IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MANYARA

AT BABATI

MISC. CIVIL APPLICATION NO. 33 OF 2023

(Arising from PC Civil Appeal No. 11 of 2013, Civil Appeal No. 7 of 2022 Original Probate and Administration Cause No. 44 of 1987 Katesh Primary Court)

ALLY OMARY ABDI .....1ST APPLICANT

HASSAN OMARI ABDI ALLY.....2ND APPLICANT

VERSUS

AMINA KHALILE ALLY.....RESPONDENT

RULING

23rd April & 4th June, 2024

D. C. KAMUZORA, J.

The above applicants brought the present application under section 5(1)(c), (2)(c) of the Appellate Jurisdiction Act [CAP 141 RE 2019], (the AJA), seeking for one substantive relief that, this court be pleased to certify that there are points of law worthy of consideration by the Court of Appeal of Tanzania in the decision of this court in PC Civil Appeal No. 11 of 2023.

Briefly, following the demise of Khalile Ally Hildid (hereinafter referred to as the deceased), Probate and Administration Cause No. 44 of 1987 was

instituted before the Primary Court of Hanang' District at Katesh (hereinafter referred to as the trial court). One Yusuph Ally Hildid was appointed as an administrator of the deceased's estate. It is on record that the said Yusuph Ally Hildid passed away in 2011 before he had finalized his duties as administrator of the deceased's estate. Following the demise of Yusuph Ally Hildid, the Respondent herein petitioned at the trial court for appointment as an administratrix of the deceased's estate in order to replace the former administrator. It is on record that the first applicant lodged objection against the appointment of the Respondent and after hearing the matter, the trial court was of the view that neither the Respondent nor the first Applicant were fit candidates to administer the deceased's estate thus, it appointed the second applicant to administer the deceased's estate.

The Respondent was aggrieved with the trial court's decision hence, appealed to the district court of Hanang' (the first appellate court). After hearing the parties, the first appellate court dismissed the appeal for want of merits. The Respondent was further aggrieved thus, appealed to this court which allowed the appeal by appointing the Respondent as administratrix of the deceased's estate. The applicants were aggrieved with the said decision

hence, filed notice of intention to appeal to the Court of Appeal and the instant application praying for certificate on point of law.

The Respondent filed a counter affidavit to contest the application as well as notice of preliminary objections to the effect that;

1. *That, the application is bad in law for being brought against the Respondent in her person capacity in contravention of the law.*
2. *That, paragraphs 14, 15, 16 and 17 of affidavit in support of the application should be struck out for not being verified as required by the law.*
3. *That, the application is incompetent in law as it contains two applicants, but supported by only affidavit of the first applicant contrary to Order XLIII Rule 2 of the Civil Procedure Code [CAP 33 RE 2019].*

The Applicants were represented by Mr. Gwakisa Sambo, learned advocate while the Respondent was represented by Mr. Innocent Mwanga and Mr. Omar Iddi Omar, learned advocates. It is on record that this court ordered the application and the preliminary objections to be argued simultaneously by way of written submissions. I will therefore start with the determination of the preliminary objections and if upheld, I will refrain from determining the application but in case the objections will not be upheld, I will proceed on determining the merit of the application.

In their submission in support of the first preliminary objection, the Respondent's counsel argued that the Respondent was duly appointed an administratrix of the deceased's estate vide PC Civil Appeal No. 11 of 2023 but this application has been preferred against the Respondent in her personal capacity and not in the capacity as administratrix of the deceased's estate. He therefore considered the application before the court to be incompetent.

On the second preliminary objection, the Respondent's counsel submitted that paragraphs 14, 15, 16 and 17 of affidavit in support of the application were not verified thus, contrary to the rules governing affidavit. It was argued that the purpose of verification in the affidavit is to ensure genuineness and authenticity of the deponed facts. This argument was supported with the case of **Lisa E. Peter v Al Hushoom Investment**, Civil Application No. 147 of 2016 Court of Appeal of Tanzania (unreported) which referred the case of **A. K. K Nambiar v Union of India** (1970) 35 CR 121. The Respondent's counsel insisted that failure to verify the paragraphs renders the affidavit in support of the application incompetent.

