

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA SUB-REGISTRY

AT ARUSHA

MISC. CIVIL APPLICATION NO. 215 OF 2023

(C/F the High Court of the United Republic of Tanzania, Civil Appeal No. 17 of 2023, emanating from Arumeru District Court, Civil Appeal No. 32 of 2022, original Emaoi Primary Court, Probate and Administration Cause No. 15 of 2022)

GODFREY MEMIRIEKI.....APPLICANT

Versus

NAISILIGAKI RAPHAEL.....RESPONDENT

RULING

17th& 24th May 2024

TIGANGA, J.

This ruling is in respect of the application for a certificate of point of law made under section 5(2)(c) of the Appellate Jurisdiction Act [Cap. 141 R.E 2019]. The application was made by the chamber summons supported by an affidavit of the applicant Godfrey Memirieki. It was opposed by the respondent Naisiligaki Raphael who contested the application by filling a counter affidavit.

The brief facts of the case according to the applicant's affidavit are that the applicant is the administrator of the estate of the late Joel Saitoti Tarakwa "the deceased" who passed away on 14/05/2015. The affidavit further deposes that, before his death, the deceased was

customarily adopted to the family of the late Lotegelwaki Lasarunye and his wife the late Katerina Lotegelwaki Laizer. Before their demise, the couple who adopted the deceased were very old and deserted by their close relatives including the respondent. The adopting couple died before the deceased, but before they died, the late Katarina Lotegelwaki allocated to the deceased as an adopted child, a portion of land measuring 56m, by 29m width located at Olorien within Arumeru District in Arusha Region. Following the death of the late Lotegelwaki Lasarunye, the deceased Joel Saitoti Tarakwa, an adopted son, assumed the role of taking care and looking after Katarina Lotegelwaki, his adopting mother until when she also passed away before the respondent had been proposed to be the administrator of the estate of the late Katarina Lotegelwaki.

The deceased objected to his land which was allocated to him by the late Katarina Lotegelwaki before her demise from being included in the estate and produced the will which categorically indicated how the late Katarina Lotegelwaki wished her properties to be distributed.

Although the will was not the base of the caveat, in framing issues, the trial court confined its finding to one issue namely whether the will of the late Katarina Lotegelwaki was legally valid. It failed to

consider another issue of whether the list of the properties presented to the Court contained the properties not owned by the late Katarina Lotegelwaki, that despite that objection, the property of the deceased was included in the estate of the late Katarina Lotegelwaki and the court overruled the caveat.

Stranded but still in the pursuit of justice, the applicant unsuccessfully appealed against the decision on the 1st and 2nd appellate courts. Still disgruntled, he wants to appeal to the Court of Appeal, and since that will be the third appeal the law requires this court to certify the point of law for determination by the Court of Appeal.

When the matter came in court for hearing on 12/03/2024, Mr. Elidaima Mbise, Advocate was in court holding brief for Advocate Mr. Jacob Maliki learned advocate, and both parties were present in person. By the consent of the parties and their respective advocates, this application was disposed of by written submissions.

Having adopted the affidavit in support of the application, the applicant submitted through his advocate Mr. Mbise that there are two points of law to be considered by the court of appeal to wit (a) whether the decision of the lower court on determining solely on the issue of the validity of will and neglecting to determine an issue regarding ownership

of the land in dispute was correct and (b) whether it was correct for the applicant being the administrator of the estate of the late Joel Saitoti to file caveat and two consecutive appeals by his own personal name.

The applicant's advocate submitted that the decision of the two lower courts confined themselves to a single issue that could not lead the court to determine the alleged ownership of the land in dispute, rather it dealt solely with the validity of the will of the late Katarina Lotegelwaki. He maintained that the trial court only framed a single issue regarding the validity of the will, and ignored the claim by the applicant herein regarding the inclusion of the land in dispute which was not the property of the late Katarina Lotegelwaki. That, in his view, occasioned injustice to the applicant, who failed the court in the determination of the ownership of the said land in dispute, whom the respondent herein was appointed administratrix of the estate.

