IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

MISC. CIVIL APPLICATION NO. 21 OF 2021

(Arising from High Court, Misc. Civil Application No. 70 of 2020)

MEET SIGH BHACHU (By his Constituted Attorney,

Rabinder Sigh Bhachu) ..... APPLICANT

VERSUS

THE ADMINISTRATOR GENERAL.....1ST RESPONDENT

GURMIT SINGH BHACHU.....2ND RESPONDENT

RULING

28.04.2022 & 31.05.2022

N.R. MWASEBA, J

The applicant in this application, Meet Sigh Bhachu (By his Constituted Attorney, Rabinder Sigh Bhachu) applies for the following orders:

i. That, the Honourable Court be pleased to grant the applicant leave to appeal to the Court of Appeal of Tanzania against the Ruling and Order of the High Court of Tanzania at Arusha (the

Honourable Justice M.R.Gwae) dated 26th February 2021 in Misc. Civil Application No. 70 of 2020.

ii. That, cost of the Application be provided.

iii. That, this Honourable Court may grant any other orders as it may deem just.

This matter is originated from Probate and Administration Cause No.05 of 2009 which was later turn into Civil Case No. 09 of 2013 to Civil Application No. 79 of 2019. And finally Misc. Civil Application No. 70 of 2020, the decision which the applicant wanted to appeal against at the Court of Appeal of Tanzania.

Initially the application was brought under Section 5 (1) (c) of the Appellate Jurisdiction Act, (Cap 141 R.E 2019) read together with Rule 45 (a) of the Tanzania Court of Appeal Rules, 2009 as amended. It is supported with an affidavit sworn by Mr. Rabinder Sighn Bhachu, the son of the applicant who hold a general power of attorney from the applicant. The application was strongly opposed by the respondents by filing their counter affidavit. The 1st respondent's counter affidavit was sworn by Mr. Reginald Simon Makoko, Principle State Attorney and the 2nd respondent's counter affidavit was sworn by Mr. Gurmit Singh.

The application was argued orally whereby Mr. Alute Mughwai, learned counsel represented the Applicant whilst Ms. Grace Shayo, learned Counsel represented the 1st applicant and Mr. Bharat Chadha, learned counsel represented the 2nd respondent.

Submitting in support of the application, Mr. Mughwai argued that the applicant being aggrieved by the decision of Hon. Gwae, J striking out the application No. 70 of 2020 has already taken essential steps to enable him to appeal to CAT. The said steps including filing a notice of appeal and [lodging a letter to High Court to be supplied with the order and proceedings. Since an appeal to CAT is not automatic that's why they prefer this application to be granted leave.

He added that, under paragraph 9 of the affidavit supporting the application, the applicant submitted that there is a point of law worth to be determined by the CAT (See annexure MSB6, Draft memorandum of appeal). Further to that, the intended grounds of appeal raise question of law due to the fact that on the first ground there is a question of limitation of time, on the second ground the applicant wanted to challenge the order of the court by way of review. As for the third ground he alleged that the trial Judge made a finding which is not supported by the evidence, for the

last point he alleged that the trial Judge considering the sworn affidavit of the process server without giving parties a right to be heard.

The counsel for the applicant submitted further that since the 2nd respondent argued in his counter affidavit that there is no point of law worth for determination by the court, the same can be argued by the Court of Appeal that's why they insisted to be granted leave to appeal to CAT. Moreover, since at this stage the court is not supposed to determine the grounds of appeal, the court is only required to be satisfied that the alleged grounds are worth to be determined by the Court of Appeal. Since it is a judicial discretion, they prayed for the application to be granted.

Opposing the application, the counsel for the 1st respondent after adopting their counter affidavit to be part of their submission, she told the court that, the applicant failed to demonstrate points worth to be determined by the Court of Appeal. The 1st respondent did discharge his duties by following all the procedures including notifying the heirs and filing final accounts. That's why they are supporting the decision of Hon. Gwae, J which strike out the application.

On his side, the counsel for the 2nd respondent while objecting the application he prayed for their counter affidavit to be part of his submission. He added that since the right to appeal to CAT is not

automatic, the applicant filed the present application to be granted leave to appeal against the decision of Hon. Gwae, J which denied the prayer to review the grant of discharge order dated 18.10.2019. Also, the applicant wants to challenge the denied review of approval of final accounts filed by the 1st respondent who was appointed as administrator of the estate of the late Gurbax Singh Arjan Ram in Civil Case No. 9 of 2013.

