IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAT ES SALAAM

MISC. CIVIL APPLICATION NO. 212 OF 2021

(Arising from Misc. Civil Application No. 245 of 2015)

PAULA DAVID KIFARU...APPLICANT

VERSUS

KARIM SHAHBUDIN ALLY................................RESPONDENT

RULING

Date of Hearing – 13/7/2021
Date of Ruling – 30/8/2021

MASABO, J:-

This is an application for leave to appeal to the Court of Appeal of Tanzania. It is made under s. 5 (1) (c) of the Appellate Jurisdiction Act (Cap. 141 RE 2019). The application is supported by an affidavit of the applicant, Paula David Kifaru, and opposed by a counter affidavit of Karim Shahbudin Ally, the respondent.

It is averred in the affidavit of **Paula David Kifaru**, that she is aggrieved by the decision of this court in Misc. Civil Application No. 245 of 2015 through which the probate granted to her by this court in Probate Cause No. 29 of 2012 was revoked. What can be discerned from the documents availed to the court is that, the parties herein contend over the administration of the estate of Mehrun Ally Tallin who died on 5th April 2012, being survived with minor children and relatives. After her death, the applicant herein, petitioned for

probate in Probate Cause No. 29 of 2012. On 3/12/2013 her application was granted. She became the executrix of the late Mehrun Ally Tallin. Meanwhile, the respondent had also applied for letters of administration through Probate and Administration Cause No. 33 of 2013 which also ended successful as he was appointed administrator of the estate of the late Mehrun Ally Tallin on 24th December 2013.

On 2015, the applicant filed the application whose ruling is the subject of this application. In the said ruling, he prayed for the following orders: (i) extension of time with which to entertain and determine an application for revocation/annulment of the grant of probate to the applicant (ii); declaration that the will upon which the probate was granted was null and void (iii) nullification/revocation of the probate. The application ended in the respondent's favour. The applicant's grant of probate was annulled. The revocation has disgruntled the applicant who now intends to challenge it in the apex court, the Court of Appeal of Tanzania. She has listed the following potential grounds of appeal:

i. The court erred in law in granting the extension of time based on an incompetent application;
ii. The court erred in nullifying/annulling the will;
iii. The court erred in revoking her appointment;
iv. The court erred in law by entertaining the application to which it had no jurisdiction;
v. The court granted letters of administration without revoking the first one.

At the hearing of the application, both parties had representation. Mr Armando Swenya, learned counsel, represented the applicant whereas Ms. Lucy Namuo, learned counsel, appeared for the respondent.

Having adopted the content of the applicant's affidavit in his submission in chief, Mr. Swenya submitted that, it is the requirement of the law that appeals to the Court of Appeal in matters of this nature, must be with leave from the High Court hence this application. He then proceeded to argue that, the decision in Misc. Civil Application No. 245 of 2015 was tainted with illegality as it entertained a matter which was supported by a defective affidavit contrary to Order XIX Rule 3(1) of the Civil Procedure Code Cap 33 RE 2019 which requires that, affidavits be confined to facts known to the deponent. In support of his submission, he cited the case of **Anatol Peter Rwebangira v The Ministry of Defence & National Service,** Civil Appl. No. 548 of 2018, Court of Appeal of Tanzania at Bukoba (unreported), and **Uganda v Commissioner of Prisons, Ex Parte Michael Matovu** [1966] 1 EA 514. Furthermore, Mr. Swenya argued the probate giving rise to this application had an executrix who is the applicant herein and an administrator who is the respondent herein but, only the executrix was revoked. By nullifying the executrix, the court erred. Therefore, there are sufficient grounds for this court to grant leave to the applicant so that she can appeal to the Court of Appeal.

On her part, Ms. Namuo submitted that there is no point of law worth consideration by the Court of Appeal as the nullification of the will was justifiable as it was tainted with numerous irregularities. Even the name of the testor appearing in the Will was different from the one appearing in grant of probate hence, it could not have been sustained. Ms. Namuo made no submission on the allegations as to the defectiveness of the affidavit or the failure by court to nullify the letters of administration granted to the respondent which were the only two points raised by Mr. Swenya. Her further submissions were extraneous and irrelevant to this application.

Applications for leave to appeal to the Court of Appeal are governed by section 5(1) (c) of The Appellate Jurisdiction Act [Cap 141 RE 2019] which vests the High Court with the discretion to grant leave to litigants intending to appeal to the Court of Appeal. The leave is granted at the discretion of the court, which as other judicial discretions, must be exercised judiciously. It is now a settled principle in our jurisdiction that, for leave to issue, the applicant must demonstrate that the intended appeal raises issues of general importance or a novel point of law or where the grounds show a *prima facie* or arguable appeal. Articulating this principle in **Harban Haji Mosi and Another v Omar Hilal Seif and Another,** Civil Reference No. 19 of 1997 CAT (unreported), the Court held that;

> Leave is grantable where the proposed appeal stands reasonable chances of success or where, but not necessarily, the proceedings as a whole

> reveal such disturbing features as to require the guidance of the Court of Appeal. The purpose of the provision is therefore to spare the Court the spectre of unmeriting matters and to enable it to give adequate attention to cases of true public importance.

