

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

MISC. LAND APPLICATION NO. 35 OF 2020

(Arising from Land Appeal No. 37 of 2015, High Court of the United Republic of Tanzania Moshi District Registry Originating from Application No. 121 of 2013 Moshi District Land and Housing Tribunal)

LIGHTNESS MLAY APPLICANT

VERSUS

SANDRA WEILLER (EXECUTOR OF ELIFADHILI

.W. MSUYA) RESPONDENT

RULING

MUTUNGI .J.

The applicant prays that, this Court grants her leave to appeal to the Court of Appeal of Tanzania against the decision of this Court (T.M. Mwenempazi, J.) dated 1st April, 2020 in **Land Case Appeal No. 37 of 2015**. The application is brought under **section 47 (1) of the Land Disputes Act, 2002, CAP 216 R.E. 2002 (Land Disputes Act)** and is supported by a sworn affidavit of Mr. Eliakunda Kipoko, advocate for the

applicant. The respondent disputed the application and filed a counter affidavit to that effect.

The essence of the dispute is to the effect that, the late Elifadhili W. Msuya who died on 2nd January, 2012 and Martha Msuya were married for more than 40 years. It is alleged that most of their life had been spent in Canada and prior to his death the said Elifadhili Msuya wrote a WILL bequeathing all his estate to his wife Martha Msuya. In the said WILL, the respondent herein was appointed as the Executrix but when she wanted to discharge her duties specifically on Plot No. 44-C-IV Majengo Moshi Municipality (the suit land) she hit a snag. The suit land was registered in the names of the late Elifadhili Msuya and Lightness Mlay, the applicant herein.

The respondent then filed a suit in the Moshi District Land and Housing Tribunal (trial tribunal) vide Application No. 121 of 2013 praying for a declaration that, the joint ownership of the suit land between the late Elifadhili Msuya and the applicant was unlawful since the same was fraudulently obtained. The trial tribunal dismissed her claims and declared the applicant herein as the sole owner to the suit land. Dissatisfied, she appealed to this court where Mwenempazi, J. nullified the

whole of the trial tribunal's proceedings and decision on the ground that, the respondent did not follow the procedure required by law to recognise her status according to **section 95 of the Probate and Administration of Estates Act, Cap 352, R.E. 2002**. Further that, since she was appointed by the Superior Court of Ontario, Canada, her probate has to first be enforced by the law of the land for her to have *locus standi* to pursue and discharge her duties as the Executrix of the Estate of the late Elifadhili Msuya within Tanzania. The applicant was aggrieved by such decision and wanted to pursue her constitutional right to the highest Court of the land hence this application. In her 9 paragraphed affidavit, particularly 9th paragraph she has pointed out the grounds of appeal that she believes are worth to be considered by the Court of Appeal. They can be summarized as follows: -

- a. Whether the Appellate Court was legally right to advise the respondent against the applicant on steps ought to have been taken prior to institution of the application subject of appeal.
- b. Whether the Appellate High Court was legally right to nullify the proceedings on the ground that, the

applicant had no *lucus standi* while she was the registered owner.

- c. Whether the Appellate High Court was legally right to entertain an appeal which was time barred.
- d. Whether the Appellate Court was legally right to decline declaring the applicant as owner of the suit land as she was registered a co-owner after the death of the other co-owner.
- e. Whether the Appellate Court was legally right in not finding the executor of a WILL in the eyes of the law was not appointed by the Tanzanian courts after holding that the marriage was conducted in Canada without proof of the same.
- f. Whether the Appellate Court was legally right to hold that there is a WILL executed in Canada without proof of the same.
- g. Whether the Appellate Court was legally right to not declare the applicant as a rightful owner of the of the suit land.
- h. Whether the Appellate Court was legally right to not award cost to the applicant.

The applicant is represented by Mr. Eliakunda Kipoko whereas the respondent is represented by Ms. Elizabeth Minde learned counsel. The application was heard orally. Mr. Kipoko started by a prayer that the court should adopt the Affidavit in support of the submission. He cited the case of **British Broadcasting Corporation V. Eric Sikujua Ng'maryo Misc. Application No. 138/2004** as a guide, this court should consider, which provides guidelines and conditions upon which leave is grounded. He submitted that in para 9 of the affidavit which is subdivided into several sub-paragraphs shows the grounds of appeal. He started with paragraph 9 (d) (i) which is based on the fact that the appeal subject of the leave to appeal was filed out of time. He argued that, while countering this paragraph the respondent in her Counter Affidavit alleged that, since this Court ruled that it was in time, the Court of Appeal is not guided to give guidance on this point. However, it is the applicant's strong submission that, the question whether it was on time or not is an appropriate question to be determined by the Court of Appeal.

On paragraph 9 (e) the Applicant is requesting leave so that the Court of Appeal can determine whether, her being a

registered Co-owner of the suit premises upon the death of the other owner was entitled to be declared the owner of the suit premises as the trial tribunal positively affirmed. In the trial tribunal and in this Court this was an issue of general importance and it should not be left undetermined. In paragraph 9 (i) Mr. Kipoko stated that the applicant prays for leave to appeal so that the Court of Appeal will determine whether it was right for this court to nullify the whole proceedings on the mere ground that, the person who filed it had no *locus standi* as the respondent was not yet an executor as she purported to be under the laws of this Country.

