

**IN THE UNITED REPUBLIC OF TANZANIA
IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF MTWARA
AT MTWARA**

MISC. CIVIL APPLICATION NO. 13 OF 2022

(Arising from the Judgement and Decree of the High Court of Tanzania in PC Civil Appeal No. 7 of 2022 dated 31st October, 2022; emanated from Probate Appeal Case No. 2 of 2021 at Kilwa District Court; Originated from Probate Causes No. 32 of 2021 at Kilwa Masoko Primary Court)

JUDITH ALFRED BIGIRWA ----- APPLICANT

VERSUS

VICTOR KINGSON BARONGO ----- RESPONDENT

RULING

Date of last Order: 05.10.2023

Date of Judgment: 14.12.2023

Ebrahim, J.:

The applicant herein has lodged the instant application praying for leave on points of law to appeal to the Court of Appeal against the decision of this Court in PC. Civil Appeal No. 7 of 2022. The application is supported by the affidavit of Judith Alfred Bigirwa, the

applicant. The application has been brought under the provisions of **Section 5 (1) (c) of the Appellate Jurisdiction Act [CAP. 141 R.E. 2019]** and **Rule 45 (a) and (b) of the Court of Appeal Rules 2019**. This matter originates from a probate case filed in 2021 at the Primary Court of Kilwa Masoko, Kilwa vide Probate Cause No. 32 of 2021. The Probate Court appointed the respondent to be the administrator of the estate of the late Auleria John Simeo (their grandmother). The deceased died on 31st January, 2021 at Kilwa Kivinje. The applicant was dissatisfied with such decision and she lodged an appeal, Probate Appeal No. 2 of 2021 at the District Court of Kilwa. The District Court of Kilwa dismissed the appeal. The applicant was aggrieved and her grievances got the attention of the High Court vide PC Civil Appeal No. 7 of 2022. This Court dismissed the appeal. The applicant was aggrieved again hence the present application for certificate on point of law.

The instant application has been argued by way of written submission as per the order of the court and a schedule set thereat. Both parties adhered to the set schedule.

The parties appeared in person, unrepresented. In her submission, the applicant outlined four points of law that she would wish to seek the intervention of the Court of Appeal. Those points of law can be condensed into one:

1. Whether Probate Cause No. 32 of 2021 which was heard by the same Magistrate who was disqualified by the order of District Court on 14th June, 2021 in Civil Revision No. 02 of 2021, was proper, as the court ordered that Probate Cause No. 22 of 2021 to be heard afresh before another Magistrate with competent jurisdiction.

In reply, the respondent referred to the four points of law raised. He argued that the applicant always blames the decision reached. She said, the applicant intends to waste court's time and his application has no merit.

It is trite law that, the contentious points worth taking to the Court of Appeal on matters originating from the Primary Court is where the point of law is involved from the decision or order of the High Court as provided in **Section 5 (2) (c) of the Appellate Jurisdiction Act**

[CAP. 141 R.E. 2019]. This principle of law was well enunciated in the case of **Ali Vuai Ali vs. Suwedi Mzee Suwedi**, Civil Appeal No. 38 of 1996 (unreported); and also considered in the case of **Maulid Makame Ali vs. Kesi Khamis Vuai**, Civil Appeal No. 100 of 2004 CAT.

Undoubtedly, the purpose of such certificate considering that it is the third appeal is to ensure that only deserving matters of law and not facts which have already been dealt with goes to the Court of Appeal.

Looking at submissions of the applicant and after going through the court records it is obvious that the points of law that she seeks for the guidance and determination of the Court of Appeal is rounded on the issue as to whether Probate Cause No. 32 of 2021 which was heard by the same Magistrate who was disqualified by the order of District Court on 14th June, 2021 in Civil Revision No. 02 of 2021, was proper. As the court ordered that Probate Cause No. 22 of 2021 be heard afresh before another Magistrate with competent jurisdiction.

The respondent urged the court not to consider the application on the basis that the facts have already been determined by the court.

However, I find that the points raised particularly on whether the filing of Probate Cause No. 32 of 2021 following the order of the District Court vide Civil Revision No. 02 of 2021 was proper, cannot be ignored by this court and termed as an issue of fact.

I find that this is a pertinent issue that needs the intervention and guidance of the Court of Appeal. As to whether the filing of Probate Cause No. 32 of 2021 as a fresh suit was proper after the court ordered probate cause No. 20 of 2021 be heard afresh before another Magistrate with competent jurisdiction; it is my considered views that it is not within my ambit to discuss those arguments at this stage of application. Although the applicant has cited the case as Probate Cause No. 22 of 2021 instead of probate cause No. 22 of 2021; it is a minor mistake that can be cured by the court without embarrassing the right of either party under the spirit of the oxygen principle.

From the above background I find that, there is a pertinent issue of law emanating from the order of the District Court vide Civil Revision

No. 02 of 2021 as put by the applicant that needs determination by the Court of Appeal.

I therefore grant the application and issue the certificate on point of law as to whether it was proper for the same magistrate who determined the case subjected to appeal preside over the case again despite the order of the 1st appellate court that the matter be heard afresh by another magistrate with competent jurisdiction. Considering the family relation of parties, I give no order as to costs. Each party to bear its own.

Accordingly ordered.


R.A Ebrahim
JUDGE



Mtwara

14.12.2023.