

**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA**

**TEMEKE SUB-REGISTRY**

**(ONE STOP CENTRE)**

**AT TEMEKE**

**MISC. CIVIL APPLICATION NO. 50 OF 2023**

*(Arising from Civil Appeal No. 55 of 2022 at Temeke High Court at One Stop Centre)*

**SALIM OMARY ..... APPLICANT**

**VERSUS**

**KARAMA OMARY RIZEG** *(As administrator of the  
Estate of the late OMARY ALLY RIZEG)* ..... **RESPONDENT**

**RULING**

19/4/2024 & 22/4/2024

**BARTHY, J.:**

The respondent herein successfully applied for letters of administration of the estate of the late Omary Ally Rizeg before Buguruni Primary Court (the trial court) in Mirathi No. 26 of 2015. The applicant herein lodged a complaint before the primary court, asserting that he was the lawful owner of the house on plot No. 82 at Ilala Sharif Shamba, which was included in the estate of the deceased.

The trial court dismissed the complaint. Consequently, the applicant unsuccessfully appealed to the district court of Ilala (the first appellate court). Subsequently, he appealed to the High Court, where the appeal was dismissed for lacking merits.



Realizing that it was not the end of the road, the applicant approached the district court of Temeke at the One Stop Judiciary Centre with an application for an extension of time to file an Appeal out of time, which was dismissed. He lodged an appeal to the High Court, which was also dismissed. As a result, he filed a notice of appeal to the Court of Appeal. Consequently, this application is made pursuant to section 5(2)(c) of the Appellate Jurisdiction Act, seeking the following reliefs

1. *That, this honourable court be pleased to certify that there is point of law involved in the intended appeal by the applicant to the court of appeal of Tanzania against the decision of high court of Tanzania – Temake High court sub registry, One stop Judicial Centre as per A.A. Omari, J. Dated 26th July 2023 in Civil Appeal No. 55 of 2022.*
2. *That costs of this application be provided for.*
3. *Any other order and/ or reliefs as this honourable court may deem fit.*

This application was supported by an affidavit sworn by Salim Omary. The respondent contested the application with a counter affidavit filed by the respondent. At the hearing of the case, the applicant was

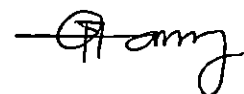


represented by Mr. Haider Twahir Mwinyimvua, while the respondent appeared in person. The matter was heard by way of written submission, and parties made their submissions accordingly.

Mr. Mwinyimvua based his submission on the findings of the district court of Temeke in Misc. Civil Application No. 94 of 2022, which were later upheld by the High Court in Civil Appeal No. 55 of 2022, stating that the matter was *res judicata*. He maintained that, ipso facto, Misc. Civil Application No. 94 of 2022 was not *res judicata* on the grounds that the said matter had been sued as Karama Omary Rizeg (in his personal capacity) and not as Karama Omary Rizeg, the administrator of the estate of the late Omary Ally Rizeg.

He argued firmly that Karama Omary Rizeg and Karama Omary Rizeg, as the administrator of the estate of the late Omary Ally Rizeg, are not one and the same person. Therefore, Misc. Civil Application No. 94 of 2022 does not qualify as *res judicata*.

Mr. Mwinyimvua further added that the provision of section 9 of the Civil Procedure Code, Cap 33 R.E. 2019, as well as the conditions set forth, do not qualify for the case to be considered *res judicata*. He mentioned that some of the conditions require the suit to involve the same parties. He



cited a case of **Village Chairman – K.C.U Mateka v. Anthony Hyiera**  
[1988] TLR 188.

He continued by stating that by suing the respondent in his personal capacity and not as the administrator of the estate of the late Omary Ally Rizeg, the applicant would not recover any claims under the estate of the late Omary Ally Rizeg. This is because suing the wrong person, namely Karama Omary Rizeg as administrator of the estate of the late Omary Ally Rizeg, is not the same as suing Karama Omary Rizeg. He firmly asserted that the proper party to be issued was Karama Omary Rizeg as the administrator of the estate of the late Omary Ally Rizeg. He thus stated that, this is the point of law that need to be certified by this court for determination by the Court of Appeal.