He added that, the decision made in Civil Application No. 70 of 2020 is not appealable by virtual of **Order XLII Rule 7 (1) of the CPC**, Cap 33 R.E 2019. Being an interlocutory order, the case is not appealable. He cited the case of **Hon. Minister for Finance and Planning and Another Vs Legal and Human Rights Center**, Misc. Civil Application No. 16 of 2021 (HC) Dar Es Salaam Registry where the court was of the view that an appeal to the Court of Appeal is not automatic and refused to grant leave to appeal against an interlocutory order. It was his further submission that even if the court will find the order to be appealable, the intended appeal has no point of law worth to be determined by the CAT.

It was his further submission that, the 1st ground is a question of fact and not law and it was never challenged by the applicant. Regarding the 2nd ground of appeal, the trial judge upheld the objection that the application

was not properly made. As for the 3rd ground, the applicant admitted that he was out of the country that's why the process server could not reach them. Therefore, it was not true that they were not heard. He avers that the intended grounds of appeal are based on pure facts not matters of the law.

The cited provision which the application was brought does not set out criteria for a leave to be granted but there are case laws which does. One of them is the case of **British Broadcasting Corporation Vs Eric Sikujua Ng'imaryo**, Civil Application No. 138 of 2004 (Unreported) where the CAT at page 6 set out criteria for leave to be granted and that the same is not automatic. Further to that he submitted that the intended appeal has zero chance of success and cited a case of **Rutagatina C.L Vs The Advocate Committee**, Civil Application No. 98 of 2010 (Unreported) which confirms the principles laid down in **British Broadcasting Corporation** (Supra).

Moreover, Mr. Chadha argued that even paragraph 9 of the affidavit supporting the application needs to be expunged because its verification is defective since the source of information is from the facts of the case and not from the applicant. He cited the case of **Convergence Wireless networks (Mauritius) Limited and 3 others Vs Wia Group Limited**,

Civil Application No. 263 "B" of 2015 (Unreported) where the court expunged the context of paragraph one of the affidavits in similar situation. Based on his submission herein, he prayed before this court to dismiss the application with costs since there is another pending appeal at the Court of Appeal against the decision of the High Court challenging the things done by the administrator.

In brief rejoinder, the applicant's counsel told the court that regarding the chance of success of the intended appeal it is the duty of the court to determine and not the respondent. And the allegation that an administrator already discharged his duties the same will be determined by the Court of Appeal. He added that they were aware that the appeal is not automatic that's why they preferred the present application under **Section 5 (1) of Cap 141** R.E 2019. More so, the current application is not a review as alleged by the counsel for the 2nd respondent, it is for leave to appeal which is governed by the Appellate Jurisdiction Act. He distinguished the cited case of **Minister for Finance** (supra) as the decision of Hon. Gwae, J was not interlocutory one.

He added further that, the issue of time is a point of law as it is subject to limitation which may bar the institution of the proceedings. The trial judge did not exclude the time he was waiting for copies of decision of

Civil Case No. 70 of 2020. As for the merit of the appeal the same will be determined by the CAT not at this stage, therefore, the case of **British Broadcasting** (Supra) is supporting the application. Further to that their intended grounds are not frivolous and it is upon the court to consider the same. Concerning paragraph 9 of the affidavit it was verified on the applicant's belief thus, there is no defect on the affidavit. And if the 2nd respondent believe there is a defective affidavit, he could have raised it as a preliminary objection but it was not pleaded even in his counter affidavit. The 2nd respondent raised objections which were already decided by Hon. Robert J in this application.

I have considered the affidavit and counter affidavits, the arguments by the parties and the law. Before I consider the merits of the application, I find myself obliged to firstly make a finding on two important issues that were raised by the counsel for the 2nd respondent.

On the first issue the 2nd respondent's counsel alleged that the order given by Hon. Judge on Misc. Civil Application No. 70 of 2020 was interlocutory order and an appeal cannot lie on such decision. Now the issue is whether the said order was an interlocutory one.

Section 5(d) of the Appellate Jurisdiction Act, Cap 141 R.E 2019 provides that:

"No appeal or application for revision shall lie against or be made in respect of any preliminary or interlocutory decision or order of the High Court unless such decision or order has the effect of finally determining the criminal charge or suit."

A judgment or order is final only when it finally disposes of the rights of the parties, that is it makes an order which would not bring back the matter to itself. In Misc. Civil Application No. 70 of 2020 the High court struck out the matter before it because it was time barred and it had no jurisdiction to determine the same. The question now is if the court is incompetent to deal with the matter before it, are the rights of the parties still subsisting?

