IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

MISC. CIVIL APPLICATION NO. 49 OF 2023

(C/F High Court of Tanzania at Arusha in PC Civil Appeal No. 5 of 2018; District Court of Arusha at Arusha in Civil Appeal No. 45 of 2017 Originating from Arusha Urban Primary Court in Probate and Administration Cause No. 156 of 2009.)

RITA ALEX MARO ..... APPLICANT

VERSUS

EMMANUEL ALEX MARO ..... 1ST RESPONDENT

BRUCE ALEX MARO ..... 2ND RESPONDENT

EVA ALEX MARO ..... 3RD RESPONDENT

RULING

20th July & 21st August 2023

TIGANGA, J.

Under Section 5(1) (c) and (2) of the Appellant Jurisdiction Act, Cap 141 R.E 2019 (AJA) the applicant prays for this Court to certify that there are points of law worth consideration by the Court of Appeal of Tanzania in the decision of this Court (S.C Moshi, J.) in (PC) Civil Appeal No. 05 of 2018, delivered on 09th August 2018.

The application was filed by a chamber summons and supported by the affidavit sworn by Mr. Gwakisa Kakusulo Sambo, the applicant's Advocate who deponed that, the applicant herein was the appellant in the High Court of Tanzania at Arusha in (PC) Civil Appeal No. 05 of 2018 which was decided against her favour. He was aggrieved by that decision and decided to commence an appeal process by filing the Notice of Appeal on 16th August 2018. She also applied for certification of point of law to appeal to the Court of Appeal of Tanzania in which this Court, Maige J, (as he then was), in Misc. Civil Application No. 72 of 2018, certified that there is the point of law involved. Following that certification, she thereafter filed Civil Appeal No. 182 of 2019 to the Court of Appeal. However, when the appeal was called for hearing, the same was found to be tainted with some technical defect as the certificate of delay was not tallying with the ruling of the Court thus, the applicant withdrew the same and started the appeal process afresh, hence the current application.

Under paragraph 14 of his affidavit, learned counsel pointed out the intended grounds of appeal that need certification as attached in annexure R-5 which are as follows:-

1. That, the trial, first and second appellate Courts erred in law in holding that the Probate and Administration proceedings at the trial Court were not closed when the application for revocation of the grant was being instituted.
2. That, the trial, first and second appellate Courts erred in law and facts by failing to abide by the established law and principles governing Probate in Primary Court hence it arrived at an erroneous decision.
3. That, the trial, first and second appellate Courts erred in law by failing to give a correct and proper interpretation of the 5th schedule to the Magistrates Court Act [Cap 11 R.E 2002]
4. That, the trial, first and second appellate Courts erred in law and facts in entertaining the proceedings which their hands are functus officio.
5. That the reopening of the Probate and Administration Cause No. 156 of 2009 which was closed, without following due process of law occasioned a miscarriage of justice and lead to illegal and irregular judgment.

6. That the trial Primary Court erred in law and facts by revoking the appointment of the appellant as administrator while the appellant is no longer administrator in the eyes of the law.
7. That, the first and second appellate Courts erred in law by blessing an error committed by the trial Primary Court by revoking the appointment of the appellant as administrator while the appellant was no longer administrator and sacred principle enunciated in the case of **Ahmed Mohamed Al Laamar vs Fatuba Baari and Asha Bakari,** Civil Appeal No. 71 of 2012, CAT –Tanga (Unreported) which was fully violated by the lower appellate Court.
8. That, the trial, first and second appellate Courts erred in law by failure to correct and give a proper interpretation of rule 2(c) of the 5th schedule to the Magistrates Courts Act Cap 11 R.E 2002.
9. That, the trial, first and second appellate Courts erred in law to entertain the matter which is Res Judicata.

The respondents did not bother to file the counter affidavit to oppose the application and at the hearing which was conducted by way of written submission, it proceeded ex-parte.

He further submitted that, with the provisions of Article 13(6)(a) of the **Constitution of the United Republic of Tanzania**, the aggrieved party is entitled to the right to appeal or get any other legal remedy against the decision of the court or the other agency concerned. In that regard, the Constitution recognizes, protects, and guarantees a right of appeal. To cement that point, he referred the Court to the case of **Tanzania (2000) Adventure Limited vs. Reliance Insurance Company (TZ) Limited**, Misc. Civil Application No. 37 of 2017, High Court of Tanzania At Arusha, which held to that effect.

Mr. Sambo further submitted that the applicant wishes to invite the Court of Appeal to look at the point upon the close of the probate and administration cause, which the High Court failed to interpret in the impugned Judgement. That is whether someone who is no longer administrator can be revoked under the law especially the 5th Schedule to the **Magistrate Courts Act** [Cap 11 R.E 2019]. Also whether it was proper under the law to revoke the administration of the probate cause which has been already closed without justification. He also posed another point, which is, whether the trial probate court erred in issuing the typed decision instead

of the handwritten one in closing the probate matter, especially in this era where the Judiciary has shifted to the digital world.

