IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MUNUO, J.A., NSEKELA, J.A., And KAJI, J.A.)

CIVIL REFERENCE NO. 8 OF 2001

BETWEEN

1. GICHUKI KAMAU
2. JANE MACHESS.. APPLICANTS

AND

LUCY MACHARIA ESS.. RESPONDENT

(Reference from the Ruling of a single Judge of the Court of Appeal of Tanzania at Dar es Salaam)

(Lubuva, J.A.)

dated the 29th day of May, 2001
in
Civil Application No. 112 of 1999

RULING OF THE COURT

NSEKELA, J.A.:

This is a ruling on a reference from the decision of a single judge refusing to grant a stay of execution. The respondent Lucy Macharia Ess, was on the 19.11.1999 granted limited letters of administration in respect of the estate of her late husband, Macharia Machess Ess, who died on the 24.12.1997. The grant was limited to the collection and preservation of the property of the deceased. The applicants, Gichuki Kamau and Jane Machess, aggrieved by the decision of the High Court (Ihema, J.) granting letters of

administration to the respondent, filed a notice of appeal to this Court. Simultaneously, the applicants filed an application for stay of execution which was dismissed by a single judge of this Court, hence this reference in terms of Rule 57 (1) of the Court Rules to have the decision reversed.

The applicants' filed a joint affidavit in support of the application in which they stated, *inter alia* –

> "6. We know the respondent very well and
> once the estate falls in her hands then the beneficiaries creditors and other expecting to benefit therefrom shall miss everything.
>
> 7. That to avoid such wastage and pending the outcome of the appeal let this court order the stay of the execution of the order of the High Court.
>
> 8. That the respondent does not stand to lose anything, if any, she is delaying the process of

administration of the estate.

9. That the estate of the deceased is intact and needs to be collected as alleged by the applicant. They can remain where they are at the moment."

Before us, Mr. Ukongwa, learned advocate for the applicants, complained that the estate is likely to be wasted if placed in the hands of the respondent and seriously doubted the competence of the respondent to administer the estate. He also complained that the procedures for the grant of letters of administration were not followed. The learned advocate essentially recapitulated the submissions he had made before the learned single judge.

On his part, Mr. Lukwaro, learned advocate for the respondent strongly resisted the reference and fully supported the decision of the learned single judge. He was of the settled view that the intended appeal did not have overwhelming chances of succeeding.

As far as we can gather from the applicants' joint affidavit, the main complaint is that once the estate falls into the hands of the respondent, the said estate will not be

properly managed and consequently other interested parties in the deceased's estate, will stand to lose. It is our considered view that the learned single judge sufficiently dealt with this complaint and we cannot fault him in anyway. The applicants have made a serious allegation that the deceased's estate is bound to be wasted if it remains in the hands of the respondent. Not a single beneficiary of the estate, apart from the applicants, has filed an affidavit to that effect. The same applies to the creditors as averred in paragraph 6 of the joint affidavit. We would go further and point out that the applicants have not stated in what manner the estate will be wasted. What we have is a very general statement lacking particulars. More importantly however, the respondent has been given a limited grant, limited to the collection and preservation of the property of the deceased. The learned single judge had this to say and we respectfully agree with him -

> "The respondent being the wife of the deceased together with her children who, according to paragraph 3 of the counter-affidavit, would in my view, be in a better position than the applicants to look after the properties of the estate in the meantime."

The learned single judge also considered another factor, namely, whether or not the applicants had shown a prima facie case with a probability of success in the pending appeal. It was the contention of Mr. Ukongwa that the intended appeal had great prospect of success due to the purported non-compliance of Sections 52 (b) and 59 (2) of the Probate and Administration Ordinance. Admittedly, where an intended appeal stands a good chance of succeeding has often been urged as a ground for granting a stay, for instance where the lower court lacked jurisdiction (see: Tanzania Electric Supply Co. Ltd and Two Others v. Independent Power Tanzania Ltd., Consolidated Civil Applications Nos. 10 and 27 of 1999 (unreported). In Tanzania Posts & Telecommunications Corporation v. M/S BS Henrita Supplies (1997) TLR 141 at page 144, a single judge of this Court, (Lubuva, J.A.) observed as follows –

> "It is however relevant at this juncture, to reflect that this Court has on numerous occasions taken the view that the chances of success of an intended appeal though a relevant factor in certain situations, it can only meaningfully be assessed later on

appeal after hearing arguments from both sides."

The caution here is that each case must be considered on its own peculiar circumstances. In the instant case, whether or not there was due compliance with sections 52 (2) and 59 (2) of the Probate and Administration Ordinance, is a contentious issue. In the same vein, whether or not the caveat had expired is a debatable matter. The resolution of these issues and others cannot be done now. It is not possible since we do not have the benefit of fuller arguments to that effect.

For the above reasons, we dismiss the reference with costs.

DATED at DAR ES SALAAM this 30th day of November, 2004.

E. N. MUNUO
JUSTICE OF APPEAL

H. R. NSEKELA
JUSTICE OF APPEAL

S. N. KAJI
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(S. M. RUMANYIKA)
DEPUTY REGISTRAR