IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

MISC. CIVIL APPLICATION NO. 30 OF 2021

BETWEEN

RAYMOND ALEXANDER KWEKA ---------- APPLICANT

VERSUS

MARY ALEXANDER ITAEL ---------- RESPONDENT

RULING

9/3/2022, 24/3/2022

MWENEMPAZI, J.

On the 30th July, 2021 the applicant filed this application under the provision of section 49(1)(a) of the Probate and Administration of the Estate Act, Cap 352 R.E. 2019 and Civil Procedure Code, Cap 33 R.E. 2019 praying for orders of revocation of the letters of Administration and Costs of the application. Prior to the filing of this application, on the 8th June, 2021, the applicant filed a notice of intention to appeal to the Court of Appeal of Tanzania contemplating to appeal against the appointment of the Respondent as the administratrix of the estate of late Jane Alexander Kweka, their late Mother. The filing of notice of appeal to the court of appeal did not come into my knowledge until when the respondent filed counter affidavit and deponent stated the fact in paragraph 5 of the affidavit.

This application is supported by an affidavit sworn by Raymond Alexander Itael Kweka, the applicant herein named. The deponent in the affidavit did not state the fact which has been uncovered by the respondent in the counter affidavit.

In the affidavit the deponent has stated that the applicant is a biological brother of the respondent and son to the deceased Jane Alexander Kweka. The respondent was appointed by this court as an administratix of the late Jane Alexander Kweka by this court, pursuant to her application. He has stated that the application was not blessed by other members of the family. Further to that, applicant has advance as a reason for the application that the respondent has been messing up with the properties of the estate of the deceased even prior to her appointment a fact which is causing loss to the estate.

The respondent is opposing the application and has stated in the counter affidavit that her appointment was blessed by the members of the family through a meeting which was convened and conducted on the 13/10/2013. It has also been averred in the counter affidavit that she has been executing the office of administration of the estate properly as directed by the court. She has also averred that the applicant is riding two horses at the same time, as the applicant on the 8th day of June, 2021 lodged the Notice of Appeal to the Court of Appeal of Tanzania which has not yet been withdrawn.

The application was scheduled for hearing on the 9th March, 2022 and the applicant was present together with his counsel, one Mr. Oscar Mallya,

learned advocate and the respondent was present together with her advocate, Mr. John Lairumbe.

The counsel for the applicant commenced the submission intending to ask for time to seek audience with the respondent with an intention of discussing to settle the matter out of court. However, there was a vigorous objection from the respondent's counsel. He informed this court that in the counter affidavit by virtue of paragraph 5, the respondent has averred that, the applicant is riding two horses at the same time as on the 8th June, 2021 lodged a Notice of Appeal in the Court of Appeal of Tanzania which is still pending. A copy has been attached to the counter affidavit. Under the circumstances this court has no jurisdiction to entertain this application.

On the point, the counsel for the applicant was quick to state that they are intending to withdraw the notice of appeal under Rule 89 of the Court of Appeal Rule 2019, thus praying for time to do so. The respondent again objected and submitted in length that this application is an abuse of court process. Since the applicant had been served with the counter affidavit immediately after filing the same on 11/10/2021, the counsel must have known and acted on what he is praying now. Litigation must come to an end.

On the notice, as a matter of law, it ceases to have effect by an order of the Court of Appeal. To support the point, the counsel has cited the case of ***Attorney General versus Tanzania Ports Authority and Alex Msama Mwita,*** *Civil Application No. 467/17 of 2016, Court of Appeal of Tanzania at Dar-es-Salaam* where it was held that the notice ceases to operate upon the

court (Court of Appeal of Tanzania) issuing an order to that effect. The counsel thus argued that, this court was therefore supposed to halt the proceedings in this application in line with the decision in ***Arcado Ntagazwa Versus Buyongera Bunyambo*** *[1997] T.L.R 242.*

The respondent raised another concern which has already been briefly stated above. Since there is a notice of appeal in the Court of Appeal of Tanzania and this application in this court the applicant is trying to ride two horses at the same time. This application is untenable in law and has cited the case of ***Hector Sequirae Versus Serengeti Breweries Ltd,*** *Civil Application No. 395/18 of 2019* where it was held that the law does not allow riding two horses at the same time because it amounts to an abuse of court process.

Essentially this application is frivolous and it is an abuse of court process; it should therefore be dismissed with costs.

