

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**  
**BUKOB A DISTRICT REGISTRY**  
**AT BUKOB A**

**MISC. CIVIL APPLICATION NO. 41 OF 2021**

*(Arising from High Court (PC) Civil Appeal No.1 of 2020 and Civil Appeal No.22 of 2017 of Bukoba District Court, Original Kasambya Primary Court Probate and Administration Cause No. 5 of 2017)*

**WILLIAM FRANCIS .....APPLICANT**

**VERSUS**

**ELIZABETH KINTU .....RESPONDENT**

**RULING**

**22/09/2021 & 13/10 /2021**

**NGIGWANA, J.**

This application is expressed to be made under Section 5(1) (c) and 5 (2) (c) of the Appellate jurisdiction Act, Cap 141 R: E 2019. The application is supported by an affidavit sworn by Mr. Alli Chamani, learned advocate for the applicant. The applicant is seeking for leave to appeal to the Court of Appeal and Certification that there are points of law involved in the judgment of the second Appellate Court (Mtulya, J) worth consideration by the Court of Appeal of Tanzania

One may ask himself/herself as to whether it is fatal or proper to combine more than one prayer in one chamber summons. I wish to state at the outset that it is not fatal as emphasized in case of **MIC TANZANIA LTD VERSUS MINISTER FOR LABOUR AND YOUTH DEVELOPMENT AND**

**ANOTHER**, Civil Appeal No.103 of 2004 CAT (Unreported) where the Court held that, the combination of two applications is not bad in law otherwise the parties would find themselves wasting more money and time on avoidable applications which would have been conveniently combined. The Court of Appeal went on stating that unless there is a specific law barring the combination of more than one prayer in one chamber summons, the court should encourage this procedure rather than thwart it for fanciful reasons. That being the position, the two prayers in this application were rightly combined since they are related See also the case of **THE PROJECT MANAGER ES-KO-INTERNATIONAL INC KIGOMA VERSUS VICENT NDUGUMBI**, CIVIL APPEAL NO.22 OF 2009 CAT (Unreported)

A brief background of this matter is to the effect that, before the Primary Court of Kasambya within Misenyi District vide Civil Case No. 05 of 2017 the respondent Elizabeth Kintu successfully applied for revocation of letters of administration of the estate of the late Christian Kintu granted to the Applicant William Francis by the same primary Court vide Probate and Administration of Estates Cause No.1 of 2017

Dissatisfied with the decision, William Francis appealed to the District Court of Bukoba vide Civil Appeal No. 22 of 2017. The appeal ended in his favor as he was restored to his position as the administrator of the estates of the late Christian Kintu.

Elizabeth Kintu was aggrieved by the decision of the District Court of Bukoba hence successfully appealed to this court vide (PC) Civil Appeal No.1 of 2020. This court (Mtulya, J.) having quashed the judgment and set

aside orders thereof, restored the decision of the Primary Court at Kasambya in Misc. Civil Case No.5 of 2017.

The applicant was dissatisfied by the said decision, hence lodged this application seeking for leave to appeal to the Court of Appeal of Tanzania to impugn the same.

It is trite that in application proceedings the affidavits constitute not only the pleadings but also the evidence. Equally straight that the applicant must make out his case in his founding affidavit and that he must stand or fall by the allegations contained therein. It follows therefore that the applicant must set out sufficient facts in his founding affidavit which will entitle him to the relief sought.

In this application, the founding affidavit was drawn, affirmed and filed by Mr. Alli Chamani. It was averred in paragraph 5 that it is the requirement of the law that an appeal to the Court of Appeal which does not originate from the High Court, must obtain leave to appeal to the Court of Appeal from this court.

The points of law sought to be certified were set out under paragraph 6 of the founding affidavit as here under;

1. *Whether the omission of doing a post act of filing form No. III in respect of the Bond of guarantors affected completed procedure of appointing the administrator of estate to the extent of revoking his appointment. (Form No. III attached as annexure "A").*
2. *Whether the second appellate court (Mtulya, J) considered the substantial justice to be done without undue regard to technicalities*

*as stipulated under section 37(2) of the Magistrates' Courts Act, Cap 11 R: E 2019 when his Lordship revoked the appointment of the administrator of estate.*

*3. Whether the appointment of the administrator of estate was contrary to item 2 to Schedule V of the Magistrates' Courts Act Cap 11 R: E 2019 where the regulation used the term "may" to the extent of occasioning a miscarriage of justice.*

4. Whether the legal remedy for not filing Form No. III in respect of Bond of guarantors was to revoke the appointment of the administrator of the estate or to order the appointed administrator of estate to fill in the said form.

The respondent generally opposed the prayers by the applicant.

