

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(AT DAR ES SALAAM)**

**DAR ES SALAAM DISTRICT REGISTRY**

**MISC. CIVIL APPLICATION NO. 464 OF 2021**

(Originating from Misc. Civil Application No. 310 of 2021 before Hon. Mgonya, J.)

**MILESH JAYANTILAL LADWA ..... 1<sup>st</sup> APPLICANT**

**CHANDULAL WALJI LADWA ..... 2<sup>nd</sup> APPLICANT**

**DHILAJLAL WALJI LADWA ..... 3<sup>rd</sup> APPLICANT**

**JW LADWA (1997) LIMITED ..... 4<sup>th</sup> APPLICANT**

**VERSUS**

**JITESH JAYANTALAL LADWA ..... RESPONDENT**

**RULING**

*13<sup>th</sup> December 2021 & 3<sup>rd</sup> February 2022*

**ITEMBA, J**

The applicants hereinabove have moved this Court to seek leave to appeal to the Court of Appeal of Tanzania against the High court decision in Miscellaneous Civil Application No. 310 of 2021 by Hon. L. Mgonya, J. It appears the applicants had applied for annulment of grant of letters of administration which were issued to the respondent, however the application was dismissed for want of jurisdiction as a result of upholding a preliminary objection which was raised by the respondent. The said decision was issued on 11<sup>th</sup> August, 2021.

The instant application is made under section 5(1) (c) of the Appellate Jurisdiction Act [Cap. 141 R.E. 2019] and it is supported by an affidavit of Robert Rutaihwa who is the Counsel for the Applicants and Sisty Bernard, learned advocate for the respondent filed a counter affidavit in controversy thereof.

The grounds in which applicants rely to support the application are found under paragraph 7(i) to (v) of the affidavit in support of application. The Counsel for the Applicants has deponed in his affidavit that the ruling which they intend to appeal against raises fundamental issues worth to be taken into consideration by the court of appeal. In essence, the questions so divulged includes briefly; whether upon the High Court appointing an administrator of the estate it becomes *functus officio* to annul or revoke the grant, whether under such circumstances only the Court of Appeal is vested with jurisdiction to annul or revoke the grant, whether the High Court Judge was right to depart from the decisions of her colleagues without advancing reasons for the departure and whether it was right for the trial judge to dismiss the application which was not determined on merit.

On his part Mr. Bernard, Counsel for the Respondent under paragraph 11 of the Counter Affidavit has generally opposed that the so questions raised in the affidavit in support of application do not justify the grant of leave to the Court of Appeal.

When the application came for hearing, both parties were represented. Mr. Robert Rutaiwa, learned advocate represented the applicants whilst Mr. Elly Musyangi and Juma John, learned advocates appeared for the respondent. The matter was argued orally and both parties submitted the substance of their application.

Mr. Rutaiwa heightening on the grounds in his supporting affidavit, explained that the respondent petitioned for letters of administration in Probate Cause No. 61 of 2021 and he was appointed. That the applicants lodged Miscellaneous Civil Application No. 310 of 2021 for annulment of such appointment. In the said application the respondent raised Preliminary Objections (herein P.O) on two grounds one of them was that the High court being the forum which appointed the respondent, it was *functus officio* to annul or revoke the grant, henceforth it was steady point of objection that the only court to annul or revoke the grant was the Court of Appeal.

It was further articulated by the Mr. Rutaiwa that the high court ruled out that it had no jurisdiction then it went on to dismiss the application without going to the merit of the application. It was Mr. Rutaiwa's contention that there is a chain of authorities which have the similar position that the Court which had appointed the administrator of the estate (the High Court) can annul or revoke the grant and that the said authorities were not taken into account by the trial Judge. According to him, if the High Court has no jurisdiction, the trial Judge should have not dismissed the application but rather struck it out.

For that reason, Mr. Rutaiwa argued that the applicants were aggrieved by such decision and require the intervention of Court of Appeal. Again, there was a question of departure by Hon. Mgonya J from other decisions of the High Court without assigning reasons and dismissing an application which was not determined on merit.

The learned counsel for the applicant in finality submitted that the application for leave is principally granted at Court's discretion and that based on his affidavit, specifically under paragraph 7(1-5), the issues of general importance worth of consideration by the Court of Appeal have been

raised which makes the application meritorious for the Court to exercise its discretion. To bolster his argument, he cited the case of **Swissport Tanzania Ltd and another Vs. Michael Lugaiya**, Civil Application No. 119 of 2010 which referred the case of **British Broadcasting corporation vs. Eric Sikujua Ng'maryo**, Court of Appeal, Civil application No. 138 of 2004 (both unreported) which provides for the two guided principles in application of this nature. The said principles are; **one**, leave is granted under the discretion of the Court and; **two**, the Court's is duty to ascertain whether the grounds of the intended appeal show a prima facie or arguable appeal.

In response, Mr. Elly Musyangi opposed the application and argued that in *Probate and Administration Cause No. 61 of 2021* in which the respondent was appointed as administrator of the late Jayantilal Walji Ladwa, the applicants were not parties and therefore the only remedy was to file a revision which they didn't. According to him, the court was justified to dismiss their application. He referred the Court to the case of **Monica Nyamakare Jigamba vs. Mugeta Bwire Bhakome (as administrator of the Estate of MUSIBA RENI JIGABHA) and another**, Civil Application No. 199/01 of 2019 (Unreported).