In reply to the submission Mr. Oscar Mallya, learned advocate has submitted that the counsel for the respondent has misdirected himself and misconceived the provision of **Rule 89(1) of the Court of Appeal Rules, 2019**, which provides that: -

> *"An application to withdraw a notice of intention to appeal may be made at any time before instituting the appeal."*

The counsel submitted that the case of **Arcardo Ntagazwa** (supra) is quite distinguishable. The holding gives a leeway for notice to be withdrawn. He also brushed off the cases of ***EADB Vs. Blueline Enterprises Ltd***, Civil Appeal No. 101 of 2009 and that of ***Williamson Diamond Ltd Vs. Salvatory Syridion & Another,*** *TBR Civil Application No. 15 of 2015* which

are cited in the case of ***Attorney General Vs. T.P.A of Alex Msama Mwita*** by stating that nothing has been discussed in them in relation to Rule 89(1) of Court of Appeal Rule, 2019 and asserting that they are not applicable.

The counsel also denied that they are not applying delay tactics nor are they trying to ride two horses. But the counsel alleges to have had no communication with his client. However, the counsel seems to propose settlement by emphasis on the availability of that chance. He finally prayed for time to withdraw the notice of appeal and proceed with the hearing of this application.

Starting with the last point, which is numbered as third point, I see it confirms the fact that the applicant is just beating around the bush thus missing the point. In reality anyone knowledgeable to the law would agree that there was no need of this application given the fact that there is a notice of intention to appeal to the Court of Appeal.

On the point regarding to Rule 89(1) of the Court of Appeal Rules, 2009; it does not stand alone where one intends to withdraw a notice of intention to appeal. Given the fact that an application must be made, then one has no way to circumvent the need to have an order of the court (Court of Appeal) confirming withdrawal. Thus, Rule 89(2) has to come into play. In case of not instituting an appeal and ignoring to apply for withdrawal of the notice of intention to appeal; Rule 91(1)(a) of the same Rules must come into play. According to Rule 91(1)(a) of the Court of Appeal Rules, the notice of appeal ceases to have effect upon court order deeming it to have been withdrawn.

That also is the position in the case of ***Attorney General Versus Tanzania Ports Authority of Alex Msama Mwita***, *Civil Application No. 467/17 of 2016*, Court of Appeal of Tanzania of Dar-es-Salaam (page 10). In my understanding court order is inevitable. In the just cited case at page 10 where the Court of Appeal cited the case of ***Williamson Diamond Limited Vs. Salvatory Syridion & Another***(supra) wherein it was stated that:

> *"It seems to us that the purpose of Rule 91(a) is to flush out such notices of appeal as have outlived their usefulness. That power is vested in the court. We are further of the view that in that in exercising such power, the Court may do so* ***suo motu*** *(after giving notice to the parties) or it may be moved by any party who may or ought to have been served with a copy of the notice of appeal under Rule 84(1) of the Rules".*

In the case of ***Arcardo Ntagazwa Versus V. Buyogera Bunyambo*** *[1997] T.L.R 242 (CA)* it was held that: -

> *"Once the formal notice of intention to appeal had been lodged in the Registry the trial Judge was obliged to halt proceedings at once and allow for the appeal process to take effect."*

In this case, the notice of intention to appeal, whose copy is annexed to the counter affidavit was lodged on the 8th June, 2021 and the current application was filed on the 30/7/2021. The question is whether it was proper under the circumstances. The counsel for the applicant, has advanced as a reason that he had no communication with the applicant. He relies on it to seek sympathy of this court to give them time to withdraw the notice of

intention to appeal. That is, in my view, wrong. Whether the applicant or his counsel did file the notice as well as this application it is under all circumstances wrong. The reason is simple. Their relationship is agent and principal and ignorance of law is not an excuse. Whether the notice was filed by the applicant and not his advocate it is still wrong. Thus, given the timing of filing the notice of intention to appeal and this application, this application ought not to have been filed altogether or at all. The applicant has been trying to ride two horses at once, which act is wrong in law and essentially an abuse of court process.

The remedy is, therefore, not to give time to the applicant to withdraw the notice of appeal but proper for them to withdraw this application and give way to the appeal.

For the reason stated, the remedy available in my considered opinion is to dismiss this application with costs as the court has no jurisdiction to deal with it. It is ordered accordingly.

Dated and delivered at Moshi this 24th March, 2022.

T. M. MWENEMPAZI
JUDGE

Ruling delivered in Court this 24th day of March, 2022 in the presence of the applicant in person and Mr. Oscar Mallya, learned advocate for the applicant and the Respondent in person.

T. M. MWENEMPAZI
JUDGE