

**IN THE HIGH COURT OF TANZANIA
(IN THE SUB-REGISTRY OF MWANZA)
AT MWANZA**

MISC. CIVIL APPLICATION NO.131 OF 2022

(Arising from the decision of the High Court of Tanzania at Mwanza, in Pc Civil Appeal No. 45 of 2022 dated 13th October by Hon. M.P. Otaru J, originating from PC Probate Cause No. 33 of 2019 at Mkuyuni Primary Court)

SIKUDHANI HANS MWAKYOMA..... APPLICANT

VERSUS

SIKUJUA MODEL MWASONI..... RESPONDENT

RULING

Date of Last Order: 24/03/2023

Date of Ruling: 06/04/2023

Kamana, J:

The Applicant herein intends to move the Court to certify that a point of law, worth consideration by the Court of Appeal of Tanzania, exists in the appeal that she intends to file. The impending appeal is against the decision of the Court (Hon. Otaru, J.) which dismissed her appeal on the grounds that it was devoid of merits and further ordered the matter to be remitted to the Primary Court of Mkuyuni for a continuation of the necessary processes. In the Applicant's thinking, the

decision by the Court is faulty. The application has been preferred under the provisions of Section 5 (2) (c) of Appellate Jurisdiction Act Cap. 141 R.E. 2019 and rule 45 (a) of the Tanzania Court of Appeal Rules. It is supported by an affidavit of Ms. Sikudhani Hans Mwakyoma, the Applicant, and it sets out grounds on which the application is based.

When the matter came up for hearing Mr. Chagula, the learned advocate appeared for the Applicant while the Respondent enjoyed the professional representation of Mr. Kweka. In his support submission, Mr. Chagula, learned advocate, firstly, adopted the affidavit sworn by the Applicant Ms. Sikudhani Hans Mwakyoma. He contended that four points of law are extracted from the impugned decision. These are: **One**, that the High Court erred in law when it decided that the deceased was not a Christian because did not live a Christian lifestyle while his burial ceremony was conducted in a Christian manner, **two**, That the High Court erred in law when it decided that the deceased Paul Perfect Lyapa lived secular lifestyle while he lived Christian lifestyle, **three**, that appeal is Constitutional right of the appellant and **four**, That the High Court erred in law, when it failed to consider that Primary Court didn't have jurisdiction to hear probate cause while the deceased Paul Perfect Lyapa

was a Christian. It is for these reasons the Applicant urges this Court to allow the application.

On his part, Mr. Kweka, counsel for the Respondent, felt that the application exhibits no point of law worth a certification for determination by the Court of Appeal. He started by attacking the application for being brought out of the prescribed time. He claimed that judgment was delivered on 13/10/2022 and notice of appeal was filed nearly a month later.

Regarding the issue that appeal is a Constitutional right, the learned advocate was of the view that both parties' rights should be observed. According to him, the primary court was right in ruling that the deceased Paul Perfect Lyapa was not a Christian. Based on these arguments, he prayed this Court to dismiss the application with costs.

Having heard the parties, the question which arises and requires this court's determination is whether the instant application meets the threshold requirement for certification of a point of law that warrants the attention of the Court of Appeal.

It is trite law that appeals to the Court of Appeal, in respect of matters originating from either the Primary Court or the Ward Tribunal, must undergo a scrutinizing process that involves ascertaining if the

intended appeal by the losing party carries a point of law of sufficient importance, worth of and relevant for consideration by the Court of Appeal. This position of law has been emphasized in numerous decisions in this Court and the Court of Appeal. These include **Ramadhan Muyenga vs Abdalah**, [TLR. 1996] 74, which was cited by the Applicant, **Omari Yusufu v. Mwajuma Yusufu & Another** [1983] TLR 29; **Dickson Rubingwa v. Paulo Lazaro**, CAT-Civil Application No. 1 Of 2008; **Harban Haji Mosi & Another v. Omari Hila Seif**, CAT-Civil Reference No. 19 of 1997; **Nurbhim Ruttensi vs Minister of Water Constructors Energy and Investment**, [2005 TLR. 220], **Harban Hajimosi and Another vs Omari Hilal Seif and Another**, [2001] TLR 409 and **Marco Kimiri & Another v. Naishoki Eliau Kimiri**, CAT-Civil Appeal No. 39 of 2012 (all unreported).

In the decision of **Harban Hajimosi and Another vs Omari Hilal Seif and Another**, [2001] TLR 409 on page 412 it was stated as follows;

'Therefore, according to subsection (2) (c), 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.'

It was further stated in the decision of **Abdallah Matata v. Raphael Mwaja**, CAT-Criminal Appeal No. 191 of 2013 (DDM-unreported), the Court of Appeal summarized the imperative requirement of certifying the point of law, thus:

'In order to lodge a competent appeal to the Court, the intended appellant has to go through the High Court first with an application for a certificate that there is a point of law involved in the intended appeal. It is only when the appellant is armed with the certificate from the High Court, that a competent appeal may be instituted in this Court.'

Looking at the matter at hand, four proposed points of argument raise complaints that the Court has failed to analyze evidence that was adduced by the Applicant. The first point is about the failure of the trial Judge to hold that the deceased was not a Christian. It is my considered view that this point does not pass the test set for certification on point of law since it requires proof. As to whether the trial Judge has failed to consider that the deceased lived a Christian lifestyle is also an evidential issue that has been dealt with quite sufficiently by this Court, District Court and the Primary Court. Regarding the third and fourth points, the

fact that I hold the view that the issue of the deceased religion has been well dealt with by previous Courts, these points also fail. It must be borne in mind that this Court cannot allow it to be re-opened by way of an appeal to the Court of Appeal. It is completely a factual question that carries no simplest resemblance to a point of law that can be considered for certification by this Court.

In the foregoing, I take the view that this application has failed the test and the same is dismissed. For obvious reasons, I order no costs.

It is so ordered.

DATED at MWANZA this 6th day of April, 2023.



A handwritten signature in blue ink, appearing to read "KS Kamana". The signature is fluid and stylized, with a large initial "K" and a long, sweeping underline.

KS KAMANA

JUDGE