Submitting on another point of law, he contended that the legality of the applicant herein to act on his name, and his capacity to file the caveat before the trial court and proceed with two consecutive appeals to the court higher in the hierarchy without the courts challenging his locus standi. He, then generally, submitted that framing of issues is regulated by Order XIV Rule 1 of the **Civil Procedure Code**, [Cap. 33

R.E 2019,] and referred to the cases of **Victor Raphael Luvena v Magreth Ephrahim Kawa and 2 others**, Civil Appeal No. 25 of 2021.

It was his submission that failure to frame an issue when a material proposition of fact or law is affirmed by one party and denied by the other party is a fatal irregularity that renders injustice to a party and results in maladministration of justice. He argued further that, the properties listed in the estate of the late Katarina belonged to the late Joel Saitoti. It was his submission that the irregularity should be diagnosed by the court of appeal upon certification of points of law by this court.

In response, Mr. Mkindi learned advocate, drew the attention of this court by raising a point of preliminary objection that the application is fatally defective for suing a wrong party. He submitted that the question of jurisdiction can be belatedly raised and canvassed at any stage of the proceedings time, even on appeal by the parties, as it goes to the root of the trial. He cited the case of **M/S Tanzania China Friendship Textile Co. Ltd v Our Lady of the Usambara Sisters** [2006] TLR 70, where the court held that the question of whether the trial court had jurisdiction to adjudicate upon the matter was not raised

before the High Court, but since it was about the jurisdiction of the court, it could raise at any stage even on appeal.

He submitted further that, the respondent was an administratrix of the estate of the late Katarina Lotegelwaki Laizer, but she is sued in her capacity instead of her capacity as an Administrator of the estate. Further, the points of law raised and which the courts is asked to certify involved the Respondent in her capacity as an Administratrix of the estate of the late Katarina Lotegelwaki Laizer. He referred to the cases of **Suzana S. Waryoba v Shija Dalawa**, Civil Appeal No. 44 of 2017 [2019] TZCA 66 TANZLII, and **Edina Mufuruki v Grace Mfuruki** (PC) Civil Appeal No. 16 of 2021 [2022] TZHC 11774.

In the alternative, Mr. Mkindi submitted that the points of law found in paragraphs 11, 12, 13, 14, 15, 16, and 17 of the Applicant affidavit and paragraphs 7 and 8 of the Applicant supplementary affidavit, are in two limbs; **first**, the will of the late Katarina Lotegelwaki Laizer was legally valid and **second**, the ownership of the land by Joel Saitoti Tarakwa.

He averred that the points of law raised to be certified by this court are legally not worth being adjudged and certified to be tabled before the Court of Appeal for determination. He submitted that the

issue of the validity of the will was dealt with in extenso by the Primary Court first, and the second appellate courts. The proceedings of the Primary Court reveal that both parties were given the right to be heard in support of and against the objection.

He further submitted that the first appellate court was enjoined to determine the correctness of the decision of the trial court on matters decided upon. The decision was upheld by the second appellate court. He argued further that, whether the will is valid or not is subject to scrutiny of the court based on the applicability of the legal requirements.

Regarding the ownership of land, the applicant was given sufficient opportunity to be heard in the proceedings before the trial court and first appellate court. He submitted that paragraph 16 of the affidavit states matters related to Application No. 20 of 2015 before the District Land and Housing Tribunal for Arusha at Arusha and Resident Magistrate Courts Extended Jurisdiction Land Appeal No. 17 of 2019. He submitted that is a purely distinct matter, and it is not related to the administration of the estate of the late Katarina Lotegelwaki Laizer.

He argued further that, the proper forum to deal with Applicant's claims was land dispute courts established by the Land Disputes Courts Act [Cap 216 R.E 2019]. He was of the opinion that the issue related to

ownership of land cannot be certified by this court as a point of law in the probate case because the issue related to the proper forum is the District Land and Housing Tribunal.

It was his further submission that, the trial court had framed issues concerning the validity of the will. The issue of ownership of land was also based on the validity of the will as the land in dispute was mentioned in the will. He alleged that there are no points of law but rather the points of facts. He cited the case of **Agnes Severin v Musa Mdoe** [1989] TLR at 164. He prayed for the application to be declared as devoid of merits and dismissed with costs.

