IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

MISC. CIVIL APPLICATION NO. 26 OF 2021

(C/f Misc. Civil Application No. 19 of 2020 of the High Court of Tanzania at Moshi before Hon. B. R. Mutungi J, Originating from Misc. Civil Application No. 39 of 2018 of the High Court of Tanzania at Moshi before Hon. Mkapa J; Originally Probate and Administration Cause No. 5 of 2015.)

CHARLES MARKO NAIBALA..... APPLICANT

VERSUS

LILIAN MARKO NAIBALA..... RESPONDENT

RULING

23/03/2022 & 18/05/2022

SIMFUKWE, J

The applicant herein, filed the instant application under **section 5 (1) (c) of Appellate Jurisdiction Act, Cap 141 R.E 2019** and any other enabling provisions of law, seeking the following orders that:

1. *This Honorable Court be pleased to grant leave to the applicant to appeal to the Court of Appeal of Tanzania against the ruling of this Court in Misc. Civil Application No. 19 of 2020 delivered on 17th day of June 2021 before* ***Hon. B. R. Mutungi, J.***
2. *Costs of this application to abide by the results of this application.*

The application was supported by an affidavit deponed by the applicant Charles Marko Naibala, which was contested by the counter affidavit deponed by Ms Regina Onesmo Mwanri, learned counsel for the respondent.

The matter was ordered to be argued by way of written submissions. The applicant hired the service of Mr. Engelbeth Boniface learned counsel.

The gist of the application in a nutshell is to the effect that, the Applicant unsuccessfully filed Misc. Civil Application No.19 of 2020 seeking for extension of time to appeal to the Court of Appeal. That, among the reasons advanced in an application for extension of time was illegality on an account that Probate and Administration No. 5 of 2015 had already been closed by filing an inventory the reason which was not adhered to. After being aggrieved by the said ruling in Mic. Civil Application No. 19 of 2020, the applicant filed the instant application on the following grounds:

a. *That, the Honourable Judge erred in law and in fact by deciding not to appreciate that, Probate and Administration Cause No. 05 of 2015 had already been closed, thus determining the same is an illegality in the face of records.*
b. *That, the Honourable trial Judge erred in law and in fact by failing to appreciate that illegality in any decision of the Court by itself is a sufficient reason to grant an application for extension of time.*
c. *That, the Honourable trial Judge acted with material illegality and irregularity as the Doctor's negligence and fraudulent acts does not at all affect the applicant as no one has ever proved such fraud as the Police case is still pending in the Court.*

In his submission in chief in support of the application, Mr. Engelbeth he craved leave of the court to adopt a chamber summons and affidavit of the applicant to form part of his submission. He submitted among other things that he had noted that the respondent's counsel did note twelve paragraphs contained in the applicant's affidavit leaving out three paragraphs of the applicant's affidavit, thus paragraph 9, 12 and 15. The learned advocate for the applicant narrated briefly the facts of the disputes which I find no need of reproducing.

Mr. Engelbeth submitted that he is quite aware that leave to appeal to the Court of Appeal is grantable where the proposed appeal stands reasonable chances of success or where, but not necessarily the proceedings as a whole revel such disturbing feature as to require the guidance of the Court of Appeal. That, the purpose of the provision is therefore to spare the court the spectra of un-meriting matters and to enable it to give adequate attention to cases of true public importance, this is a basic principle as to why one has to seek leave to appeal to the Court of Appeal and the same was categorically stated in the case of **Harban Haji Mosiand Another versus Omar Hilal Seif and Another, Civil Reference No.19 of 1997,** Court of Appeal of Tanzania, (Unreported), the same was quoted in the case of **Sospeter Hezron Buhuba and Another versus Victoria Savings and Credit and Another, Misc. Land Application No. 62 of 2019, High Court of Tanzania at Mwanza (unreported).**

The learned counsel for the applicant contended that it was his concern that the requirements of the above principle was well fulfilled in the applicant's affidavit and in his submission in chief.

It was averred further that the gist of the application is based on the illegality which was misconceived by the trial judge by passing a decision revoking the applicant as an administrator of the estate of his late father one Marko Naibala while the same was already closed and the applicant had discharged his duties as an administrator of the estate of his late father by distributing the properties of the deceased to the legal heirs. On 24th day of March, 2017 the applicant filed an inventory of the estate as required by section 107 of the Probate and Administration Act and Rule 106 of the Probate and Administration of Estates Rules and the same marked the end of the applicant as an administrator of the estate of the late Marco Naibala the applicant's and respondent's father.

