

**IN THE HIGH COURT OF TANZANIA  
(DAR ES SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**MISCELLANEOUS CIVIL APPLICATION NO. 830 OF 2016  
(Arising from the decision of the High Court of Tanzania at  
Dar es Salaam in Civil Appeal No. 51 of 2016, origination  
from the decision of Kinondoni District Court in Civil Case  
No. 23 of 1998)**

**GERION FRANCIS TAIRO**

**(As administrator of the Estate of the late**

**Francis KaruwesaTairo).....APPLICANT**

**Versus**

**1. JUMANNE S. KITILA.....1<sup>ST</sup>RESPONDENT**

**2. HAMIS IDDI.....2<sup>ND</sup> RESPONDENT**

**RULING**

**B.R. MUTUNGI, J:**

The applicant herein prays for the following orders;

- 1. The applicant be granted leave to appeal to the Court of Appeal against the whole decision of the High Court at Dar es Salaam, in Civil Appeal No. 51 of 2016, Hon. Z. Muroke, J. dated the 21<sup>st</sup> day of November, 2016.*
- 2. Costs of this application be provided for.*

3. *Any other order (s) that the Honourable Court may deem fit.*

The application at hand has been brought by a chamber summons made under section 5 (c) of the Appellate Jurisdiction Act [Cap. 141 R.E 2002] and section 45 (a) and 47 of the Court of Appeal Rules, 2009. The same is supported by an Affidavit sworn by the applicant.

The applicant in his Affidavit deposed that, he was an appellant in Civil Appeal No. 51 of 2016 by virtue of being an Administrator of the estate of the late Francis Karuwesa Tairo. He went further by stating that the High Court erred in upholding the decision of the trial court which held the suit property was not part of the deceased's estate. More so, he stated this court was wrong to disregard the fact that the suit had abated.

The respondents on the other hand in their separate counter affidavit strongly contested the instant application.

During the hearing of the application, Dr. Lamwai appeared for the applicant, Mr. Mtatiro appeared for the first respondent while the second respondent defended himself.

Dr. Lamwai in his submission argued that, the trial court refused to comply with its previous decision (Appeal No. 1 of 2015) which determined the property in dispute belonged to IDDI NSUNZA and not FATUMA NSUNZA. Following this decision there was no appeal preferred. To ones dismay in subsequent developments the same court pronounced the disputed house belonged to Fatuma Nsunza. On the same vein this court confirmed this finding in appeal No. 51 of 2016.

Dr. Lamwai raised another point of contention that, the case at hand had abated after the respondent had failed to enjoin in the case as the legal representative. It follows then the issue of abatement is a legal point.

The applicant's counsel raised a point that, the District Court had given directives to make rectification in the land register without following the procedure laid down in section 99 of the Land Registration Act which empowers the Registrar to do so and not the said court.

Dr. Lamwai further submitted on the findings made by this court that Hamis Iddi (2<sup>nd</sup> respondent) had no qualification to administer the said estate but was merely a caretaker. He was of the view that there is no record that the said Hamis Iddi's appointment had been contested or challenged. On the same footing a person lawfully appointed by the court and has collected and disposed off the estate, can be said to have no legal effect.

Lastly, the learned Counsel insisted that a right of appeal is a constitutional right and once the decree in appeal No. 51 of 2016 is appealable falling under section 5 (1) (c) that is "any decree" then his client has this right.