Submitting on the prayer for leave to the Court of Appeal, Mr. Alli Chamani referred this court to the case of **British Broadcasting Corporation versus Erick Sikujua Ng'amaryo, Civil Application No. 133 of 2004** in which principles governing leave to the Court of Appeal were stated. He added that leave is always granted where the matter is not frivolous, vexatious, useless or hypothetical. He referred the court to the case of **Jebra Kambole versus Attorney General, Misc. Civil Cause No. 27 of 2017** HC DSM (Unreported). He also made reference to the case of **Said Ramadhani Mnyanga versus Abdala Salehe** [1996] TLR 74 to emphasize that leave is granted where there are contentious issues of law worth of consideration by the Court of Appeal. He further submitted that this application is neither frivolous nor vexatious taking into account paragraph 6 of the founding affidavit. Submitting on the role of the High

Court when dealing with application of this nature, Mr. Chamani referred this court to the case of **Joseph Ndyamukama versus NIC Bank and 2 others, Misc. Land Application No.10 of 2014.**

Submitting on the 2<sup>nd</sup> prayer, Mr. Chamani stated that, since this matter originated from Primary Court, certification on point of law is imperative. He further said the points of law stated as No.1, 2 and 3 may be combined to read as follows:-

***“Whether the omission of doing a post act of filing form No. III immediately after appointing an administrator of estate occasioned a failure of justice to the extent of revoking the appointment”.***

He went on submitting that, as revealed in page four of the judgment of this court (Mtulya J), the court stated that, in probate suits filed in Primary Courts, all necessary steps must be complied as per requirement of the law regulating probate matters, and if the law is not complied there would be complaints on irregularity and fraud.

Mr. Chamani further argued that, this is contrary to section 37 (2) of the MCA and the Principle of Overriding Objectives, as failure to fill form No. III did not occasion any failure of justice. He added that in this case, it has to be decided by the Court of Appeal as to **whether or not the appointment of an administrator of the estates was contrary to item 2 to the fifth** Schedule of the MCA Cap 11 R: E 2019.

On his side Mr. Matete, learned counsel for the respondent conceded that, for matters originating from Primary Court, leave to appeal to the Court of

Appeal and certificate on points of law worth of consideration by the Court of Appeal is imperative. However, he further argued that, in the present application there is no point of law worth of consideration by the Court of Appeal. He said section 37 (2) of the MCA is not applicable since letters of administration can be termed as a complaint. He added that form No. III is very important as stipulated under the 5<sup>th</sup> Schedule of the MCA item No. 2(f). He also argued that, the case of **Joseph Ndyamukama is distinguishable because it cannot apply to the case** which was not determined in merit like the present case. Mr. Matete further argued that this application is frivolous and vexatious because the applicant William Francis was just a friend of the deceased that is why he did not get guarantors.

In rejoinder, Mr. Chamani reiterated that section 37(2) of the MCA is applicable, likewise the case of Ndyamukama (Supra) is very relevant. He ended his rejoinder that in this matter especially as far as form No. III is concerned, the guidance of the Court of Appeal is necessary.

Having heard the submissions for and against the application, I will determine whether the application is meritorious.

Appeal is a right which is guaranteed in our Constitution. The exercise of that right, is however not absolute. There are certain procedures to be complied with before one can exercise his right to appeal, and in the case of appeal from the High Court to the Court of Appeal, such procedures are stipulated under Section 5(1) (c) of the Appellate Jurisdiction Act, [Cap 141 RE 2019]. The provision states as follows;



*"In civil proceedings, except where any other written law for the time being in force provides otherwise, **an appeal shall lie to the Court of Appeal with the leave of the High Court or of the Court of Appeal, against every other decree, order, judgment, decision or finding of the High Court.***

From this provision, it is apparent that appeals to the Court of Appeal against a decree, order or judgment of the High Court should be done with the leave.

The requirement for leave imposes a duty upon this court to filter out frivolous and vexatious appeals and in so doing, spare the Court of Appeal by from the "spectre" of un meriting matters and to enable it to give adequate attention to cases of public importance

The Court of Appeal in **Paulo Juma versus Diesel & Auto Electrical Services Ltd & 2 Others**, Civil Appeal No. 183 of 2007, (unreported) held that:

*"The purpose of the provision is therefore to spare the court the specter of un-meriting matter and to enable it to give adequate attention to cases of public importance".*

The grant or refusal of the application is within the spectrum of discretionary powers of the High Court. The discretionary powers of the court in granting of leave and the exercise of that discretion is as stated in the excerpt below from the **British Broadcasting Corporation versus Eric Sikujua Ng'ymaro**, (supra);

*"Needless to say, leave to appeal is not automatic. It is within the discretion of the court to grant or refuse leave. The discretion must, however judiciously exercised and on the materials before the court. As a matter of general principle, leave to appeal will be granted where the grounds of appeals raise issues of general importance or a novel point of law or where the grounds show a prima facie or arguable appeal."*