On paragraph 9 (h) the Applicant wants to invite the Court of Appeal to determine whether, it was proper for this Court to conclude on documentary evidence by the respondent, despite being photocopies which were objected to and no independent witness corroborated the fact that the respondent was legally appointed the executor. On the same line paragraph (i) the Court of Appeal, will be invited to determine whether, this Court was right to reach a conclusion that, such exhibits by the respondent came from

a common wealth Country i.e. Canada in absence of specific statements that they were coming from Canada.

Mr. Kipoko went on submitting on paragraph 9 (j) that, the Court of Appeal will also be invited to find whether, this Court was legally right to conclude the 3 different names referred in the body of evidence by the respondent referred to the same person in absence of the Affidavit or any evidence to that conclusion. Likewise the Court of Appeal will be invited to decide whether it was right for this Court to find that, the respondent was an executor and at the same time advising the same respondent that, her case was premature as she ought to have confirmed her appointment before the Tanzanian Courts by resealing.

Lastly, the Court of Appeal will be invited to decide whether it was correct for the Appellate Court to ignore the crucial issue which was the ownership of the suit premises despite presence of crucial evidence in the form of a title deed which the applicant was a registered co-owner.

It was the learned counsel averment that, the foregoing grounds were sufficient to dispose of the matter, rather than nullify the decision. He prayed, this court does find the

intended appeal has reasonable chances of success and grant the applicant leave to appeal to the Court of Appeal.

In reply, Ms. Minde prayed, the court adopts the counter affidavit as part of her submission and argued that, the Appellate Court had centred its decision on the locus standi of the then applicant (respondent in this application) and ordered for a re-trial. The respondent has already complied with that issue. Thus, if this matter goes to the Court of Appeal instead of complying with the re-trial order, parties will be wasting time which they have always been urged to avoid unless for substantive justice which the applicant can have by going for a re-trial as advised by this court. She argued that, substantive justice is not going to be achieved by going to the Court of Appeal. She added that, this Court in its wisdom had looked at the compliance issue (Locus standi) as going to the root of the matter and found a re-trial was appropriate instead of going into the exercise which will ultimately take the parties back to square one. The appeal to the Court of Appeal will not conclude this dispute to its finality.

In his brief rejoinder Mr. Kipoko reiterate his earlier submission and added that, the applicant has met the criteria for leave to appeal with the aim of achieving substantive justice. This Court omitted to address the core issue which was before the trial tribunal and the High Court, on the issue of ownership. This raises an important point of law based on substantive justice to be addressed by the Court of Appeal. He added that, in deed there was no order for retrial in the decision by this court as averred by the respondent's advocate.

After considering parties affidavits and respective submissions, the pertinent issue for determination before this court is whether the applicant has singled out a point of law worth to be considered by the Court of Appeal. In determining so, the role of the Court is not to stand in the shoes of the Appellate Court, but only to consider whether or not arguable issues have been raised in the proposed grounds of appeal. In the case of **British Broadcasting Corporation V Eric Sikujua Ng'maryo (supra)** it was held that;

“As a matter of general principle, leave to appeal will be granted where the grounds of appeal raise issues of general importance or a

novel point of law or where the grounds show a prima facie or arguable appeal. However, where the grounds of appeal are frivolous, vexatious or useless or hypothetical, no leave will be granted."

Also in the case of **Saidi Ramadhani Mnyanga V Abdallah Salehe [1996] TLR 74** it was maintained that, for leave to appeal be granted, the application must demonstrate that there are serious and contentious issues of law or fact fit for consideration by the Court of Appeal.

In the present application, the Court of Appeal is called upon to determine the intended appeal basing on whether there are points of law, the applicant has reasonable chances of success, or rather if the proceedings as a whole reveal such disturbing features as to require the guidance of the Court of Appeal.

From the brief history of the dispute between the parties, I am of the considered view that, this application is a fit case that deserves the Court of Appeal intervention. The applicant's advocate has overstepped this court's duty by going into the merits of the grounds but it suffices to note the same are well

listed in paragraph 9 of the corresponding affidavit to the application which on the face of it, raise issues depicting an arguable appeal before the Apex Court of this land. The respondent's advocate has tried to circumvent the leave process by giving meaning to the decision of this court. This is no reason to stop the applicant from her desire to have the Court of Appeal look into the said decision once she is aggrieved.

Additionally, I have as well considered, that the applicant has justification to exercise her right to appeal specified under **Article 13 (6) (a) in the Constitution of the United Republic of Tanzania, 1977** as amended from time to time. An opportunity to be heard by the Court of Appeal, is the only way the applicant can exercise the claimed right stipulated in the referred Article of the Constitution.

From the foregoing and for the interest of justice, I hereby grant the application for leave to appeal to the Court of Appeal as sought. I give no orders as to costs.

It is so ordered.


B. R. MUTUNGI
JUDGE
11/12/2020



Ruling read this day of 11/12/2020 in presence of Pamela Mdee holding Mr. Kipoko's brief for the Applicant and Atu Ngondya holding Miss Elizabeth Minde's brief for the Respondent.


B. R. MUTUNGI
JUDGE
11/12/2020

RIGHT OF APPEAL EXPLAINED.


B. R. MUTUNGI
JUDGE
11/12/2020