

IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MOSHI SUB-REGISTRY

AT MOSHI

MISCELLANEOUS CIVIL APPLICATION NO. 20 OF 2023

*(C/F PC Probate Appeal No. 14/2022 in the High Court of Tanzania at Moshi;
Probate Appeal No. 01 of 2022 in the District Court of Mwanaga at Mwanaga
and; Originating from Probate and Administration cause No. 15 of 1996 in
Mwanaga Primary Court)*

EMMANUEL THEODORE MSHANA..... APPLICANT

VERSUS

SHANGWE MSHANA.....RESPONDENT

RULING

Date of Last Order: 30.04.2024
Date of Ruling : 23.05.2024

MONGELLA, J.

The applicant has moved this court under **Section 5(1)(c) of the Appellate Jurisdiction Act** [Cap 141 RE 2019] seeking for certificate on point of law and leave to appeal so that he could prefer an appeal to the Court of Appeal against Probate Appeal No. 14 of 2022 determined by this court. His application is accompanied by his own sworn affidavit.

The respondent opposed the application as reflected in his own duly sworn counter affidavit. She also raised three points of objection whereby two of them were all overruled. One point of objection in which the application was challenged for being

omnibus was considered, but the court found the application could be salvaged by disregarding the irrelevant prayer whereby leave to appeal was sought. The court shall thus consider the application for certificate on point of law which is covered under **Section 5 (2)(c) of the Appellate Jurisdiction Act.**

The application was argued in writing whereby the applicant was represented by Mr. Desderius Hekwe, learned advocate while the respondent appeared in person.

Adopting the applicant's sworn affidavit, Mr. Hekwe argued the application basing on allegedly three points of law raised under paragraph 8 of the applicant's sworn affidavit, to wit;

- 1. That the Hon. Judge erred in law and fact when re-evaluating the evidence on record by holding that based on balance of probabilities it was proper for the properties at Usangi to be struck out of the deceased estates.*
- 2. That the Hon. Judge erred in law and fact in holding that the respondent's status was stated and determined by the trial courts, and that she is the lawfully heir to the deceased estates, without considering that particular evidence was never authentic to determine that the respondent was the legal wife to the deceased.*

3. *That the learned Judge erred in law and fact in holding that the primary Court Magistrate (Hon. Nyihirani-RM) was proper in revoking the applicant's appointment, without proper evaluation of evidence on record to her satisfaction that since the respondent status was never determined and so long as the whereabouts of said Henry Harris Mshana is unknown, it was then proper for the appointment-administration to remain with the appellant.*

The learned counsel noted the holding of the Court of Appeal in **Magige Nyamoyo Kisinja vs. Merania Mapambo Machiwa** (Civil Appeal 87 of 2018) [2021] TZCA 42 TANZLII, in which it was clarified as to what points should be considered by the court in granting certificate on point of law. Giving a brief history of the matter, he clarified that the applicant was a brother to the late Harris Theodore Mshana. That, upon his demise on 25.06.1996 he was appointed to administer his estate. At such time, the family was of understanding that the deceased was survived by his son alone and his whereabouts were unknown.

Amid administering the estate of the late Harris, the respondent appeared claiming to be the legal wife of the deceased thereby claiming a house at Dar es Salaam and pensioned fund. He further asserted that there have been a series of litigations including Probate Appeal No. 14 of 2022 in which this court found in the respondent's favour and struck out the late Haris' properties at Usangi from his estate and declared the respondent the legal wife.

The court also revoked the applicant's appointment and entrusted everything on the respondent.

On the 1st point, Mr. Hekwe, quoting the definition of balance of probabilities offered by Lord Hoffman in **Re B** [2008] UKH 35; averred that this court expunged the properties at Usangi from a list of properties belonging to the late Harris, while it found the issue to have been proved under balance of probabilities. He was thus of the view that the Court of Appeal would be in a better position to determine the extent of burden to be discharged before the court decides in favour of a party.

Arguing on the 2nd point, Mr. Hekwe challenged the authenticity of the evidence by the respondent considering that the name of the late Harris' wife, as displayed on his personal record from his place of employment (annexture ETM-2) is Angela while the respondent has used another name, that is, Shangwe Mshana.

He contended further that the respondent alleged to have contracted a customary marriage with the deceased, but failed to prove that she was the wife of the deceased through the alleged customary marriage. He further claimed that this court went on to declare the respondent the legal wife and granted her almost all the estate without regarding that there were other properties in the hands of unentitled parties. In the premises, he had the view that the Court of Appeal would set a precedent with respect to significance of courts on being keen with parties who claim to be legal heirs.