Submitting on the third preliminary objection, the counsel for the Respondent submitted that in terms of Order XLIII Rule 2 of the Civil

Procedure Code [Cap 33 RE 2019], (the CPC) requires an application to be supported by an affidavit. He argued that, the instant application was supported by an affidavit of Mr. Gwakisa Sambo, the applicants' advocate but the first line of the affidavit indicates that the advocate is representing the first applicant and the verification clause shows that Mr. Gwakisa Sambo is verifying on behalf of the first applicant. The Respondent's counsel was of the view that the affidavit is defective for it shows that the deponent is acting on behalf of the first Applicant contrary to the chamber summons which shows the deponent is acting for both applicants. That, in that regard, the second applicant does not have an affidavit before the court thus, the application is incompetent and the same be dismissed. Reference was made to the decision in **LRM Investment Company Limited & 6 others vs Diamond Trust Bank Tanzania Limited & another** Civil Application No. 418/16 of 2016 (unreported).

In reply, the learned advocate for the applicants contended that, the application at hand arises from the decision of this court in PC Civil Appeal No. 11 of 2023 and parties in the said appeal are the same as parties in the instant application. The learned advocate argued that there was no leave of the court

to amend the names of the parties and therefore they must appear the same as in the previous proceedings. He submitted further that, in the previous decision which is sought to be appealed against to the Court of Appeal, the Respondent was in her personal capacity and the same status should be maintained.

On the second preliminary objection, the learned advocate for the applicants argued that the fact that paragraphs 14, 15, 16 and 17 were not included in the verification clause does not mean that they are useless and they can still be used to support the application. To buttress his arguments, he referred the case of **Ramadhani Mikidadi vs Tanga Cement Company Ltd** Civil Application No. 275/01 of 201 (unreported). He was of the view that such omission can be cured by an amendment so that both paragraphs can be included in the verification clause. He added that, even if those paragraphs will be excluded still, it will not affect the application since the remaining paragraphs are enough to support the prayers in the application.

In reply to the third preliminary objection, the learned advocate for the applicants submitted that paragraph 2 of the affidavit in support of the application shows clearly that he had authority from the first and second

applicants to swear an affidavit on their behalf. He therefore urged this court to overrule all the preliminary objections.

Having gone through the parties' rival submissions, the sole issue for determination is whether the preliminary objections raised by the Respondent have merits. I will determine the objections in the sequence adopted by counsel for the parties.

Starting with the first preliminary objection in which the Respondent argued that the application at hand has been brought against the Respondent in her personal capacity instead in her administratrix capacity, this court went through the record. In this application the applicants are seeking for certification on point of law to appeal against the decision of this court in PC Civil Appeal No. 11 of 2013. The said Appeal was filed against Civil Appeal No. 7 of 2022 originating from Probate Cause No. 44 of 1987. The parties to aal those proceedings were referred in their personal capacity including parties in PC Civil Appeal No. 11 of 2013 which was instituted by the Respondent herein. I am therefore in agreement with the learned advocate for the applicants that the parties in this application should appear as they were in the previous proceedings. I therefore find no merit in in the first preliminary objection and

proceed to overrule it.

On the second preliminary objection the Respondent argued that, the fact that paragraphs 14, 15, 16 and 17 were not verified renders the affidavit defective. I have gone through the affidavit in support of the application and noted that paragraphs 14, 15, 16 and 17 were not included in the verification clause thus, not verified. In the case of **Ramadhani Mikidadi vs Tanga Cement Company Ltd** (supra), the Court of Appeal facing an akin situation in which verification was only for paragraphs 1-8 out of the 128, it held that where the verification is defective the same can be amended by the applicant upon being granted leave by the court. The applicants' advocate sought for such avenue in his submission but before considering such prayer, I assessed the said paragraphs of the affidavit. Paragraph 14 raise a point that the decision of this court created conflicting decision while paragraph 15 is notifying this court that there is point of law for consideration by the Court of Appeal. Paragraphs 16 and 17 are general provisions on powers of this court and procedural compliance. On that basis, those paragraphs do not in any way affect the application because the remained paragraphs still support the application at hand. I proceed to expunge paragraphs 14, 15, 16 and 17 from

the affidavit and since the remained paragraphs supports the application, the Respondent's prayer to dismiss the application is not merited.