Mr. Musyangi further stated that this application is an abuse of court process and an act of forum shopping. He then contended that the case of **Swissport Tanzania Ltd and another** (*supra*) is distinguishable since the decision which ought to have been challenged in the said case was an *ex parte* which is quite different to the instant case.

In his rejoinder, Mr. Rutaiwa persistently emphasised on what he had submitted prior in his submission in chief and he then supplemented that the respondent's counsel has failed to explain how the principles in the case of **Swissport Tanzania Ltd and another** (*supra*) are not in support of this application. Again, he insisted that the case of **Monica Nyamakare Jigamba** (*Supra*) is irrelevant here as the main issue in the case was premised under section 65 of Probate and Administration of Estate Act, [Cap 352 R.E: 2002] herein Cap 352 which is distribution of the properties/estate of the deceased. It was his contention that the issue in the instant case regards annulment of grant under section 49 of Cap 352.

The learned counsel concluded that the application is not an abuse of Court process but rather it is the mandatory step which is provided by the statute where one wishes to exercise his or her Constitutional right of appeal.

He then reiterated his prayer that leave should be granted for the issues raised in the affidavit in support of application.

Having gone through submissions by both counsels and records of this application the issue is whether the application is meritorious.

I am convinced to enlighten the following two (2) observations which will assist me to easily determine the raised issue.

**One**, an application for leave to appeal to the Court of Appeal is usually granted if there is good reason, normally on a point of law or on a point of public importance, that calls for the Court's intervention. The aspect of application for leave to appeal was well articulated by the Court of Appeal in **Harban Haji Mosi and Another vs. Omar Hilal Seif and Another**, Civil Reference No. 19 of 1997 (Unreported) 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 feature 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 principle was reaffirmed, by the Court of Appeal of Tanzania in **British Broadcasting Corporation vs. Eric Sikujua Ng'maryo**, Civil Application No. 138 of 2004 (Unreported). In that case, the supreme Court of the land referred itself to the reasoning in **Buckle v. Holmes** (1926) All ER Rep. 90 at page 91) which stated as follows:

*"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 be judiciously exercised and on the materials before the court. As the matter of general principle, leave to appeal will be granted where the grounds of appeal raise issues of general importance or a novel point of law or where the grounds show a prima facie case or arguable appeal..... However, where the grounds of appeal are frivolous, vexatious or useless or hypothetical, no leave will be granted."*

From the forgoing authorities, it is clear that for the applicants to succeed in the instant application, the affidavit in support of his application must show that the grounds of the intended appeal raise arguable issues in



the appeal or in other words the so raised grounds of appeal must suggest commendable appeal before the Court of Appeal.

**Two;** I have intensely taken time to peruse the suggested grounds of appeal under paragraph 7(1-5) of the affidavit in support of application, indeed, the applicants intend to challenge the decision of the High Court which ordered a dismissal of their application for annulment of grant against the respondent. Essentially, they wish to challenge the legality of the interpretation of section 49 of Cap 352 that was made by the trial judge to dismiss the application of annulment for want of jurisdiction. Further, the applicants wish to challenge the legality of the order of dismissal on the matter which was not heard on merit.

The duty of this Court in application of this nature is not to determine the merits or demerits of the grounds of appeal raised. Instead, a court has only to consider the substantive issues raised for the intended appeal. [See- the case of **Regional Manager-TANROADS Lindi vs. DB Shapriya and Company Ltd**, Civil Application No. 29 of 2012 CA (Unreported). Guided by such principle, I believe, by considering the effect of dismissal order that a party is precluded from bringing again the matter in court, as well the question of jurisdiction in relation to interpretation of section 49 of Cap 352

being a vital point for determination, I am satisfied that the grounds raised by the applicants, raise some serious issues which are worth consideration by the Court of Appeal.

As a side note, I would like to clarify an issue which was raised by the respondent in the course of hearing the application. Mr. Musyangi had contended that the applicants could have preferred revision avenue instead of the intended appeal since they were not parties in *Probate and Administration Cause No. 61 of 2021* in which the respondent was appointed as administrator of the late Jayantilal Walji Ladwa. I think, the counsel has misdirected himself. The matter intended to be challenged before the Court of Appeal is in respect of *Miscellaneous Civil Application No. 310 of 2021* in which the applicants were the parties. Hence, upon being aggrieved, the applicants were entitled to seek for an appeal to the Apex Court. Therefore, the decision of **Monica Nyamakare Jigamba** (*Supra*) is distinguishable to the matter at hand and in those premises, with all due respect, I do not agree with Mr. Musyangi that the remedy available for the applicants is an application for revision.

In the event, I accordingly allow the application and hereby grant leave to appeal to the applicants to appeal to the Court of Appeal against the ruling

of the High Court of Tanzania in *Miscellaneous Civil Application no. 310/2021*.

The appeal shall be lodged within **sixty (60)** days of delivery of this ruling.

Costs shall abide by the outcome of the intended appeal.

It is so ordered.



**L. J. Itemba**  
**JUDGE**  
**3/2/2022**