Concerning the 3rd point, Mr. Hekwe again pointed out that the trial court erred in declaring the respondent the legal wife of the late Harris while her evidence was not authentic. He averred that the trial court ought to have left the appellant in the position of administrator of the deceased's estate given that the sole beneficiary's (that is the deceased's son) whereabouts were unknown. He finalized his submissions by praying for the three points to be certified.

The respondent, started his reply submission by adopting his counter affidavit. She then argued that according to **Section 5(2) (c) of the Appellate Jurisdiction Act**, the High Court is required to certify that there is a point of law in matters originating from the primary court before the applicant can file his appeal in the Court of Appeal. She fortified his point with the case of **Mohamed Mohamed and Another vs. Omar Katibu**, Civil Appeal No. 68 of 2011 (unreported). She challenged the applicant's application on the ground that he has failed to demonstrate sufficient reason to warrant this court to exercise its discretion to certify that there is a point of law worthy of consideration by Court of Appeal.

She further contended that this court properly evaluated the evidence on record on balance of probabilities as required under the law and reached a fair and just decision. She supported the re-evaluation of evidence by this court arguing that since the 1st appellate court failed to re-evaluate the evidence of the trial court, this court was right to discharge such duty. She supported her

assertion with the holding in **Hassan Mzee Mfaume vs. Republic** [1981] TLR 167.

As to the status of the respondent, she submitted that the same was well determined by this court. She challenged the applicant's assertion as to her status in the family arguing that the applicant himself did refer to her as a family member and even included her in two family meetings in 2015, which the applicant convened. In the premises, she found the applicant only trying to mislead this court by raising the matter again.

The respondent further submitted that this court was correct in law and fact in revoking the applicant's appointment. She found the trial judge to have properly evaluated the evidence on record to her satisfaction. That, this court entertained the matter on merit after analysing and evaluating the lower courts' evidence.

Reiterating her position that it is only a pure matter of law that should be referred to the Court of Appeal, she prayed for the application to be dismissed with costs.

I have accorded the submissions by both parties, due consideration. From the record, it is not contested that this matter originated from Mwang primary court, thus in view of **Section 5 (2)(c) of the Appellate Jurisdiction Act**, a certificate on point of law ought to be granted by this court prior to an appeal being preferred.

It is settled that certification of point of law for purposes of appeal is not automatic. This court ought to consider the points to be certified contained in the affidavit of the applicant and to frame or approve and adopt the same as points of law. What amounts to a point of law has been well expounded in **Haji Mradi vs. Linda Sadiki Rupia** (Civil Appeal 24 of 2016) [2019] TZCA 263, TANZLII whereby the Court of Appeal stated:

“In this regard, it is crucial on what comes by way of an appeal to be certified as points of law and not fact. We say so because the factual matters require evidence and are dealt with conclusively by the courts below. Thus, a point of law should be free from the need to ascertain it by evidence. There can be no pure point of law where there are facts that require proof by evidence.”

Upon observing the three points raised by the applicant in his affidavit and his submission in that regard; appears find that they are all centred on matters of fact. This is because all points require evaluation of the evidence on record.

On the 1st point, the applicant intends to challenge the reason why this court struck out some properties from the list of items owned by the late Harris. This indeed would require the Court of Appeal to observe the evidence on record and assess why this court made such decision.

With regard to the 2nd point, the applicant intends to challenge this court's decision in declaring that the respondent's status had been determined by the trial courts. That, she is the legal heir to the estate

of the late Harris. This matter, in my considered view, is also purely on facts requiring analysis of evidence of the lower courts. The question as to authenticity of evidence presented by the respondent in relation to her identity also calls for the evaluation of evidence by the Court of Appeal.

I as well find the 3rd point regarding revocation of the applicant from administration of the estate of the late Harris also calling for evaluation of evidence. This point also addresses concerns raised on the 2nd and 1st points which are also based on matters of fact requiring evidence.

Insisting that the points raised ought to be of a legal nature, the Court of Appeal in **Magige Nyamoyo Kisinja vs. Merania Mapambo Machiwa** (supra) stated:

“We must emphasize that the point to be certified by the High Court must be that of legal nature and significant to warrant the decision of the Court. It is not enough for a party in a third appeal, like in the instant appeal, to simply think the lower court is wrong in its decision to have his case heard by the Court of Appeal. Matters of law which the Court is called upon to determine must transcend the interest of the immediate parties in the appeal. Indeed, in some cases matters of law placed before the Court for determination are of public importance especially when an interpretation of the law is involved.

In the upshot, I am of the settled view that the applicant has failed to raise matters of law worthy to be certified as such for

determination by the Court of Appeal. The application is therefore dismissed with costs.

Dated and delivered at Moshi on this 23rd day of May, 2024.



X

A handwritten signature in blue ink, appearing to read "L. M. Mongella".

L. M. MONGELLA
JUDGE
Signed by: L. M. MONGELLA