On the third preliminary objection the Respondent argued that the affidavit in support of the application is defective because at one point it indicates that the advocate is acting on behalf of both applicants and at another point it indicates that he is acting for the 1st applicant only. I have gone through the chamber application and the supporting affidavit and observed the Respondent's concern. On the first page of the chamber application, it is indicated that the application is supported by an affidavit sworn by Mr. Sambo, advocate for the applicants and the second paragraph of the affidavit also indicates that the advocate was affirming the affidavit on behalf of the first and second applicant. However, in verification clause, only the first applicant is mentioned and not the second applicant. The omission to include the second applicant on the verification clause is in my view, a minor error and no one was able to demonstrate if it occasioned any injustice to the parties. The decision in **LRM Investment Company Limited & 6 others vs Diamond Trust Bank Tanzania Limited & another** (supra) referred by the Respondent is distinguishable to the matter at hand. In that decision,

there were six applicants and there were no affidavits by or on behalf of two applicants which is not the case in the instant application.

From the above analysis, I find that all preliminary objections raised by the Respondent to have no merits and the same are hereby overruled. I will therefore proceed on determining the application on merit.

Coming to the merits of the application, Mr. Sambo argued that it is the requirement under section 5(1)(c) of the AJA that where a matter traces its origin from the primary court, before going to the Court of Appeal, this court has to certify that there is a point of law involved. He pointed at the following as points of law worthy of consideration by the Court of Appeal;

i. *The second appellate court misconstrued the law regarding the filing of objections as per the law and created conflicting decision with that of* ***Beatrice Brighton Kamanga & another v Ziada William Kamanga****, Civil Revision No. 13 of 2020 (unreported).*
ii. *The second appellate court miserably and against the law misconstrued the law regarding the paternity and section 4 of the Birth and Death Registration Act [CAP 108 RE 2002] hence arriving at erroneous decision.*
iii. *The high court being the second appellate court erred in law in interpreting the factors which the primary court is supposed to look in appointment of the administrator of the estate.*

iv. *Whether second objection against the petition for letters of administration can be entertained without inviting the public by publication of general notice (general citation).*

v. *Whether mismatch in the petitioner's evidence like lack of knowledge of the deceased's relatives, lack of minutes of the clan meeting appointing her, ineptness of the proceedings in another court and misspelling of petitioner's mother do not disapprove the paternity of the petitioner to the deceased.*

vi. *Whether the second appellate court erred in law by omitting to properly evaluate on validity of exhibit D1 (birth certificate) purported to establish paternity of the petitioner to the deceased notwithstanding its admission in evidence.*

vii. *Whether the trial court ought to consider consanguinity in appointment of the administrator of the deceased's estate.*

viii. *That the second appellate court erred in law in holding that it was not necessarily true the first applicant's witnesses that must recognize the Respondent who was living abroad and was not sharing a mother with the deceased.*

Based on the above points, the counsel for the applicant prayed for this court to be pleased to grant a certificate on point of law to appeal to the Court of Appeal of Tanzania against the decision of the High Court of Tanzania, at Manyara Sub registry in PC Civil Appeal No 11 of 2023.

In reply submission, the Respondent's counsel faulted the applicant's

pleadings for annexing the points sought to be certified by this court in a separate document namely annexure H-3 instead of including them in the affidavit. The Respondent was of the view that, points sought to be certified should have been indicated in the affidavit and not in a separate document. The Respondent's counsel added that the applicants also introduced new point contrary to those listed on annexure H-3. He argued that the seventh ground as it appears on annexure H-3 is not the same as it appears in the submission. He added that, while annexure H-3 contains 11 grounds, the learned advocate for the applicants argued only 8 grounds leaving 3 grounds. He prayed for that the grounds which were not argued be considered as abandoned.

