

**IN THE HIGH COURT OF TANZANIA  
(DAR ES SALAAM DISTRICT REGISTRY)  
AT DAR ES SALAAM**

**MISC. CIVIL APPLICATION NO. 390 OF 2021**

(Originating From Ruling and Order of the High Court, Dar es salaam District Registry,  
Civil Revision No.13 of 2020 before (Hon. Justice Mlacha, J) dated 10/07/2020)

**ZIADA WILLIAM KAMANGA..... APPLICANT**

**VERSUS**

**AMANDA BRIGHTON KAMANGA.....1<sup>ST</sup> RESPONDENT**

**BEATRICE BRIGHTON KAMANGA..... 2<sup>ND</sup> RESPONDENT**

**RULING**

Date of Last Order: 27<sup>th</sup> April, 2022.

Date of Ruling: 13<sup>th</sup> May 2022.

**E.E. KAKOLAKI, J.**

This Court has been moved by the Applicant Ziada William Kamanga for grant of leave to appeal to the Court of Appeal against the Ruling and Order of this Court handed down on 10/07/2020 by my brother Mlacha J in Civil Revision No. 13 of 2020. The application is preferred under section 5(1)(c) of the Appellate Jurisdiction Act, [Cap. 141 R.E 2019] and Rules 45(a) and 47 of the Court of Appeal Rules, 2009, supported by the applicant's affidavit. It is worth noting that, when served with the chamber summons in which originally the court was moved under Rule 83(1) of the Court of Appeal Rules, 2009, and in filing their counter affidavit, the respondents through

their advocate Mr. James Mwenda raised a preliminary point of objection to the effect that the application was incurably defective for wrong citation of the law. At the hearing of the said preliminary point of objection counsel for the applicant conceded and the court ordered the applicant to amend the chamber summons only by inserting the proper provision of the law, the order which was complied with. Further to that the applicant prayed for leave to file a supplementary affidavit the prayer which was not challenged by the respondents hence granted.

Upon completion of filing of pleadings, parties with permission of the court proceeded to argue the application by way of written submission as both appeared represented. The applicant prosecuted the application through Mr. Nafikile Elly Mwamboma learned advocate while the respondents hired the services of Mr. James Mwenda, learned advocate though the reply submissions were made and filed by Mr. Kelvin Kidifu, learned advocate.

Briefly, parties are contesting over administration of the estate of the late **Brighton William Kamanga** who died in 1988. The applicant is the sister to the deceased person while the respondents are biological children to him though the applicant is challenging their legality. Following death of the **Brighton William Kamanga**, the applicant successfully petitioned for

letters of administration in Probate and Administration Cause No. 64 of 1988, in the Primary Court of Kinondoni, in which it is claimed the only beneficiary was the deceased mother. It appears the administration of estate went smoothly on the applicant's side as the respondents were still minors by then as the battle sparked when they started claiming handing over from the applicant of their three (3) houses as part of estate of their late father. In between there were several unsuccessful litigations by the respondents attempting to revoke the applicant's appointment as administratrix of the estate of their late father. As there developed odd relationship between the two sides and since more than twenty one (21) years had passed without any filing of inventory and statements of accounts to the estate by the applicant, the 1<sup>st</sup> respondent before the same Primary Court of Kinondoni vide Probate and Administration Cause No. 43 of 2010, was successfully appointed the administrator of the estate of his late father Brighton William Kamanga. The said appointment was challenged by the applicant in the District Court vide Misc. Application No. 186 of 2019 and Revision No. 8 of 2020 which was pending by the time when the ruling sought to be impugned was delivered.

Following that development the respondents extended several complaint in different authorities, the wave that landed them to this Court before the Judge in-charge who order for institution of Civil Revision No. 13 of 2020 subject of this application. Upon hearing both parties this court (Mlacha, J) called for all records relating to this matter and revised them, the decision which resulted into upholding the decision of the Primary Court of Kinondoni in Probate and Administration Cause No. 43 of 2010. Further to that the proceedings and decisions of the District Court of Kinondoni in Probate Appeal No. 186 of 2019 and Revision No. 17 of 2017 were vacated. The proceedings in Misc. Application No. 186 of 2019 and Revision No. 8 of 2020 which was pending in the District Court by then were not spared as the same were also terminated. The Court reasoned that under the Law of the Child Act, 2009, the respondents though alleged to be children born outside wedlock were entitled to inherit their father's estate and proceeded to order the applicant whom her office had ceased to exist as administratrix of estate by operation of law, to hand over the estate to the 1<sup>st</sup> respondent who was to administer it and file the inventory and statement of account to the Primary Court within four (4) months from the date of the ruling. It is from

that decision the applicant was dissatisfied and lodge the Notice of appeal to the Court of Appeal hence the present application.