In determining this application, I will begin with the preliminary objection raised by the Counsel for the Respondent that; the applicant sued the wrong party by suing the respondent in her personal capacity instead of her position as an administratrix. I will not dwell much on this, for I think this is not the correct forum to address the preliminary objection. I hold so because the application before me is for certification of points of law. I agree with Mr. Mkindi, that you can challenge and raise preliminary objection on a jurisdictional matter at any stage, even on appeal; but with due respect that is not the case in an application of this nature for the certification of the point of law. This is because the

powers of this court in an application of this nature are confined to certifying the point as to whether they are the points of law worthy of determination by the Court of Appeal.

It is my opinion that the right forum to raise the preliminary objection was before the trial court, or before the first or second appellate courts, not in this application where it stands misplaced. I thus find the preliminary objection in the wrong forum, and it is hereby dismissed for reasons explained herein above.

Going back to the main agenda before this court; I will begin with the provision upon which the application was preferred which is section 5(2) (c) of the Appellate Jurisdiction Act [Cap 141 R.E 2019] is couched thus:

"5 (2) Notwithstanding the provisions of subsection (1)-

*(c) no appeal shall lie against any decision or order of the High Court in any proceedings under Head (c) of Part III of the Magistrates' Courts Act unless **the High Court certifies that a point of law is involved in the decision or order.**" (emphasis added).*

Grasped from the above section is that a certificate on a point of law is a mandatory requirement for all decisions or orders of the High Court in respect of proceedings falling under Head (c) of Part III of the

Magistrates' Courts Act, Cap. 11 R.E. 2002 (the MCA) that is to say the proceedings that originate from the Primary Court. I have perused the mentioned Part III of the Magistrate Courts Act, the same deals with the appellate and revisional jurisdiction of the High Court in matters originating from Primary Courts. The applicability of section 5(2)(c) was interpreted in the case of **Harban Hajimosi and Another vs Omari Hilal Seif and Another [2001] TLR 409** on page 412 where it was held inter alia that:

"Therefore, according to subsection (2)(c), a certificate on point of law is necessary with appeals relating to matter originating in Primary Courts..."

The next issue is the merit of the application. The issue for discussion is whether there is a point of law involved to be certified for consideration to be considered by the Court of Appeal. Here Mr. Mbise is of the view that what he raised is the point of law, while Mr. Mkindi, said they are just points of facts. Now what is a point of law? Generally, is a matter involving the application or interpretation of legal principles or statutes. It is the determination of what the law is and how it is applied to the facts in the case. The applicants are challenging the decision of this court on which the main issue posed was whether the decision of the lower court on determining solely on the issue of validity of will, and

neglecting to determine an issue regarding ownership of the land in dispute was correct and whether it was correct for the applicant being the administrator of the estate of the late Joel Saitoti to file caveat and to consecutive appeals by his name.

Both paragraphs 11, 12, 13, 14, 15, 16, and 17 of the applicant's affidavit, and paragraphs 7 and 8 of the Applicant's supplementary affidavits, raise two points (1) whether the decision of the lower court on determining solely on the issue of validity of will, and neglecting to determine an issue regarding ownership of the land in dispute was correct and (2) whether it was correct for the applicant being the administrator of the estate of the late Joel Saitoti to file caveat and two consecutive appeals by his name.

On assessment of the impugned decision and parties' submissions, I find the two to be the points of law involved worth certification by this court, for the determination by the Court of Appeal of Tanzania. Therefore, I find and certify the two points namely;

- i. Whether the decision of the lower court on determining solely on the issue of the validity of the will, and neglecting to determine an issue regarding ownership of the land in dispute was correct and

- ii. Whether it was correct for the applicant being the administrator of the estate of the late Joel Saitoti to file a caveat and two consecutive appeals by his own personal name.

For determination by the Court of Appeal of Tanzania. That said, I allow the application. Costs to be in the cause.

Order accordingly.

DATED delivered at ARUSHA this 24th day of May 2024.



A handwritten signature in black ink, appearing to read "J. C. Tiganga", written over a horizontal line.

J. C. TIGANGA

JUDGE