It was stated further that since the applicant had already discharged his duties of executing his duties as the administrator of the estate of the late Marco Naibala by filing an inventory and accounts, then the hands of the judges in this court were tied up from revoking or annulling the applicant as an administrator of the estate as from the time the applicant filed an inventory and accounts in this court, from that date on ward, he was no longer an administrator of the estate of the late Marco Naibala which is the position of **section 49 (1) of the Probate and Administration of Estates Act, Cap 352 R.E 2019** in which probate can be revoked or annulled if the conditions of the afore said provisions of the law are met or found and that should be during the time the administrator of the estate is still performing his duties as explained in terms of **section 108 of the Probate and Administration of Estates Act** (supra). That, this court's decision of revoking the applicant as an administrator of the estate of the late Marco Naibala after filing of the inventory and accounts of the deceased was superfluous and had no

purpose to serve rather than increasing chaos to the family members. The learned counsel cemented his argument by citing the case of **Saada Rashidi versus Abdallah Rashid, PC Civil Appeal No. 12 of 2020,** High Court of Tanzania at Arusha (unreported) at page 6 held that:

> *"From the outset, I feel bound to uphold the appellate court's decision for the reasons that I shall give hereunder. It is a settled position of the law that in probate matters when the inventory has been filed in court by the administrator or executor as the case may be and the probate or administration cause has been closed the court that has closed the same becomes Functus Officio with regard to all matters that shall be brought up before it after the closure of the cause. This position is supported by the case cited by the respondent counsel Mr. Yoyo of Ahmed Mohamed Al Lamaar where the Court of Appeal of Tanzania had the following to say:*
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> *"Given the fact that the appellant had already discharged his duties of executing the will, whether honestly or otherwise, and had already exhibited the inventory and accounts in the High Court, there was no granted probate which could have been revoked or annulled in terms of section 49 (1) of the Act. As the appellant was already Functus Officio..."*

On the basis of the above authority, Mr. Engelbeth commented that in the matter at hand the record via annexure CMN-3 as enunciated via paragraph 9 of the applicant's affidavit is to the effect that Probate and Administration Cause No. 5 of 2015 was officially closed on 24th day of March, 2017 and there is no requirement of the law that after filing an inventory and accounts the court has to pass an order to that effect as

contended by the respondent's counsel in her well composed counter affidavit. Mr Engelbeth buttressed his point by referring to the case of **Ahmed Mohamed Al Lamaar versus Fatuma Bakari and Another, Civil Appeal No. 71 of 2012,** at page 17 Court of Appeal of Tanzania at Tanga, (unreported) which quoted in the case of Saada Rashid (supra).

Mr. Engelbeth concluded his submission by praying that this application should be granted with costs in favour of the applicant.

Ms Regina Mwanri learned counsel for the respondent gave brief facts which gave rise to this application and stated among other things that the respondent vide Misc. Application No 39 of 2018 applied for revocation of the applicant as administrator, whereas the court granted the application and revoked the applicant. Being aggrieved with the said revocation, the applicant applied for extension of time within which to apply for leave to appeal which was also dismissed. The learned counsel for the respondent pointed out that the applicant was not required under the law to apply for leave as when the court revoked the applicant as administrator was exercising its original jurisdiction. She invited the attention of this court by referring to **Rule 45 A (1) of the Tanzania Court of Appeal Rules,** Cap 141 R.E 2019 (sic) which provides that:

"45A (1) Where an application for extension of time to: -

(a) Lodge a notice of appeal

(b) Apply for leave to appeal; or

(c) Apply for a certificate on a point of law

Is refused by the High Court, the applicant may within 14 days of such decision apply to the ***Court*** *for extension of time* (Emphasis added)

The learned counsel for the respondent also referred to **Rule 3 of the Tanzania Court of Appeal Rules** (supra) provides the meaning of Court to mean Court of Appeal of United Republic of Tanzania. She submitted that, as Misc. Civil Application No. 19 of 2020 which is the subject of this application refused the applicant with extension of time within which to apply for leave to appeal, the applicant was required to apply for such extension before the Court of Appeal of Tanzania as second bite as stipulated under **Rule 45A (1) of the Tanzania Court Appeal Rules** (supra). The learned counsel insisted that this Court lacks jurisdiction to entertain application for leave to appeal against the decision for refusing to grant extension of time within which to apply for leave. Otherwise, she was of the opinion that this application was incompetent before the court. She added that, the issue of jurisdiction and competency of the application can be raised at any time as they have done in their reply submission, and prayed this application to be dismissed for being devoid of any merit.

In the alternative and without prejudice to the forgone, Ms Regina submitted that, if the Court seem to have jurisdiction and the application is competent, she prayed to adopt her counter affidavit together with its annexures to form part of this submission.