As to the merits or otherwise of the grounds argued by the applicants, the counsel for the Respondent submitted that all grounds do not qualify as points of law worthy of consideration by the Court of Appeal. He argued that, the said grounds are not points of law rather contain facts and matters of evidence and others are of general view which could not certainly be certified by this court. He explained that the points 1, 2, 3, 4, 5, 6 and 7 are maters which came up during hearing of the matter before the high court in PC Civil Appeal No. 11 of 2023 and decision in that appeal did not conflict the decision

in **Beatrice Brighton Kamanga & another v Ziada William Kamanga** (supra) to require consideration of the Court of Appeal.

The Respondent's counsel further submitted that the second appellate court did not misconstrue the provision of section 4 of the Birth and Death Registration Act [CAP 108 RE 2002] as alleged by the applicants. She argued that the second appellate court was adjudicating on the genuineness of exhibit D1 which the applicants were disputing. He was of the view that, the decision cannot be altered because of the improper admission or rejection of an exhibit as provided for under section 178 of the Law of Evidence Act [CAP 6 RE 2019]. He therefore prayed for this court to distinguish the case of **Dawapa Security** (supra) from the case at hand.

In conclusion, the learned counsel for the Respondent was of the view that the applicants' points do not qualify as points of law worthy of consideration of the Court of Appeal. He therefore urged this court to dismiss the application with costs.

In rejoinder, the applicants submitted that there was no amendment or alteration of the grounds argued. He added that the provision of section 178 of the Evidence Act is inapplicable to the matter at hand because the said

provision refers admission or rejection of exhibit while in the instant matter the applicants are complaining on the manner the evidence was applied in considering the applicable laws.

Before addressing the substantive issue, I find it necessary to clear the air on issues raised by the Respondent regarding non-inclusion of the grounds sought to be certified as points of law in the applicants' affidavit. It is true that the points sought to be certified were listed in a separate document titled and annexed to the affidavit in support of application as annexure H-3. The Respondent's counsel also claimed that there was alteration and abandonment of some of the grounds and thought that the mode adopted by the applicants is not backed by law. To him, this court can only certify points listed in the affidavit.

I think the Respondent's counsel has misconceived the meaning of the affidavit. The said annexure H-3 was pleaded in the affidavit in support of the application at paragraphs 10, 11, 12 and 13 and was annexed to the affidavit. It was clearly deponed that the grounds expounded in annexure H-3 raise novel points of law worthy of consideration by the Court of Appeal hence, are points of law. Legally, the annexures to the affidavit also form contents of the

affidavit. Thus, it cannot be treated as a separate document from the affidavit because its contents were deponed in the affidavit. In that regard, I am of the settled view that, listing of the points sought to certified in a separate document was not fatal in the circumstance of this case as annexure H-3 is part and parcel of the affidavit.

On the argument that the applicants introduced new matters different from those deposed in the affidavit, nothing was pointed out specifically as new matters raised by the applicants. I however agree with the argument that some of the points listed in annexure H-3 were not argued by the applicant's counsel thus, they will not be considered by this court.

Turning to application, I have gone through the parties' pleadings and rival submissions and the sole issue for determination is whether the applicants were able to demonstrate the existence of points of law for certification. It is the requirement of law under section 5 (1)(2) and (2) of the AJA that matters covered under head (c) part III of the Magistrates' Courts Act [CAP 11 RE 2019], (hereinafter referred to as the MCA) are appealable upon this court certifying that there is a point of law involved. In simple way, before going for a third appeal to the Court of Appeal for a matter originating

from primary court, this court has to certify that there is a point of law worthy of consideration by the Court of Appeal. In the case of **Harban Hajimosi and Another Vs. Omari Hilal Seif and Another** [2001] TLR 409 at page 412 it was stated as follows: -