This position has been adopted in a plethora of authorities including in British **Broadcasting Corporation v. Eric Sikujua Ngmaryo, CAT Civil Application No. 133 of 2004** (unreported) where it was highlighted that, leave to appeal to the Court of Appeal of Tanzania is granted by discretion of the court that must be exercised judicially where the grounds of appeal raise issues of general importance or novel point of law or *prima-facie* arguable appeal. Similarly, in **Rutagatina C. L v. The Advocates Committee and Clavery Mtindo Ngalapa,** Civil Application No. 98 of 2010, Court of Appeal of Tanzania (unreported), it was emphasised that, leave is grated if there is good reason normally on point of law or public importance. Leave would not issue where the grounds of appeal are frivolous, vexatious or useless or hypothetical, no leave will be granted(**British Broadcasting Corporation v. Eric Sikujua Ngmaryo,** (supra) and **Rutagatina C. L v. The Advocates Committee and Clavery Mtindo Ngalapa**(supra).

Therefore, in determining these applications which are basically meant to spare the Court of Appeal with the spectre of unmeriting matters and to enable it to give adequate attention to cases of true

public importance, the court is enjoined to carefully scrutinize the application to see whether there is an arguable case meriting the consideration of the Court of Appeal because as stated in **Gaudencia Mzungu v. IDM Mzumbe, Civil Application No. 94 of 1999, CAT** (unreported);

> "...leave is not granted because there is an arguable appeal. There is always arguable appeals. What is important is whether there are prima facie, grounds meriting an appeal to this Court. The echo stands as guidance for the High Court and Court of Appeal."

Guided by the principles above, the issue to be determined by this court is whether the applicant has demonstrated an arguable case meriting the consideration of the Court of Appeal. I will pose a moment to just remark that, although the applicant's affidavit shows that the intended appeal will have five points, the submission of his counsel zeroed down on two grounds only, to wit; that the court erred in law in granting the extension of time based on an incompetent application and that, the court erroneously failed to revoke the letters of administration granted to the respondent. Thus, it is presumed that he silently abandoned the remaining three grounds without revoking the first one.

Submitting on the first ground, the counsel for the applicant briefly argued that the court erred in entertaining the matter as it was supported by a defective affidavit containing matters not known to the

deponent contrary to Orcer IX rule 3. Much as this may seem to be an arguable point, I would be hesitant to allow the application based on this ground because, as the impugned ruling will demonstrate, the defect in the affidavit was extensively canvased by the trial judge and at the end, it was found that the defects are not fatal hence curable under the principle of overriding objective as provided for under Article 107(2) (e) of the Constitution of the United Republic of Tanzania. Under the premise and while mindful not to surpass my jurisdiction by encroaching on the merits of the intended appeal, it was not sufficient for the applicant to just lament that there is arguable case as the affidavit was defective. It was crucial in my view for the applicant to go a step further by, among other things, availing this court with the defective affidavit and demonstrating that the defect was, indeed incurable.

I say so mindful of the fact that, the Court of Appeal has stated in numerous authorities that, only a fatal irregularity can render the affidavit incurably defective and inactionable. Where the defect is inconsequential it can be expunged or overlooked, and the court may proceed to act on the substantive part of it (see **Phantom Modern Transport (supra) Rustamali Shivji Karim Merani v Kamal Bhushan Joshi**, Civil Application No. 80 of 2009 (CAT) (unreported). In the absence of explanation of the fatality of the defect, I find myself confined to find and hold that this ground is devoid of merit.

As to the point that, the applicant's probate was annulled whereas the respondent's letters of administration were not, I do not see how this can make an arguable case as the annulment of the letters of the annulment of the respondent as administrator of the estate was never at issue in the impugned ruling.

Having observed as above, I answer the issue posed above negatively that, the application at hand has not demonstrated an arguable case worth the consideration of the Court of Appeal. Her application does not meet any of the conditions listed above for granting the prayed leave to appeal to the Court of Appeal of Tanzania. Leave to appeal to the Court of Appeal of Tanzania against the impugned ruling of this court, is thus, denied. Although the general rule is that, costs follow the event, this application having emanated from a probate matter, I refrain from ordering costs. It is so ordered.

DATED at **DAR ES SALAAM** this 30th day of August 2021.

02/09/2021

X

Signed by: J.L.MASABO

J.L. MASABO

JUDGE