Ms Regina submitted further that it is trite under the law that leave to appeal to the Court of Appeal the court must ascertain if there is legal point worth of being considered by the Court of Appeal. She subscribed to the case of **Nurbhai Raittansi vs Ministry of Water Construction Energy and Environment and Another [2005] TLR 220** in which it was held that:

"Not only that there must be legal point worth to be determined but also leave to appeal may be granted where the court feels that ground to appeal raise issues of general importance or where the grounds show prima facie or arguable appeal (See ***Buckle v. Holmes (1926) ALL ER 90****)."*

It was also stated that from the affidavit in support of the application and submission of the applicant, there is neither legal point worth to be determined by the Court of Appeal nor the appeal does raise the issue of general importance. Ms Regina referred to paragraph 10 of her counter affidavit where it has been clearly pointed out how there is neither legal point worth to be determined nor does the appeal raise the issue of general importance. The learned counsel went on to submit that the point of illegality sought as plethora of authorities have held that the point of illegality to be considered as a good cause for extending time it has to be on point of law, issue of general importance and that it must be apparent on the face of the record and not one that would be discovered by a long-drawn argument or process. She said the same was stated in the case of **Zainabu Ally Gafusi Ally Gafusi and Rehema Ramadhani Musa vs Asha Said (As Legal Representative of the late Sofia Makuria),** Civil Application No 155/5/2017, Court of Appeal of Tanzania at Arusha (unreported), quoting with approval the case of **Lyamuya Construction Company Limited vs Board of Registered Trustees of Young Women's Christian Association of Tanzania,** Civil Application No. 2 of 2010 (unreported).

Ms Regina also submitted that it is trite law that for extension of time to be granted a number of factors have to be taken into account including whether or not the application has been brought promptly, the absence

of any or valid explanation for the delay, lack of diligence on part of the applicant.

Back to the instant matter, the learned counsel for the respondent was of the view that, the applicant does not only reflect the negligence of his advocate, but also the negligence of the applicant himself. She cemented her averment with the case of **Yusuf Same & Hawa Dada v. Hadija Yusufu, Civil Appeal No. 1 of 2002, Court** of Appeal of Tanzania at Dar es Salaam (unreported).

Furthermore, it was submitted for the respondent that it has been pointed out by the applicant at paragraph 15 (c) of the affidavit that the issue of illegality as the Doctor's negligence and fraudulent acts does not at all affect the applicant as the one who has ever proved such fraud as the Police case is still pending. That, the same was not a legal point worth to be determined by the Court of Appeal.

It was stated further by Ms Regina that in our laws there is no endless administrators or a life administrator. The act of the applicant filing an inventory and accounts of the estate of the late Marco Naibala cannot be said that the probate was closed because there was an objection from the respondent and there was no court order closing the matter. She said the position was well enunciated in the case of **Beatrice Brighton Kamanga and Amanda Brighton Kamanga versus Ziada William Kamanga,** Civil Revision No. 133 of 2020, High Court of Tanzania at DSM at page 23 (unreported), it was held that:

> *"That is to say, if **there is no objection to the statement of Accounts and Inventories,** the decision of the administrator is*

final and the Court must make an order closing the matter."
(Emphasis added)

The learned counsel for the respondent prayed the application to be dismissed with costs for being devoid of any merit.

In his rejoinder, Mr. Engelbeth reiterated his submission in chief. Regarding the issue that this court lacks jurisdiction to entertain the application at hand, Mr. Engelbeth submitted that the respondent's counsel had never raised any preliminary point of objection before hearing of the matter at hand and having taken into consideration that written submission by itself amounts to a hearing. He supported his argument with the case of **Fredrick A.M. Mutafurwa versus CRDB 1996 LTD**, Land Case No. 146 of 2004, Land Division at Dar es Salaam (unreported) and the case of **Mariam Suleiman versus Suleiman Ahmed**, Civil Appeal No. 27 of 2010, High Court of Tanzania at DSM (unreported). Mr. Engelbeth insisted that raising an objection at this stage amounts to taking the other party by surprise. That, it is rule of a thumb that a party should raise its preliminary objection by giving notice so as not to take the opposite party by surprise, that is to say, once a party in a case wishes to raise preliminary objection must give notice to that effect and indeed the said notice of preliminary objection must contain grounds for objection and prayers to the court. That, since the said preliminary objection was not preceded by notice, the learned counsel prayed the same to be disregarded. He supported his opinion by citing the case of **Joseph Obeto versus Ali Suleiman Khamis,** High Court Commercial Case No. 16 of 2006. (unreported). He opined that, it was not proper for the respondent to raise the preliminary objection at the hearing stage without notifying the applicant and seeking leave of the court. He prayed that the

raised preliminary point of objection be disregarded by this court with costs in favour of the applicant.

