IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

THE SUB-REGISTRY OF MWANZA

AT MWANZA

MISC. CIVIL APPLICATION NO. 27562 OF 2024

(Arising from civil appeal No. 35/2023 of the High Court of Tanzania at Mwanza)

HASSAN SAID KIMWAGA .....APPLICANT

VERSUS

ASHRAF SAID KIMWAGA (As the administrator of the Estate of the late Said Seif Kimwaga) **..... RESPONDENT**

RULING

21st March & 8th May 2024

CHUMA, J.

In the instant application, the applicant is moving this court to certify eight points of law worth determination by the Court of Appeal. The application is preferred under Section 5 (2) (c) of the **Appellate Jurisdiction Act,** Cap 141 R.E 2019. To appreciate the points of law to be certified I find it worth to narrate the historical back ground of this matter.

The parties herein are siblings. They both belong to one mother, **Jamila Said Kanuma**. The rival dispute between them is whether **Said Seif Kimwaga** (the deceased) sired the applicant. The litigant's mother was married to the deceased. The respondent and the other three siblings were born while their mother was living with the deceased. Their mother separated from the deceased in 1986 while was pregnant to another son

called **Ashiru** who was later taken by the deceased from their mother in 1994. The applicant was born after the mother had already separated from the deceased and went to stay in Bukoba in 1991. Their mother died while the applicant was 7 years old.

Through administration Cause No. 83 of 2020 the respondent herein was appointed as an administrator of the estates of the deceased who died on 8/5/2020. Subsequently, to the grant of letters of administration, the applicant filed an objection before Ilemela Primary Court (the trial court). He was claiming to be the son of the deceased. During the hearing of objection, it was the evidence of the applicant's uncle **Hamidu Sid Kanuma** that after the death of their mother, he lived with the applicant until when he graduated from form Four. He knew the applicant's father who once came to claim his son but failed to pay traditional redemption money. That the said father stays in Uganda. Mr. Hamidu further stated that he was the one who pleased the deceased to support the applicant based on their good relationship. The deceased offered the applicant a job in a hotel. The applicant applied for a birth certificate in 2013 showing the deceased as his father. it was further evidence before trial that, among the two wives who were married to the deceased after he separated from the

applicant's mother, gave birth to one child with the name **Hassan Said Kimwaga.** Therefore, the applicant's further claim that he was mentioned in the Will left by the deceased failed. In short, the applicant lost at the trial court, the District court vide Probate Appeal No. 9 of 2021 and Civil Appeal No. 35 of 2023 before this court. He now wants this court to certify points of law for his intended appeal to the Court of Appeal. As I have stated hereinabove the applicant raised 8 points for certification. However, in his submission, he did not submit the last five points. Therefore, he is presumed to have abandoned them. The remained first four points are;

i. Whether it was correct for the learned Judge to rely on the other evidence to determine the paternity of the applicant, despite the applicant being the child born into an existing marriage and on the evidence available on the records there was neither piece of paper purporting separation or divorce.

ii. Whether it was correct for the learned Judge to raise the issue suo motto on the admission of the birth certificate of the applicant and dispose it without affording the parties right to be heard, even though the issue of admission of birth certificate had never contested by the parties.

iii. Whether it was correct for the learned Judge to require other evidence to determine whether the applicant was the biological child of the late SAID SEIF KIMMWAGA while his name was enshrined on the WILL.

iv. Whether the learned Judge was correct to rely on DNA test by paving away the opinion of the applicant to undergo DNA test for all Children of their late father because of Court practice, but in her judgment draw a negative inference against the applicant.

This application was argued by way of written submissions. Each party complied with the filing schedule the applicant filed his submissions while Ms. Rosemary G. Makori submitted for the respondent. The applicant submitted on the first point that his evidence regarding his paternity was abandoned by the second appellate court.

Regarding the second point, he submitted that the appellate judge disposed of the issue of the birth certificate *suo moto* without affording parties the right to be heard. As to the third point, the applicant submitted that the applicant is the biological son of the late Said Seif Kimwaga, his name is reflected in the Will surprisingly the Appellate Judge abandoned this evidence. On the last point, he submitted that he proposed the test to be taken to all biological children but the respondent and the second appellate

court insisted the same to be conducted for the litigants only. He prayed for the application to be allowed.