In the case of **Akisanya Vs Bank for Africa Ltd** [1987] LRC(Comm) 222 at page 37 the supreme court of Nigeria had this to say:

"... if the court of first instance orders that a matter before it be terminated (struck out) because it has no jurisdiction to determine the issue before it, that is the end of all the issues arising in the cause or matter and where is no longer any issue between the parties in that cause or matter that remains for determination in that court. But it would be interlocutory if its

order is that it has jurisdiction, for there will be reference of the remaining issues in the case to itself."

With respect, I would like to be persuaded with the said test. It is my considered view that, the ruling of the High Court that the matter was time barred and it has no jurisdiction to entertain the matter was a final decision in that court and not an interlocutory decision.

The second issue is on allegation that an affidavit supporting the application is defective since the source of information at paragraph 9 is from the facts of the case and not from the applicant. I have revisited the said paragraph 9 of the affidavit supporting the application which reads:

"That, important points of law are evolved in their intended appeal to the Court of Appeal. I verily believe that the intended appeal stands a great chance of success. A copy of the intended memorandum of appeal is attached hereto and marked "MSD6"."

And under verification it was stated:

".....paragraph 9 is true according to my belief based on my appreciation of the facts of the case...."

Having gone through the cited paragraphs, I do not see any defectiveness since the applicant already verified that the said information is based on his belief from the facts of the case.

Now coming to the merit of the application on whether the application at hand meets the conditions for granting the leave, in **Rutagatina C. L. Vs The Advocates Committee and Another** (supra), the Court stated that:

> "*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 appeal raises issues of general importance or a novel point of law or where the grounds show a prima facie or arguable appeal (see: Buckie v Holmes (1926) ALL £ R. 90 at page 91). However, where the grounds of appeal are frivolous, vexatious or useless or hypothetical, no leave will be granted.*"

On the foregoing authority, there is no doubt that grant of leave is not automatic, but condition is that it can only be granted where the grounds of the intended appeal raise arguable issues in the appeal before the

Court. The grounds raised should merit a serious judicial consideration by the Court. The same was decided in the case of **Bulyanhulu Gold Mine Limited & 2 Others Vs. Petrolube & another,** Civil Application No. 364/16 of 2017 (Unreported).

In the application at hand, the main issue for determination by this court is whether the ground raised by the applicant is embraced in the conditions set out in the above decision of the Court of Appeal of Tanzania for this court to grant leave to appeal. From the factual setting in this application, the applicant is intending to challenge the decision of the High Court in Misc. Civil Application No. 70 of 2020 which was struck out on the reason that the application was hopelessly time barred and that the court lacks jurisdiction to entertain it as it has already been seized by the Court of Appeal.

It is worth noting that at this juncture I am not expected to consider whether the learned judge was justified to struck out the application for Review, this Court is only entitled to consider the ground for seeking leave and not to sit as an appellate court.

Just as a matter of guidance, it is also important to note that the duty of a court in applications for leave is not to determine the merits or demerits of the ground of appeal raised by the applicant when seeking leave to

appeal. Instead, a court has only to consider whether the proposed grounds are embraced in conditions set in the case of **British Broadcasting Corporation Vs Eric Sikujua Ng'maryo** (supra).

Although the counsel for the parties agree to the principles applicable in considering the grant of leave to appeal to the Court of appeal of Tanzania, they have parted ways on whether the issue raised by the applicant constitute good cause for grant of leave to appeal.

A careful study of the point raised by the applicant, that this court did exclude the period that was taken to obtain the copy of the order sought to be reviewed pursuant to **Section 19 (1) and (2) of the Law of Limitation Act,** Cap 89 R.E 2019 and ruled out that the applicant was time barred is worth for consideration by the Court of Appeal of Tanzania and in relation to the impugned ruling. It is also the applicant's allegation that he was not given statutory notice as required by **Section 43 of Administrator General (Powers and Function) Act**, Cap 27 R.E 2019 to all beneficiaries of the deceased estate. In my considered view, at this stage it suffices to say that the grounds raised by counsel for the applicant merits the application.

From the foregoing, I find that the application to be meritorious and proceed to grant leave to the applicant to appeal to the Court of Appeal

against the ruling and order of the High Court of Tanzania in Misc. Civil application no. 70 of 2020. Due to the nature of the case, each party should bear its own costs.

It is so ordered.

DATED at **ARUSHA** this 31st day of May 2022.

N.R. MWASEBA

JUDGE

31.05.2022