IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TEMEKE SUB-REGISTRY

(ONE-STOP JUDICIAL CENTRE)

AT TEMEKE

MISC. APPLICATION NO. 15 OF 2022

(From the decision of this court)(Mugeta J)Dated 2nd February 2022 in

Civil Appeal No. 2 of 2022

BONIVENTURE LADSLAUS.....APPLICANT

VERSUS

ARON EDGA MNYANI.....RESPONDENT

RULING

10th March & 24th April 2023

Rwizile, J.

The applicant Boniventure Ladislaus is applying for leave to appeal to the Court of Appeal. The application is by way of chamber summons, supported by the affidavit of the applicant. It is preferred under section 5(1)(c) of the Appellate Jurisdiction Act [Cap 141, R.E 2019] and Rule 45(a) of the Tanzania Court of Appeal Rules, 2009.

The respondent resisted the application as manifested in his counter affidavit. The application was heard by written submissions.

In his argument, the applicant stated that the decision he intends to appeal against is based on judgment and decree without an automatic right of appeal. He argued, leave can only be granted, if there is a point

of law or facts mixed with the law that needs to be determined by the Court of Appeal.

In the instant application, the point of law to be decided by the Court of Appeal is whether; the bonafide absence of the name of the executor nullifies the *will* of the deceased and whether a nullified *will* excludes the blood relatives named by the deceased as beneficiaries of the estate.

The applicant states that the deceased wrote a *will* honestly believing the same to be in order. She also named the beneficiaries. She rejected with reasons, those whom, she didn't want to benefit from her estate. The family noted that because human beings are fallible, they are capable of doing mistakes, which is why bona fide mistakes constitute sufficient reasons. It is for this reason; it was argued, the applicant believes there are good grounds for granting leave to appeal to the Court of Appeal.

Opposing the application, the respondent argued that, no ground of law was established as the trial court judgment was clear. He further stated that section 2(1) of the Probate and Administration Act, [Cap 352. R.E 2019] defines a *Will* to mean the legal declaration of the intentions of a testator with respect to his property, which he desires to be carried into effect after his death. Thus, for the said to be enforceable in courts, it has to meet established criteria including naming the executor of the said *will*. The *will*, it was added, had no executor. Under order 4 of the Local

Customary Declaration Order, G.N 436, 1963, he argued, for the *will* to be invalid the testator is forbidden to deny the heirs without reasonable grounds. Doing so will automatically invalidate the said *will*. In further substantiating the point, it was argued that the third schedule to the G.N 436 of 1963 points out that, the *will* is invalidated if the testator is of unsound mind because of insanity, illness, drunkenness, or sudden anger.

It was further submitted by the respondent that, not only the executor was not named but also the *will* was made out of anger which means she was not in her normal state of mind when making the *will*. Lastly, the respondent prayed for the court to adopt his counter-affidavit and find that the reasons adduced by the applicant are not valid to warrant leave to appeal to the Court of Appeal.

In the rejoinder, the applicant reiterated what he has stated in his submission in chief and I find no need to repeat the same.

It is settled, that leave to the Court of Appeal, is not an automatic right.

In the case of **British Broadcasting Corporation v Erick Sikujua Ng'maryo,** Civil Case No. 138 of 2004, the Court of Appeal of Tanzania, (unreported) it was held that;

> *"... As a 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 or arguable appeal..."

In yet another case, that is **Ramadhani Mnyanga v Abdallah Salehe** [1996] TLR 74, it was held that;

"...for leave to appeal to be granted, an applicant must demonstrate that there are serious and contentious issues of law or fact fit for consideration the appeal..."

It is therefore clear to me, for the application for leave to hold, an applicant has to demonstrate that there are matters of public importance and serious issues of misdirection or non-direction likely to result in a failure of justice. In the instant application, the applicant has argued and advanced the following points for consideration by the Court of Appeal; *Whether the bonafide absence of the name of the executor nullifies the will. And whether such nullification will oust the blood relatives named therein benefiting from the estate of the deceased.*

The point to decide here is if the applicant has sufficiently shown the reasons worth granting the application. Admittedly, the contentious issue is on the validity of the *will*, where the executor is not named, and the effect thereof, when the *will* is rendered invalid. In the Affidavit supporting the application, the applicant stated in paragraph 5 that, he was appointed

together with the respondent to be the administrator. Under paragraph 6 of the same affidavit, it was averred that he appealed to the High Court. Paragraph 7 explains that the High Court revoked his appointment.

He was as well prevented from benefiting from the deceased's estate. The respondent noted so as reflected in his counter affidavit in paragraphs 7 and 8. Thus from the pleadings and submission, it is not disputed that the contentious issues lie in the validity of the *will*, especially where the executor is not named and the consequences thereafter.

Wills are governed and regulated by law. For the foregoing, I find the grounds raised to be of general importance which may be determined by the Court. Therefore, the application is granted. No order as to costs.

A.K. Rwizile
JUDGE
24.04.2023