

IN THE HIGH COURT OF TANZANIA

DODOMA SUB REGISTRY

AT DODOMA

MISCELLENOUS CIVIL APPLICATION NO. 24 OF 2020

(Originating from the decision of the High Court of Tanzania, Dodoma Sub Registry dated 15th November 2023 in PC Probate Appeal No. 9 of 2019; Misc Civil Application No. 16 of 2017 in the District Court of Kondoa; and Probate and Administration of Cause No 2 of 2014 in the Kolo Primary Court)

YAHAYA ISSA APPLICANT

VERSUS

ISSA MOHAMED RESPONDENT

RULING

Date of last order: 16/01/ 2024

Date of Ruling: 05/02/2024

LONGOPA, J:

The Applicant and Respondent were parties to the proceedings involving the administration of estate of the late Mohamed Hamis who was also known as Mohamed Benta Hamis. The record indicates that on 4th April 2014 Applicant one Yahya Issa applied for letters of administration of the estate of late Mohamed Benta Hamis at Kolo Primary Court in Kondoa vide Probate and Administration Cause No. 2 of 2014, the said application was dismissed on 16th July 2015 under Rule 23 of the Primary Court Civil Procedure Code, Cap 11 R.E 2002.



As a result, on 12th September 2017 the Applicant filed an application for revision of the dismissal order of the Kolo Primary Court vide Misc Civil Application No. 16 of 2017. That application was struck out on account of the matter being repetitive and that it had been determined by another Court in Moshi thus the Applicant had to challenge the same in the High Court of Tanzania at Moshi instead of filing a new application. Being dissatisfied with the decision of the District Court of Kondoa, the Applicant filed PC Probate Appeal No. 9 of 2019 before this Court. On 21st August 2020, this Court having heard both parties dismissed the appeal in its entirety and invoked its revisional powers to quash and set aside the Probate proceedings before the Kolo Primary Court.

The Applicant being further dissatisfied with decision of the High Court of Tanzania at Dodoma intends to challenge the decision by way of appeal to the Court of Appeal of Tanzania. Thus, on 22nd September 2020, the applicant filed this application for the following orders, namely:

- (a) That, this Honourable Court be pleased to certify that a point of law is involved in the judgement of the High Court of Tanzania at Dodoma in PC Probate Appeal No. 9 of 2019 delivered by Honourable Mansoor, J.;
- (b) That, this Honourable Court be pleased to grant leave for the Applicant to lodge his appeal against the judgement of the High Court of Tanzania at Dodoma in PC Probate Appeal No. 9 of 2019 delivered by Honourable Mansoor, J.;
- (c) Costs of this Application



(d) Any other relief(s) this Honourable Court.

The application is supported by an affidavit of one **Yahya Issa**, the applicant, and oral submissions by the counsel for applicant.

On 16th January 2024 when the matter came for hearing, the applicant enjoyed services of Ms. Josephine Mzava Paul learned advocate while the respondent was represented by Mr. Majaliwa Wiga, learned advocate. Both Counsel for Applicant and Respondent submitted orally on the application. The Counsel for applicant formally abandoned the second prayer regarding the leave to appeal to the Court of Appeal for being overtaken by events following coming into effect on 1st December 2023 of the Legal Sector Laws (Miscellaneous Amendments) Act, No. 11 of 2023 which vide section 10 amended section 5(1) of the Appellate Jurisdiction Act by deleting the same and replacing it with a new provision that do not require leave of the Court.

In respect of the order regarding certification on point of law, the applicant argued that it was crucial for this Court to certify that a point of law is involved in the judgement of the High Court of Tanzania in PC Probate Appeal No. 9 of 2019 delivered by Honourable L. Mansoor, J. This order is prayed under Section 5(2) (c) of the Appellate Jurisdiction Act, Cap 141 R.E 2019 which provides mandatorily for the High Court to certify that there is a point of law.



It was further submitted that the applicant wishes the Court of Appeal of Tanzania to determine two main points of law, namely:

- (a) Whether the High Court was right in law for holding that the District Court of Kondoa was right in striking the Miscellaneous Civil Application No. 16 of 2016 on ground that the same was Res judicata; and
- (b) Whether the High Court judge was right in law for holding that the District Court of Kondoa was right in striking the Miscellaneous Civil Application No. 16 of 2016 without affording the applicant the constitutional right to be heard.

The applicant firmly prayed that this Court find that there are those two points of law for the applicant to access the Court of Appeal of Tanzania for determination. It was a considered view of the applicant that the applicant has overwhelming chances to succeed in the Court of Appeal. Meanwhile, the counsel for respondent did not object the submission by the Counsel of the applicant.

