

IN THE HIGH COURT OF TANZANIA

AT SUMBAWANGA

MISC. CIVIL APPLICATION NO. 12 OF 2018

(From HC and Administration Appeal No 6 of 2017 Sumbawanga District Court in Revision No. 4 of 2017 Original Probate Cause No. 89 of 2011 all of Misc. Application No. 23 of 2014 and Probate Cause No. 89 of 2011 all of Sumbawanga Urban Primary Court)

FROWN S/O HAULEAPPLICANT

VERSUS

JACKLINE D/O J. KALESARESPONDENT

RULING

24th February – 18th March, 2020

MRANGO, J

This is an application for leave to appeal to the Court of Appeal. It is made under **section 5(1) (C) and 5 (2) of the Appellate Jurisdiction Act, Cap 141. RE :2002.**

The applicant is asking this court to grant leave to appeal to the Court of Appeal against the decision of this court in PC. Probate and Administration Appeal No. 6 of 2017 which was delivered on 27. 8. 2018 (Hon. Dr. A. J. Mambi, J)

This application is supported by the affidavit sworn, drawn and filed by the applicant himself.

The present applicant, Frown Haule was the appellant in PC. Probate and Administration Appeal No. 6 of 2017 as administrator of Estate of the late Kennedy Haule which was before this court. The respondent was also a respondent in the above mentioned appeal. In that appeal the decision was given in favour of the respondent herein.

Aggrieved by the decision of this court in PC. Probate and Administration Appeal No. 6 of 2017, the applicant lodged the notice of Appeal to the Court of Appeal and he filed Misc. Civil Application No. 12 of 2018 for leave and certificate on point of law in this court.

However, when the application (Misc. Civil Application No. 12 of 2018) was called on for hearing on 18. 07. 2019 before this court, the applicant defaulted appearance. The applicant could not be able to attend as a result the application was dismissed for want of prosecution. However the application was restored after the application has demonstrated why he failed to enter appearance when the matter was scheduled for hearing.

In application of this nature, it has been held by this court and the Court of Appeal time and again that leave will be granted only when the intended appeal has some merits whether factual or legal. See **Ms. Ilabila Industries Ltd and 2 Others vs. Tanzania Investment Bank and**

Another, Commercial Case No. 27 of 2002 (HC unreported),
Wambele Mtumwa Shamte vs. Asha Juma, Civil Application No. 45 of
1999 (CAT unreported).

In the Shamte Case (Supra) the Court of Appeal observed;

**“..... Unfortunately, it is provided what factors are
to be taken into account when considering whether
or not to grant leave to appeal to this court.
However it is obvious that leave will only be granted
if the intended appeal has some merits whether
factual or legal”**

When the matter was called on for hearing on 24. 02. 2020 both parties appeared in persons, unrepresented. The applicant prayed for the court to adopt the affidavit he filed and he had nothing to add. Whereas the respondent also prayed for the court to adopt her counter affidavit she has lodged and she had nothing to add.

Now the issue for determination is whether the intended appeal has some merits factual or legal.

The applicant through his affidavit averred that he was appellant in the High Court defending the appeal and now an applicant, whereas the respondent in this application was respondent before this Court.

He said the judgement of the High Court delivered on 27. 8. 2018 before Hon. Dr. A. J Mambi, J was in favour of the respondent.

Having aggrieved by such judgement, he decided to lodge this application seeking certificate and leave to appeal to the Court of Appeal against the decision of this court with the following point of law to be considered and determined by the Court of Appeal;

- a) That the Honourable Judge erred in law to hold that the District Court Magistrate had already determined and gave a ruling of whether he has to qualify himself from the conduct of his case or not contrary to what transpired in court record.
- b) That the Honourable Judge erred in law to determine the issue of disqualification of the District Court Magistrate from the conduct of the case while the same had never been first determined by him.
- c) That the Honourable Judge erred in law to hold that attendance of the parties in court alone amount to affording them an opportunity to be heard.

- d) That the Honourable Judge erred in law to arrive at the decision basing on the facts which were not part of the trial court records.
- e) That the Honourable Judge erred in law by misconstruing section 33 (1) of the Probate and Administration of Estates Act, Cap 352 RE 2002 to mean that it applied to the circumstances of this case.
- f) That the Honourable Judge erred in law to hold that the respondent was the right party in Probate Cause No. 41 of 2019 and Misc. Application No. 2B of 2014 of Sumbawanga Urban Primary Court.
- g) That the Honourable Judge erred in law to hold that the House in plot No. 49B subject to the estate of Kennedy B. Haule be include in the estate of Celina John without proof.

The applicant argued that the intended appeal has overwhelming chance of success thus denying the application will defeat justice.

In reply to the argument advanced by the applicant, the respondent strongly disputed to what was averred by the applicant in his affidavit unless the applicant is put to the strict proof thereof.

Having scrutinized the application by the applicant, this court find that the point as raised by the applicant were involved in the Probate cause No. 6 of 2017, therefore the application to my view has overwhelming chance of success and as well contain some legal points necessary to be considered and determined by the Court of Appeal as contained in the chamber summon and affidavit of the applicant.

Having above in mind, this court see to it that it will be in the interest of justice to grant this application so as the applicant can appeal to the Court of Appeal. Thus the point of law are hereby certified by this court so as to be considered and determined by the Court of Appeal.

In the premise, the application for leave to appeal to the Court of Appeal of Tanzania from the decision of this court is accordingly granted. The applicant is given fourteen (14) days from today within which to file notice of intention to appeal. No order as to costs is made.

Order accordingly.


D. E. MRANGO

JUDGE

18. 03. 2020

Date - 18.03.2020

Coram - Hon. D.E. Mrango – J.

Applicant } Both present in persons
Respondent }

B/C - Mr. A.K. Sichilima – SRMA

COURT: Typed Ruling delivered today the 18th day of March, 2020 in presence of both the parties in persons.

Right of appeal fully explained.


D.E. MRANGO
JUDGE
18.03.2020