Concerning **Rule 45A (1) of the Court of Appeal Rules,** cited by the learned counsel for the respondent, Mr. Engelbeth submitted that the same was distinguishable by itself as the same, first deals with applications for the extension of time either to lodge a notice of appeal; apply for leave to appeal or apply for a certificate on point of law. Second, the cited law by the respondent's counsel which is **Cap 141 R.E 2019** does not have **Rule 45A,** thus the cited law does not exist thus cannot be referred in the application as far as **Cap 141** is the Appellate Jurisdiction Act and not the Court of Appeal Rules. Thirdly, the application at hand is all about leave to appeal to the Court of Appeal and not on extension of time to appeal out of time. Fourthly, the applicability of **Rule 45A** is based on discretion of the applicant if at all it is to be employed for extension of time as far as **section 53 of the Interpretation of Laws Act, Cap 1 R.E 2019** is concerned.

Mr. Engelbeth finalised his rejoinder by praying that the applicant be allowed to appeal to the Court of Appeal.

I have scrutinized the affidavits and submissions by both parties, the issue for determination is ***whether this application deserves to be granted***

It is trite law that for matters originating from the High Court in its original jurisdiction apart from matters stipulated under **section 5 (1) (a) and (b) of the Appellate Jurisdiction Act,** (supra) leave is required for one to file his appeal to the Court of Appeal. That position was made clear in the recent Court of Appeal decision in the case of **Julius Philibert**

Shadrack versus The Board of Pamba Secondary School and 2 others, Civil Appeal No. 484 of 2021, at page 5 it was held that:

> *"The orders that are appealable as of right or without seeking any leave are provided under* ***section 5 (1) (a) or (b) of the AJA.***"
> Emphasis added

Thus, as a matter of law the instant matter being probate by nature, it falls under matters whose orders are appealable with leave pursuant to **section 5 (1) (c) of the Appellate Jurisdiction Act** (supra). Therefore, the submission by the learned counsel for the respondent that the applicant was not required under the law to apply for leave as in Misc. Civil Application No. 39 of 2018 when the High Court revoked the applicant as administrator was exercising its original jurisdiction is misconceived.

In her submission, the learned counsel for the respondent pointed out that with the intrusion of **Rule 45A of the Tanzania Court of Appeal Rules,** the applicant was required to apply for extension of time before the Court of Appeal of Tanzania as second bite as stipulated under **Rule 45A (1) (b) of the Court of Appeal Rules** (supra). That, this court lacks jurisdiction to entertain an application for leave to appeal against the decision for refusing to grant extension of time within which to apply for leave.

In his rejoinder Mr. Engelbeth for the applicant faulted the learned counsel for the respondent for raising a preliminary objection on point of law without notifying the other part. However, in his submission in rejoinder, he proceeded to argue the cited Rule 45A (1) (supra), to the effect that the same was distinguishable on four grounds. First, that the cited Rule deals with applications for extension of time to either lodge a notice of

appeal, apply for leave to appeal or apply for a certificate on a point of law. Second, that the cited law by the respondent's counsel which is **Cap 141 R.E 2019** does not have Rule 45A and that the same is the Appellate Jurisdiction Act. Third, that the application at hand is all about leave to appeal to the Court of Appeal and not on extension of time to appeal out of time. Fourth, that the applicability of Rule 45A is all based on discretion of the applicant if at all it is to be employed for the extension of time.

With respect, this court agrees with the learned counsel for the applicant that preliminary objections on point of law should not be raised by surprise to the other party. The essence of the same is simple, in order to accord the other party with right to argue the raised preliminary objection. However, in this case, this court is of considered opinion that since the learned counsel for the applicant managed to submit his reply on the raised point of law, the way forward is to determine the raised issue whether it has merit as both parties has discussed the same.

In the case of **Tanzania Rent A Car Limited versus Peter Kimuhu,** Civil Application No. 226/01/2017, Court of Appeal of Tanzania at Dsm at page 9 held among other things that:

> *"It is accordingly evident that Bank of Tanzania, the applicant in Civil Application No. 150 of 2011 before the Court (Mandia J. A) was applying* ***for extension of time to file a notice of appeal for the second time (second bite) after being denied by the High Court*** *(Mruke J)."* Emphasis added

At page 11 the Court held that:

Though the Court in the above case, was considering **an application for extension of time after it was refused by the**

High Court in what is now referred to as a second bite...."

Emphasis added

From the above authority, it goes without saying that, the proper procedure after the application for extension of time to file an application for leave to appeal to the Court of Appeal was denied, was to file the same before the Court of Appeal as a second bite. Thus, I join hands with the learned counsel for the respondent that this court lacks jurisdiction to entertain the instant application. The application was supposed to be filed before the Court of Appeal as prescribed under **Rule 45A (1) (c)** (supra).

Regarding the issue of referring the **Court of Appeal Rules** as Cap 141 R.E 2019, this court is of considered view that the anomaly is a typing error which if not fatal.

In the circumstances, I find this application to have no merit and misplaced. I therefore dismiss it with costs.

It is so ordered.

Dated and delivered at Moshi this 18th day of May,2022.

S. H. SIMFUKWE

JUDGE

18/05/2022