In reply, Ms. Makori submitted that the Applicant had the duty to prove his case that he was born within the wedlock, but he failed to do so. The issue of whether the learned judge was correct to rely on the other evidence to determine the paternity of the applicant was purely a matter of fact and not a point of law. Ms. Makori referred this court to the case of **Dorina N. Mkumbwa vs Edwin David Hamis**, Civil Application No. 53/2017 (unreported), which was quoted in the case of **John Waziri Mpanga vs Calvert Sindano**, Misc. Civil Application Case No. 23 of 2021 (unreported) that,

> *"It is therefore seif-evidence that application for certificates of the High Court on point of law are serious applications. Therefore, when the high court receives applications to certify point of law, we expect a ruling showing serious evaluation of the question whether what is proposed as a point of law, is worth to be certified to the Court of Appeal. This Court does not expect the certifying High Court to act as an uncritical conduit to allow whatsoever the intending applicant proposes as a point of law to be perfunctorily forwarded to the court as a point of law. We are prepared to reiterate that certificates on points of law for appeals*

originating from ward tribunals mark a point of finality of land disputed that are predicated on matters of fact…"

Regarding the second point, Ms. Makori submitted that the issue of birth certificate was not raised by this court *suo motto*. That, at the first and second appellate courts, one of the grounds of appeal raised by the Applicant was that;

> *"The trial magistrate erred in law and facts for failure to consider that, after the applicant's parents died, nothing can prove his parents other than his birth certificate."*

That the 2nd 3rd and 4th points are not points of law she referred to the case of **Agnes Severini vs. Mussa Mdoe** [1989] TLR 164 (TZCA). She finally invited this court to dismiss this application with cost.

Having considered the submissions for and against this application by both parties, I am duty-bound to determine whether the raised points are worth certification. I agree with the respondent that certification of a point of law is not a matter of mere formality. The court needs to scrutinize the points sought to be certified to see whether they involve matters of law.

My close look at the points for certification, the first, third, and fourth points are based on facts and/or evidence that were competently considered

and determined by this court and two subordinate courts. The evidence of the applicant's uncle was considered watertight against all possibilities that the applicant's mother had an intimate relationship with the deceased even after separation; the issue of the birth certificate was considered and determined by three courts to have not managed to prove the applicant's case and the name **Hassan Said Kimwaga** appearing in the Will was decided to be not of the applicant but of the son of the last wife of the deceased.

Regarding the fourth point, the DNA test was first ordered by the trial court but the same was not done. The first appellate court quashed the decision of the trial court and ordered the objection to be heard afresh. When the objection was heard for a second time there was no order for DNA until when the matter came before this court. It was this court which advised parties to undergo the DNA test. On page 7 this court stated;

> *"Before hearing, it appeared significant to receive specific further evidence. Parties were advised to do a DNA paternity test to determine if the deceased was the applicant's father. Initially, both parties agreed. The government chemist was invited as a court witness for that purpose. After the arrangement was done, the applicant became reluctant stating that he did not request for any paternity test. Hearing*

proceeded and it was done by way of written submission following a prayer by the applicant which was welcomed by the applicant's counsel."

On page 11 this court held that

"The applicant, however, rejected the test. The court can draw an inference that the applicant avoided the DNA test because he knew that the deceased was not his father but he was trying his luck."

In my findings this point was also dealt with by this court by drawing an adverse inference against the applicant in his findings and the same does not amount to be a point of law but rather of facts. Therefore, the first, third, and fourth grounds are not issues of law worth certification by this court for determination by the Court of Appeal.

As to the second point, the appellate judge alleged to have disposed of the issue of birth certificate "suo *moto"* without affording parties the right to be heard. This right has been discussed by the Court of Appeal in the case of **Juma Said Vs. Republic,** Criminal Appeal No. 29 Of 2018 (Cat-Mwz) (Unreported) on page 8, the Court of Appeal of Tanzania cited with approval the case of **Abbas Sherally & Another Vs. Abdul S.H.M Fazalboy, Civil Application No. 33 Of 2002 (Unreported)** the Court had this to say and I quote;

> *"The right to be heard before adverse action is taken against such party has been stated and emphasized by the courts in numerous decisions.* ***That right is so basic that decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard because the violation is considered to be a breach of natural justice."***

Guided by the above-cited case law, to me this point amounts to a point of law worth certification for determination by the court of appeal.

On that note and for the reasons discussed above, the application meets the legal threshold for its grant for only the second point. Consequently, I certify the second point as a point of law for determination by the Court of Appeal. The application is thus partly allowed. Owing to the nature of this matter, I desist to make an order for cost.

Dated at **MWANZA** this 8th day of May 2024.

W. M. CHUMA

JUDGE

Ruling delivered in court before Mr. Hassan Said Kimwaga the applicant in person and in absence of the respondent this 8th day of May 2024.

W. M. CHUMA

JUDGE