Having elaborated as above, Dr. Lamwai listed down four grounds which he believed to be points of law, these are;

1. *Whether the District court could refuse to follow its decision in Civil Appeal No. 1 of 1998 which declared the property to belong to the Estate of the late IddiSunza.*
2. *Whether the court was right in holding that the suit had not abated and if the issue of abatement of the suit does not go to the jurisdiction of the court to be raised at any stage even at an appellate stage.*
3. *Whether the District court as confirmed by the High Court had power to order the rectification of the land register without following the procedure.*
4. *Whether the High Court was correct in law in holding that the second respondent was not qualified to administer the Estate of his deceased father and was just a care taker while there was no objection to his appointment as such.*

The first respondent through the legal services of Mr. Mtatilo opposed the application. His reasons were that, the applicant has not filed a notice of appeal which he was to serve them in accordance with Rule 3 of the Court of Appeal Rules. He further attacked paragraph 4 of the applicant's Affidavit to the effect, there was no evidence that, the late FATUMA had given the property to IDDI SUNZA. According to Mr. Mtatiro this is a new fact which has been raised at this stage. He suggested Dr. Lamwai had miscomprehended what the District Court and this court had decided. Mr. Mtatiro further clarified that appeal No. 1 of 1985 and Probate No. 54 of 1994 are no longer existing. These were quashed and set aside by Mkwawa, J in Civil Appeal No. 61 of 1996

On the issue of abatement, Mr. Mtatiro submitted the same was not in Hon. Muruke, J's judgment since there was no abatement as the applicant applied and amended the

defense and prosecuted the defense, hence he cannot deny the facts or deeds which he did and made of which parties believed and acted upon. To him this was contrary to the doctrine of estoppel under section 121 of the Evidence Act [Cap. 6 R.E 2002]. Basically Mr. Mtatiro was of the view there were no sufficient grounds to allow the application. In his settled view all the arguments raised had already been determined by the two courts. He prayed the application be dismissed.

The second respondent in his submission supported the decisions of both courts as being lawfully. He insisted the said house belonged to FATUMA NSUNZA but not IDDI NSUNZA. He went further to support the submissions made by Mr. Mtatiro learned advocate in general.

In his rejoinder, basically Dr. Lamwai insisted the notice of appeal was filed and served on the respondents on

23/11/2016. He further lamented there is a serious issue which need to be determined by the Court of Appeal.

After going through the entire records and submissions from both camps, the issue here is whether this application has merit. In determining this issue, I must be confined to the legal position proclaimed by the Court of Appeal of Tanzania in the case of **Rutagatina C.L Versus Advocates Committee and Clavery Mtindo Ngalapa, Civil Application No. 98 of 2010 (CAT-DSM) (Unreported)** at page 6 and 7 cited with approval the case of **British Broadcasting Corporation Versus Eric SikujuaNg'mao, Civil Application No. 133 of 2004 (Unreported)** where it was stated, and I quote;

*'Needless to say, **leave to appeal is not an automatic. It is within the discretion of the court to grant or refuse.** The discretion must, however be judiciously exercised on the materials before the court. **Leave to appeal will be granted where***

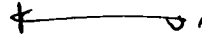


***grounds of appeal raises general importance or a novel point of law or where the grounds show a prima facie or arguable appeal.*** (See *Buckle Versus Holmes* (1926) ALL ER Rep. 90 at page 91) However, where the grounds of appeal are *frivolous, vexatious or useless or hypothetical, no leave will be granted'*. [Emphasis is mine]

Bearing in mind the above legal position I find the application has merits. The sole reason being that Dr. Lamwai has raised striking points of law in his submission which in my settled opinion would need the interference of the Court of Appeal. He has touched on a point of jurisdiction and the powers vested in the District court in ordering a rectification in the land register. The applicant in the given circumstances has overwhelming chances of making out an arguable appeal before the court of appeal.

In the event, I hereby grant the application with no order to costs, having taken into consideration on the nature of the cause of action at the trial.

It is so ordered.

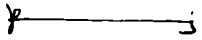


**B.R. MUTUNGI**

**JUDGE**

**30/4/2018**

Right of Appeal Explained.



**B.R. MUTUNGI**

**JUDGE**

**30/4/2018**

Read this day of 30<sup>th</sup> April, 2018 in the presence of Dr. Lamwai for the applicant and 1<sup>st</sup> respondent in person.



**B.R. MUTUNGI**

**JUDGE**

**30/4/2018**