In response to the submissions made by the applicant, the respondent focused on two main issues raised by the applicant: *res judicata* and suing the wrong party.

Regarding the issue of *res judicata*, the respondent supported the findings of the district court in Misc. Civil Application No. 94 of 2022 and those of the high court in Civil Appeal No. 55 of 2022, which determined the matter to be *res judicata*.




On the other issue of suing the wrong party, the respondent argued that there was a need to clarify the point of law since the matter involved an individual person instead of the administrator of the deceased estate. The respondent referred to page 15 of the judgment in Civil Appeal No. 55 of 2022, where it was held that Karama Omary Rizeg is the same person as Karama Omary Rizeg, the administrator of the estate of the late Omary Ally Rizeg. The respondent was sued as the administrator of the estate of the late Omary Ally Rizeg and not sued in his personal capacity. He cited the judgment of the court in PC Civil Appeal No. 66 of 2021.

In his rejoinder, the applicant reiterated the submissions made in his initial submission.

Having thoroughly reviewed the submissions presented by both parties, and upon close scrutiny of the applicant's arguments in support of the application, as outlined in the accompanying affidavit and the court record below, the key issue for determination is whether there exists a point of law to be certified by this Court for consideration by the Court of Appeal.

I am mindful that the aggrieved party has no recourse to appeal on factual matters, a principle underscored by section 5(2)(c) of the Appellate Jurisdiction Act, Cap 141, which states;

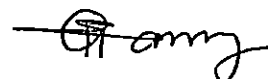


*"No appeal shall be against any decision or order of the High Court in any proceedings under Head (c) of part III of the Magistrate Courts Act unless the High Court certifies that a point of law is involved in the decision or order."*

See also the case of **Mariam Othman Matekele v. Nyacheri Joseph Mwangwa**, Misc. Civil Application No. 139 of 2021 referring to the decision of the Court of Appeal of Tanzania in the case of **Eustace Kubalyenda v. Venancia Daud**, Civil Application No. 70 of 2011

In fulfilling the duty of determining whether there exists a point of law to be certified by this court, I will examine the contents of the affidavit and counter-affidavit of the parties, as well as their submissions. Upon reviewing the applicant's affidavit, specifically from paragraphs 5 to 7, legal issues have been raised that merit consideration and are subject to argument before the Court of Appeal.

These issues include whether the application falls under the doctrine of *res judicata* and whether the applicant sued the respondent in his personal capacity or as the administrator of the estate of the late Omary Ally Rizeg. It's important to note that a point of law pertains to the interpretation of legal principles or statutes. It involves determining the application of the law to the facts of the case.

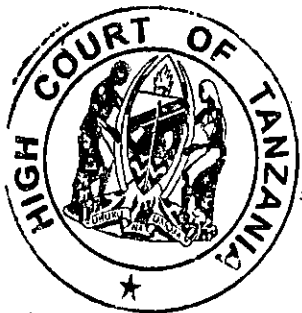


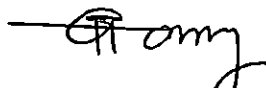
Upon reviewing the respondent's counter affidavit and submissions, it is apparent that these two issues revolve around points of law, necessitating determination by the Court of Appeal. As there are no compelling reasons to oppose the granting of a certificate on points of law, it is evident that the issues raised have a legal basis deserving consideration by the Court of Appeal in the interest of justice.

In the upshot, the application demonstrates merit and is therefore granted. Costs will follow the events.

It is so ordered.

**Dated at Dar es Salaam this 22<sup>nd</sup> day of April, 2024.**



  
**G. N. BARTHY**  
**JUDGE**

Delivered in the presence of Ms. Neema Barnabas, learned advocate for the applicant and the respondent in person, in the absence of the applicant.