In the course of their submissions in support and against the application the respondent casually raised a point on the competence of the application opining that, the amended chamber summons is supported by the supplementary affidavit only in contravention of Order XLII Rule 2 of the Civil Procedure Code, [Cap. 33 R.E 2019) (the CPC). Before going into merit of the application, I find it worth to address the said point first. In his submission on the raised point Mr. Kidifu contended that, it is in the requirement of Order XLIII Rule 2 of the CPC that, an application under the Code shall be made by way of chamber summons supported by affidavit. He argued, in this application the amended chamber summons is accompanied by the supplementary affidavit only in which the respondents were allowed to file as the former affidavit ceased to exist after filing the amended summons. He relied on the Court of Appeal decision in **Ashraf Akber Khan Vs. Ravji Govind Varsan**, Civil Appeal No. 5 of 2017 (unreported) that cited the case of **Tanga Hardware & Autoparts Ltd and Six Others Vs. CRDB Bank Ltd**, Civil Application No. 144 of 2005 (CAT-unreported) where it was held that, *'once pleadings are amended, that which stood before*

*amendment is no longer material before the court*'. He thus prayed the court to find the application is not supported by any affidavit and since the supplementary affidavit cannot support the chamber summons as per the dictates of the law, then there is no affidavit to support the application hence the same should suffer dismissal.

In response to the raised point Mr. Mwamboma attacked the submission by Mr. Kidifu branding it as misconceived. He said the Court's order of 10/11/2021 for the applicant to amend the chamber application by inserting the proper provision of the law did not affect the affidavit as chamber summons/application and the supporting affidavit are two different documents as per the case of **Charles Tito Nzegenuka & 2 Others Vs. Minister for Works and the Attorney General**, Civil Application No. 255/08 of 2021 (CAT-unreported). As the application is also sufficiently supported by the supplementary affidavit the same is competent. Mr. Mwamboma implored the Court to dismiss the point and proceed determine the application on merit.

It is true and I agree with Mr. Kidifu's proposition that as per the case of **Tanga Hardware & Autoparts Ltd and Six Others** (supra), it is a general principle that, once the pleadings are amended, the former pleadings are

rendered immaterial before the court. However, each case is decided basing on its own facts. In that case I have noted the Court was considering the amended WSD that had carried the counter claim before the amendment and held that, since the same was amended then the said counter claim died with it. In this matter the circumstance is different as what the applicant was ordered to amend is the chamber summons only by inserting the proper citation of the law and not the affidavit as the two documents though accompanied are different as rightly submitted by Mr. Mwamboma, the submission which I embrace. It was held in the case of **Charles Tito Nzegenuka & 2 Others** (supra) that:

*"As rightly pointed out by Mr. Kakwaya, an affidavit is just a supporting document and for the purpose of effectiveness, each (Notice of Motion and affidavit) stands on its own."* (Emphasis added)

In this matter since the amendment order was directed to the chamber summons only, and given the fact that affidavit and Notice of motion which is equal to chamber summons stand on their own each as depicted in **Charles Tito Nzegenuka & 2 Others** (supra), I hold the chamber application is validly supported by the affidavit formerly filed and the

supplementary affidavit hence properly before this court. I thus dismiss the point raised by Mr. Kidifu.

With that finding, I now move to consider the merit of this application. Having thoroughly perused the pleadings and the submissions filed by both parties in support and against this application, I have noted that parties are in agreement that this Court has discretion to grant the prayed orders upon satisfying itself that the grounds advanced by the applicant raise arguable issues worth consideration by the Court of Appeal. And that in so doing this Court should always refrain from embarking on determination of the merits or substantive issues involved in the intended appeal. It is true and I agree with both parties that, leave to appeal is not automatic as it is within the discretion of the Court to either grant or refuse and such discretion must be judiciously exercised basing on the materials before the court disclosing prima facie arguable appeal before the Court of Appeal. This settled position of the law is stated in times without number by the Court of Appeal and this court. See the cases of **Harban Haji Mosi and Shauri Haji Mosi Vs. Omari Hilal Seif and Another**, [2001] TLR 409 (CAT), **British Broadcasting Corporation Vs. Eric Sikujua Ng'imaryo**, Civil Application No. 133 of 2004 (CAT-unreported), **Bulyankulu Gold Mine Limited and**



**2 Others Vs. Petrolube** (T) Limited, Civil Application No. 364/16 of 2017 (CAT-unreported) and **Jireys Nestory Mutalemwa Vs. Ngorongoro Conservation Area Authority**, Civil Application No. 154 of 2016 [2021] TZCA 9 (11<sup>th</sup> February 2022), to mention few.