> *"Therefore, according to subsection (2) (c), a certificate on point of law is necessary with appeals relating to matter originating in Primary Courts. The practice of the High Court is to frame such a point or to approve and adopt one framed by the intending Appellant to certify it to the Court of Appeal."*

In the case of **Agnes Serein Vs. Musa Mdoe,** [1989] TLR 164, the Court of Appeal gave guidance on how to look at point of law for certification and insisted that only points of law are to be certified as opposed to facts or matters of evidence. In the instant matter while the applicants maintained that there are 8 points of law worthy consideration, the Respondent argued that the points raised are full of facts and are matters of evidence thus, not points of law within the meaning of the law.

I have keenly gone through the points argued by the applicants' counsel. On the first point, what is referred as conflicting decision with the decision of **Beatrice Brighton Kamanga & another Vs. Ziada William Kamanga**,

Civil Revision No. 13 of 2020 (unreported) is based on time limitation in filing objections against an appointment of the administrator before the primary court. The applicants alleged that this court while determining PC Civil Appeal No 11 of 2023 came with different decision as regard the time limit for filing objection as opposed to the decision of the same court in **Beatrice Brighton Kamanga** (supra). In my view, there is a point of law worthy of consideration by the Court of Appeal but the point to be certified is on the controverse surrounding the time limitation in filing objections against an appointment of the administrator before the primary court.

On the point that the second appellate court misconstrued the law regarding the paternity and section 4 of the Birth and Death Registration Act [CAP 108 RE 2002] this court finds that the matter raises point of law for the intention is to give a clear interpretation of the provision if it sets out procedures of verifying genuineness of birth certificate. The same is therefore certified as point of law.

The third point that the high court erred in interpreting the factors which the primary court is supposed to look in appointment of the administrator of the estate, I agree with the applicants' counsel that this was an issued before

the court. It refers procedures prescribed by law, the decision therefrom hence, form a point of law worthy of consideration by the Court of Appeal. The fourth point on whether second objection against the petition for letters of administration can be entertained without inviting the public by publication of general notice (general citation), this court also finds it worthy of consideration as point of law.

However, the fifth, sixth, seventh and eighth points do not raise any point of law within the meaning of the principles set in **Agnes Serein Vs Musa Mdoe**(supra). I say so because the point on whether mismatch in the petitioner's evidence like lack of knowledge of the deceased's relatives, lack of minutes of the clan meeting appointing her, ineptness of the proceedings in another court and misspelling of petitioner's mother do not disapprove the paternity of the petitioner to the deceased are matters of facts and evidence and not matters of law. Similarly, the point on whether the second appellate court erred in law by omitting to properly evaluate on validity of exhibit D1 (birth certificate) purported to establish paternity of the petitioner to the deceased notwithstanding its admission in evidence cannot be considered as point of law. Equally, the point on whether the trial court ought to consider

consanguinity in appointment of the administrator of the deceased's estate or the point that the second appellate court erred in holding that it was not necessarily true that the first applicant's witnesses must recognize the Respondent who was living abroad and was not sharing a mother with the deceased, are all matters of facts and evidence thus, not worthy of consideration by the Court of Appeal for they are not points of law.

In the final analysis this court do hereby find that the applicants were able to demonstrate only four grounds as points of law. I therefore certify the following as points of law worthy of consideration by the Court of Appeal;

1. Whether, the second appellate court misinterpreted the law regarding the time limitation in filing objections against an appointment of the administrator before the primary court.
2. Whether, the second appellate court misconstrued the provision of section 4 of the Birth and Death Registration Act [CAP 108 RE 2002].
3. Whether, this court erred in law in interpreting the factors which the primary court is supposed to look at in appointing the administrator of the deceased's estate.
4. Whether, second objection against the petition for letters of

administration can be entertained without general citation.

This application is therefore granted to the extent shown above. In the circumstance I order each party to bear its own costs.

DATED at **BABATI** this 04th Day of June, 2024.

D. C. KAMUZORA

JUDGE