added illegally and thus contends it contravened the principle articulated in **JAICA VS KHAKI COMPLEX LIMITED [2006] TLR** in which it was held the court should not base its decision on documents not formally admitted. To him it was an issue which was not pleaded and the case of **James Funke Ngwagilo Vs Attorney General , Civil Appeal No.67 of 2001 TLR 2004 at page 161** where the Court of Appeal stated the function of pleadings is to give notice of the case which has to be met. A part must therefore so state his case that the opponent will not be taken by surprise.

Mr. Hyera rested his reply submission by praying the Applicant's Application be dismissed with costs

In determining the Application, my power is limited to that of finding out if the contended grounds are worthy being certified as point of law or otherwise for consideration and determination by the Court of Appeal, this is per the dictate of Section 5(2)(c) of the Appellate Jurisdiction Act [Cap 141 R.E.2019] which provides thus :-

*"(2)(c)- no appeal shall lie against any decision or order of the High Court in any proceedings under Head (c) of party III of the Magistrates' Court Act*

***unless the High Court certifies that a point of law is involved in the decision or order***

The said Head (c) of Part III of the Magistrates' Court Act reads as follows: -

*"(c) Appellate and Revisional Jurisdiction of the High Court in Relation to Matters Originating in Primary Courts". End of quote*

In **Hamis Mdida and Another Versus The Registered Trustees of Islamic Foundation, Civil Appeal No.232 of 2018 CAT at Tabora (unreported)** at page 11 the Court of Appeal had this to state:

*"The court would generally look at the judgment or ruling sought to be appealed against to assess whether there are arguable grounds meriting an appeal. Certainly, such a determination will be made at the end of the day after some deliberation **but not an adjudication on the merits of the proposed grounds**". End of quote*

Guided by the above cited provisions of the law and the decision of the Court of Appeal in **Hamis Mdida case (supra)** the issue for determination is whether what is provided under paragraph 7(i)-(iii) of the affidavit supporting the Application are grounds worthy to be certified as points of law for consideration and determination by the Court of Appeal of Tanzania.



Having gone through the impugned high court decision together with the lower courts records, I am persuaded that only what is asked for certification as points of laws under paragraphs 7(i) and 7(iii) of the affidavit in support of the Application are worthy consideration and determination by the Court of Appeal save paragraph 7(ii) which I wonder as to where the Applicant got it. The raised issue is not supported by the court records in that it never featured anywhere in the decision of the learned high court judge, as correctly so submitted, in my view, by the counsel for the Respondent.

In the upshot, I hereby certify paragraph 7(i) and 7(iii) of the Applicant's affidavit to be points of law worthy consideration and determination by the Court of Appeal and decline to certify paragraph 7(ii) as the same is not supported anyhow by the court record to have ever featured. To that extent, I allow the Application with no order as to costs.

It is so ordered.

Dated at **Dar es Salaam** this 27<sup>th</sup> day of February 2023.



**MUSA K. POMO**

**JUDGE**

**27/02/2023**