In the case of **Bulyankulu Gold Mine Limited** (supra) the Court of Appeal on the duty of the Court when entertaining the application for leave to appeal observed thus:

*"Just as a matter of guidance, we wish to emphasize that the duty of a court in applications of this nature is not to determine the merits or demerits of the grounds of appeal raised when seeking leave. Instead, a court has only to consider whether the proposed issues are embraced in conditions set in the case of **British Broadcasting Corporation** (supra)."*

In a very recent case of **Jireys Nestory Mutalemwa** (supra), on the same principle the Court of Appeal held that:

*"...in application of this nature, it is well-established principle of the law that **the Court is not expected to determine the merit or otherwise of the substantive issues before the appeal itself is heard...** It is not settled that a Court hearing an application should refrain from considering substantive issues that are to be dealt with by the appellate*

*Court. This is so order to avoid making decisions on substantive issues before the appeal itself is heard... **The duty of the Court at this stage is to confine itself to the determination of whether the proposed grounds raise an arguable issue(s)** before the Court in the event is granted". (Emphasis supplied)*

Having explained the principles governing the grant of applications for leave to Appeal to the Court of Appeal, I now proceed to consider parties submissions which I had an ample time to traverse over as well as the pleadings. In her supplementary affidavit the applicant has raised eight grounds in which she is intending to present before the Court of Appeal to assail the ruling and order of this Court (Mlacha, J) in Civil Revision No. 13 of 2020. Mr. Kidifu without going into details has challenged them for being frivolous and vexatious and delaying tactic so as to continue benefiting from the estate as she is staying in one of the house which is part of the estate at dispute. Further to that, he raised a concern that despite of issuing the alleged Notice of appeal to the Court of Appeal the same has never been served to the respondents in contravention of the requirements of Rule 84(1) of the Court of Appeal Rule, 2009, and as well stated in the case of

**Kantibahi M. Patel Vs. Dahyabhaif Mistry** [2003] T.L.R 347. He therefore prayed the court to dismiss the application with costs.

It is the law under section 110 and 111 of the Evidence Act, [Cap. 6 R.E 2019], that the one who alleges that a certain fact exists must so prove and the onus of so doing lies on him. In the present matter since Mr. Kifidu has levelled accusations of frivolousness and vexatious of the advanced grounds by the applicant without proof I find the respondents' bare assertion is without any substance and dismiss it. As regard to the complaint of failure of the applicant to serve them the Notice of appeal, I find this is not a proper forum to address it as the same will be tabled before the Court of Appeal if this application is granted.

As regard to raised grounds by the applicant it is the duty of this Court to investigate them whether they raise any arguable issue worth consideration by the court of appeal. In this ruling I am proposing to examine one after another as deposed in the applicant's supplementary affidavit.

To start with the first and second grounds, it is claimed the revision proceedings, ruling and order are a nullity for proceedings against the applicant who was sued in her personal capacity and not as administratrix of

the estate of the late Brighton William Kamanga while the respondents are contesting arguing that, proceedings were properly conducted as she had ceased to hold the office by operation of law. I find there are arguable issues here, one, whether the applicant allegedly ceased to hold office by operation of law was properly sued under personal capacity and secondly, whether the proceedings, ruling and order of this court in Civil Revision No. 13 of 2020 is a nullity.

As to the third and fourth grounds it is contended that, the impugned ruling and order are a nullity as the High Court Judge had no jurisdiction to exercise the revision jurisdiction against the proceedings and decisions of District Court under section 44(1)(b) of the Magistrates' Courts Act, [Cap. 11 R.E 2019] and vacate the Primary Court decision that appointed the applicant as administratrix of the estate of the late Brighton William Kamanga, in Probate and Administration Cause No. 64 of 1988. I find there is arguable issues herein worth consideration by the higher Court as the complaints stated above are self-explanatory.

Next for consideration is the applicant's ground that, this Court erred to hold the estate of the late Brighton William Kamanga includes three (3) houses while in fact one of them belong to his late father William Kamanga in which

the applicant is entitled to inherit. The issue as to whether the estate of the late Brighton William Kamanga includes three (3) houses or not, I propose is the proper issue worth determination by the Court of Appeal and I endorse it.

In the sixth and seventh grounds, the applicant is intending to fault this Court when held that, her failure to file the inventory and statement of accounts automatically ceased her offices as administratrix of the estate and the upholding of the Primary Court's decision in Probate and Administration Cause No. 43 of 2010 that appointed the 1<sup>st</sup> Respondent as administrator to the estate in her pendency. In these two complaints I find the issues as to whether failure to file inventory and statement of accounts of the estate renders automatic cessation of the administrator from office and whether the new administrator can replace the former without court revocation order are arguable before the Court of Appeal.

Lastly is the issue as to whether this Court wrongly interpreted the rights of Respondents to inherit as children born outside wedlock under the Law of the Child for not being below the age of 18 which is the major complaint of the applicant in the eighth ground. I also find the issue not only interesting but also arguable one before the higher court hence endorse it as well.

All said and done I find the application is meritorious and proceed to grant it as I hereby do on the endorsed grounds.

Since the parties' dispute revolves around probate and administration issues, I order each party to bear its own costs.

It is so ordered.

DATED at Dar es salaam this 13<sup>th</sup> day of May, 2022



E. E. KAKOLAKI

**JUDGE**

13/05/2022.

The ruling has been delivered at Dar es Salaam today on 13<sup>th</sup> day of May, 2022 in the presence of Mr. Nafikile Mwamboma, advocate for the applicant and Mr. Thomas Mathias, advocate for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and Ms. Asha Livanga, Court clerk.

Right of Appeal explained.



E. E. KAKOLAKI

**JUDGE**

13/05/2022