I have carefully considered the affidavit and oral submissions of the parties to this application as well judgement of both the High Court and the District Court of Kondoa on the matter. I have observed that it is crucial to demonstrate shortly on the importance of the requirements of certificate on the point of law to appeal to the Court of Appeal of Tanzania for matters originating from the Primary Courts. The appeal to the Court of Appeal has been characterized by the requirement of certification by the High Court

prior to appeal being preferred. Section 5(2) (c) of the Appellate Jurisdiction Act, Cap 141 R.E. 2019 provides for a requirement that certificate on point of law for matters originating from primary court. Section 5(2) (c) of the Appellate Jurisdiction Act provides that:

5 (2) Notwithstanding the provisions of subsection (1)—

(a) N/A

(b) N/A

(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;

The aspects covered under Head (c) of Part III of the Magistrates Courts Act, Cap 11 R.E. 2019 are those relating to the exercising powers of the High Court on revisional and appellate mandate for matters originating from Primary Courts.

The instant matter originated from the proceedings of the Primary Court of Kolo at Kondoa where the applicant instituted a Probate and Administration Cause No. 2 of 2014. As such, the instant matter falls within the ambits of the requirements of section 5(2) (c) of the Appellate Jurisdiction Act, Cap 141 R.E 2019 which requires the certification by the High Court as to point(s) of law for the parties to have access to the Court of Appeal of Tanzania for matters originating from primary courts.

In the case of **Okech Akomo vs Konsilata Adoyo** (Civil Application 625 of 2022) [2022] TZCA 810 (8 December 2022), the Court of Appeal observed that:

*With respect, there is a difference between a point of law for consideration on appeal and an illegality for consideration in an application for extension of time, The distinction may be appreciated in the Court's decision in **Ngao Godwin Losero v. Julius Mwarabu**, Civil Application No. 10 of 2015 and **Lyamuya Construction Company Ltd. v. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (both unreported). In the latter case it was held in part:- " Since every party intending to appeal seeks to challenge the decision either on point of law or fact in, cannot in my view, be said in **VALAMBIA's Case** that the Court meant to draw a general rule that every applicant who demonstrates that his intended appeal raises points of law should, as of right, be granted extension of time if he applies for one. **The Court emphasized that such point of law must be that of sufficient importance and I would add, it must be apparent on the face of the record such as the question of jurisdiction; not one that would be discovered by a long-drawn argument or process**".*

It is lucid that this decision of the Court of Appeal reiterates the need to thoroughly consider application for certification of a point of law with view of being satisfied that there exists a sufficient and important legal question worth determination by the Court of Appeal. Such point (s) of law should be easily identified from record of the Court.

To ascertain whether there are important questions worthy determination by the Court of Appeal of Tanzania, it is quite clear that affidavit of the applicant can reveal some of the aspects. Paragraphs 4 to 10 of the applicant's affidavit provide for averments that are the most relevant regarding the points of law in question. The affidavit states as follows:

4. That, honourable High Court misdirected itself in law for holding that the District Court at Kondoa was right in striking the Misc Civil Application No. 16 of 2016 on ground that the same was Res Judicata.

5. That, honourable High Court misdirected itself in law by holding that the District Court of Kondoa was right in striking the Misc Civil Application No. 16 of 2016 without affording the appellant's constitutional right to be heard.

6. That, the High Court erred in law for holding that the District Court at Kondoa in Misc Civil Application No. 16 of 2016 was right in relying on a letter dated 12th day of May 2015 from the Resident Magistrate in charge of Kondoa

District directing Kolo Primary Court Magistrate to stop/dismiss the Probate and Administration Cause No. 2 of 2014, a letter dated 5th June 2017 from the Registrar of the High Court at Dodoma and a letter dated 10th July 2017 from the Deputy Registrar of the High Court at Dodoma as evidence sufficient to strike out the Misc Civil Application No 16 of 2016 for being Res judicata.

7. That, the honourable High Court erred in law for holding that the late Mohamed Hamis and the late Mohamed Benta Hamis are the same person while there was evidence that the latter died on the 30th day of May 1991 and the former died on 29th day of May 1991.

8. That, the Honourable High Court erred in law for holding that the Death Certificate No. 003811272 which was relied by the Appellant was wrongly issued.

9. That, the Applicant's intended appeal is subject to a points (sic) of law.

10. That, if this honourable Court declines to certify that a point of law involved in the Judgement of the High Court at Dodoma in PC Probate Appeal No. 9 of 2019 and grant leave for the applicant to appeal to Court of Appeal of Tanzania, the Applicant shall suffer irreparable loss.

My review of this affidavit indicates that there are both issues of law and those of fact. At this juncture, the certification required should focus only on points of law. Contents of Paragraphs 6, 7 and 8 of the applicant's affidavit seem to reflect on issues of fact whose determination ought to be finalised by the High Court. As such, issues averred in those paragraphs are not capable of being certified as points of law in the circumstances. The issues of existence of letters that led to the dismissal of the Probate and Administration Cause, the aspect of death certificate as well as the issue of whether late Mohamed Hamis and Mohamed Benta Hamis is one and the same person are factual in nature.