He further argued that the two appellate Courts misapplied the law hence arriving at an erroneous decision that needs the attention of the Court Appeal of Tanzania for their proper interpretation applicability and directions especially when the High Court has faulted the Primary Court for its failure to have a handwritten judgment despite the presence of a computer printed Judgment being in the Primary Court file. He argued that, when he formally perused the High Court file in regards to the Judgment which the applicant intends to challenge to the Court of Appeal, he noted that there is no handwritten judgment by the High Court, but rather the computer-printed one. This means the Court cannot fault the primary court to use the same procedure.

He prayed that these abnormalities developed by the High Court in the impugned Judgment need to be settled by the Court of Appeal. He prayed for the application to be granted as prayed.

Having considered the applicant's affidavit and submission filed in support of the application, the main issue for determination is whether the applicant has pointed out the points of law worthy of certification for

consideration by the Court of Appeal. In determining the issue framed, the role of this Court is not to step in the shoes of the Appellate Court, but only to consider whether or not there are points of law worthy of consideration by the Court of Appeal. The practice for this Court, in the application of this nature, is as stated in the case of **Harban Hajimosi & Another vs Omari Hilal Seif & Another**, [2001] TLR 409, it was stated as follows;

> *"Therefore according to subsection (2)(c) a certificate on point of law is necessary with the appeal relating to matters originating in Primary Court. The Practice of the High Court is to frame such a point or to approve and adopt the one framed by the intending appellant to certify to the court of appeal"*

In performing this duty, I have traversed in the affidavit filed by the applicant in support of the application, the attached intended memorandum of appeal as attached to the affidavit as annexure R5, and the decisions of the trial, first and second appellate Courts. As earlier on intimated, what I am required to do is to certify the points which are points of law. The applicant through her counsel Mr. Gwakisa Sambo, proposed a total of nine points to be certified as the points of law. Some of them are, by their look, the points of facts, while others are mixed points of fact and law, while very few may stand as points of law.

Having considered all the criteria, I find the 1st, 2nd, 5th, and 7th, intended grounds of appeal, which raises the complaint that, the three Courts, below the Court Appeal, erred in law in holding that the Probate and Administration proceedings at the trial Court were not closed when the application for revocation of the grant was being instituted and that they failed to abide by the established law and principles governing Probate and Administration Cause in Primary Court, hence, it arrived at an erroneous decision. The other one is that the trial Primary Court erred in law and facts by revoking the appointment of the appellant as an administratrix while the appellant was no longer an administrator in the eyes of the law. In my view, these are points of fact because they need evidence to ascertain the truth, they, therefore, fall short of the qualities to be the point of law, worthy of certification.

The 3rd and 8th grounds, given their nature, are both points of law as they raise the complaint that, the two appellate courts blessed an error committed by the trial Primary Court by revoking the appointment of the appellant as administrator while the appellant was no longer administrator and against the sacred principle enunciated in the case of **Ahmed Mohamed Al Laamar vs Fatuba Baari and Asha Bakari,** Civil Appeal

No. 71 of 2012, CAT –Tanga (Unreported). In his view, the lower appellate Courts failed to give a correct and proper interpretation of the 5th schedule to the Magistrates Court Act [Cap 11 R.E 2002]. These in my view are points of law from which a point of law can be framed and certified.

Now before I pen down, I find it worth discussing two legal principles raised that is the ground containing the doctrine of *functus officio* and *res judicata* these on the face of it, would seem to be the point of law. However, the concept of res judicata has not been supported by both, the record and the fact in the affidavit and the submissions in support of the application. It has therefore been raised without a legal and factual base. But the issue of *functus officio* can be framed depending on the result of the other issue of whether the 2nd appellate Court properly interpreted governing the probate and administration of the estate in the Primary Court. From the foregoing, I remain with the two points which deserve to be certified, as I hereby do. I, therefore, certify the following two points which are;

(i) *whether the High Court correctly applied the law in holding that the Probate and Administration proceedings at the trial Court had not been closed when the application for revocation of the grant was being instituted.*

(ii) *If the first issue is resolved in the favour of the intending applicant, whether the trial Court was not functus officio?*

For the foregoing reasons, and to the extent explained hereinabove, I hereby grant the application and hold that the two points of law which have been certified hereinabove merit consideration by the Court of Appeal. The application is therefore granted to the extent explained above, and since it has not been opposed, no order for cost is made.

It is accordingly ordered.

DATED and delivered at **ARUSHA** this 21st day of August 2023.

J.C. TIGANGA

JUDGE