Furthermore, in the same case of **British Broadcasting Corporation** (Supra) which at page 7 the Court of Appeal quoted the holding in the case of **Harban Haji Mosi and Another versus Omar Hilal and another**, Civil reference No. 19 of 1997 (Unreported) where it was held that:

*"Leave is granted where the proposed appeal stands reasonable chances of success or where but not necessarily, the proceedings as a whole reveal such disturbing features as require the guidance of the Court of Appeal. The purpose of the provision is, therefore, to spare the Court the specter of unmeriting matters and to enable it to give adequate attention to cases of true public importance."*

In the case of **Ramadhani Mnyanga versus Abdala Selehe** [1996] it was held that;

*"For leave to be granted, the application must demonstrate that there are serious and contentious issues of law or fact fit for consideration of appeal".*

From the above authorities, we can learn that there are conditions to be met for the grant of leave to appeal to the Court of Appeal, amongst



them being that; the appeal would have reasonable prospect of success, there are compelling reasons why the appeal should be heard, including conflicting judgments on the matter under consideration, the decision sought to be appealed did not dispose of all the issues in the case, the proceedings as a whole reveal disturbing features requiring the Court of Appeal intervention and provision of guidance, there is point of law or point of public importance detected from the appealed decision and that there are arguable issues fit for the consideration of the Court of Appeal.

In our case however, I would like to state very clearly that I have no mandate to go into the merits or deficiencies of the judgment or orders of the Hon. Judge or to analyze the grounds of the proposed appeal because this is not the Court of Appeal, and application of this nature does not mean re-hearing of the appeal. All what I am duty bound to do is to consider whether there is real prospect of success, or arguable issues or compelling reasons, or disturbing features, or point of law or point of public importance requiring the court of appeal intervention.

Another prayer in this application is certification that there are points of law involved in the judgment of the second Appellate Court worth consideration by the Court of Appeal of Tanzania. It was made under Section 5 (2) (c) of the Appellate Jurisdiction Act Cap 141 R: E 2019 which provides that;

*"Notwithstanding the provisions of subsection (1) no appeal shall lie against any decision or order of the High Court in any proceedings under Head (c) of Part III of the Magistrates' Courts **Act unless the High***

***Court certifies that a point of law is involved in the decision or order.***

I would like to state that certification is aimed to ensure that all cases originating from Primary Courts end within the High Court except where there are matters of "legal significance and public importance. The Court of Appeal in the case of Ali **Vuai Ali versus Suwedi Mzee Suwedi** [2004] TLR 110 held that:

*"The purpose of a certificate for the class of appeals originating in primary courts was to ensure that deserving cases only reached the Court of Appeal. The exercise is therefore a screening process which would leave for the attention of the Court only those matters of legal significance and public importance."*

What constitutes a point of law was described in **Mohamed Mohamed & Khamis Mselem versus Omar Khatib**, Civil Appeal No. 68 of 2011, where the Court of Appeal of Tanzania at Zanzibar (unreported) held:

*"a novel a point, where the issue raised is unprecedented, where the point sought to be certified has not been pronounced by this Court before and is significant or goes to the root of the decision, where the issue at stake involves jurisdiction, where the court(s) below misinterpreted the law "*

As pointed out earlier, the applicant under paragraph 6 of the founding affidavit listed four (4) points of law which he wants to be certified for determination by the Court of Appeal of Tanzania but during the hearing he combined the four points into a single point which reads as follows;

***"Whether the omission of doing a post act of filing form No. III immediately after appointing an administrator of estate occasioned a failure of justice to the extent of revoking the appointment".***

Now the issue here is whether or not the herein above-mentioned issue constitutes a point of law worth consideration by the Court of Appeal.

Bearing in mind that in the administration of justice, it is admitted that every case is unique and must be decided on its own merits, I have carefully gone through the proceedings of this court as a whole to see whether the same reveal disturbing features requiring the Court of Appeal intervention and provision of guidance but found no disturbing features. The issue mentioned here in above does not at all constitute a point of law worth of being certified for consideration by the Court of Appeal of Tanzania. Generally, I find nothing contentious neither legal nor factual exhibited that is worthy of consideration by the Court of Appeal.

Consequently, the application is hereby dismissed. Each party shall bear its own costs.



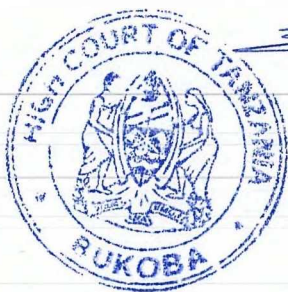
  
E. L. NGIGWANA

JUDGE

13/10/2021

Ruling delivered this 13<sup>th</sup> day of October 2021 in the presence of Mr. Ali Chamani, leaned counsel for the applicant, Mr. E.M. Kamaleki, Judges' Law

Assistant and Mr. Gosbert Rugaika-B/C, but in the absence the respondent.



E. L. NGIGWANA

JUDGE

13/10/2021