I concur with submission of the learned Counsel for the applicant that there are mainly two points of law that may be worth of determination by the Court of Appeal. Those points can be discerned from Paragraphs 4 and 5 of the applicant's affidavit. They relate to the question of application of *Res judicata* principle and the right of fair hearing especially the right to be heard. Such points of law raise important legal questions that require determination of the Court of Appeal of Tanzania.

In the case of **Dorina N. Mkumwa vs Edwin David Hamis** (Civil Appeal 53 of 2017) [2018] TZCA 221 (10 October 2018) At page 10 -11, the Court of Appeal provided a detailed guidance on certification on point of law. It stated that:

In land disputes, the High Court is the final court on matters of fact. The Legislature has taken this finality so

seriously that it has, under subsections (1) and (2) of section 47 of Cap. 216 [as amended by the Written Laws (Miscellaneous Amendments) (No.3) Act, 2018 Act No. 8 of 2018] imposed on the intending appellant the statutory duty to obtain either leave or certificate on point of law before appealing to this Court. It is therefore self-evident that applications for Certificates of the High Court on points of law are serious applications.

Therefore, when High Court receives applications to certify point of law, we expect rulings 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 appellant proposes as point of law to be perfunctorily forwarded to the Court as 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 disputes that are predicated on matters of fact. Certificates are designed to ensure that land disputes originating from Ward Tribunal come to an expeditious end, preferably in the High Court.

The certificate on point of law has two main functions. First, it confers the Court of Appeal with proper jurisdiction to entertain the matter

before it in case the same originates from the primary court or ward tribunal on land matters. Second, it limits the grounds of appeal to revolve on the certified points of law and no others. This is in accordance with the decision in **Elilumba Elezel vs John Jaja** (Civil Appeal 30 of 2020) [2022] TZCA 232 (5 May 2022), at pages 5-6, where the Court of Appeal stated that:

*The importance of certification by the High Court of the points of law was well pronounced by the Court in **Yakobo Magoiga Gichere v. Peninah Yusuph**, Civil Appeal No. 55 of 2017 (unreported) as follows: "In our opinion, the learned counsel for the appellant properly abandoned the two grounds of appeal for lack of certification by the High Court. Certificate from the High Court is mandatory for appeals originating from Ward Tribunals and should not be taken perfunctorily or lightly by the certifying High Court and by the parties to the impending appeal. A certificate of the High Court predicates the jurisdiction of the Court in land matters, so much so, this Court has often times stated that a decision of the High Court refusing to grant a certificate on a point of law under section 47(2) of the Land Disputes Courts Act, is final and no appeal against it lies to this Court: (see-**TIMOTHY A LVIN KAHORO V. SALUM ADAM MFIKIRWA**, CIVIL APPLICATION NO. 215 OF 2013(unreported). To underscore the significance of the certificate, we may add that where the High Court has*

certified points of law in appeals originating in Ward Tribunals, the grounds of appeal filed in the Court must substantially conform to the points of law which the High Court has certified."

This position of the law amplified a similar position taken by the Court of Appeal in the case of **Yakobo Magoiga Gichere vs Penina Yusuph** (Civil Appeal 55 of 2017) [2018] TZCA 222 (9 October 2018), at pp 7-8 of the decision.

As I have pointed out that the Appellate Jurisdiction Act, Cap 141 R.E. 2019 contains a requirement of certificate on point of law to appeal to Court of Appeal for decisions of the High Court in exercise of its appellate or revisional jurisdiction for matters originating from the primary court categorically enumerated under section 5(2) (c) of the Act. It means therefore that such requirement must be adhered to prior to appealing to the Court of Appeal for matters which have been decided by the High Court of Tanzania in exercise of appellate or revisional jurisdiction for proceedings originating from primary court.

It is clear this application has merits. There are points of law that are worth to invoke determination of the Court of Appeal of Tanzania. These points can be couched on the question of *Res Judicata* and the right to be heard. I am inclined to uphold the application and certify that the decision

of the High Court in PC Probate Appeal No. 9 of 2019 contains points of law for determination by the Court of Appeal.

I can safely therefore, certify that the High Court judgement in PC Probate Appeal No. 9 of 2019 dated 21st August 2020 contains two points of law worthy determination by the Court of Appeal, namely:

(i) Whether the High Court was right to uphold the decision of the District Court of Kondoa to strike out Miscellaneous Civil Application No. 16 of 2016 on ground of *Res judicata*; and

(ii) Whether the High Court was right to uphold the decision of the District Court of Kondoa to strike out Miscellaneous Civil Application No. 16 of 2016 without affording the applicant the constitutional right to be heard.

That said and done, this court finds merits in the application for certificate on point of law to appeal to Court of Appeal. In the end, the application is granted. Each party shall bear its own costs.

It is so ordered.

DATED at DODOMA this 5th day of February 2024.



Longopa
E. E. LONGOPA
JUDGE
05/02/2024.