

IN THE HIGH COURT OF TANZANIA

SUB-REGISTRY OF MWANZA

AT MWANZA

MISCELLANEOUS APPLICATION NO. 93 OF 2023

*(Arising from Civil Appeal No. 37 of 2022 in the High Court of Tanzania at Mwanza,
originating from Probate Cause No. 8 of 2021 in the District Court of Ilemela at Ilemela)*

GRACE B. LYIMO @ AUGENIA BILDAD LYIMO.....1st APPLICANT

GAUDENSIA MAGESA MASHIMBA.....2nd APPLICANT

VERSUS

KALUNDE WILLIAM KAFITI.....1st RESPONDENT

PUDENCIA WILLIAM KAFITI.....2nd RESPONDENT

STEVEN WILLIAM KAFITI.....3rd RESPONDENT

RULING

Date of last order: 3rd November 2023

Date of Ruling: 7th November 2023

MTEMBWA, J.:

Under ***section 5(1) of the Appellate Jurisdiction Act, Cap 141, [RE 2019]***, the Applicants are seeking for leave to Appeal to the Court of Appeal of Tanzania against the Judgment of Hon. K.S. Kamana, J in Civil Appeal No. 37 of 2022 dated 9th June 2023. The

same was supported by an affidavit of Mr. Emmanuel John, learned advocate for the Applicants.

From the facts as revealed by the affidavit and attached documents, it could appear, the litigants battled in the District Court of Ilemela in Probate Cause No. 8 of 2021 where the Applicants were appointed as administrators of the estate of late William Kafiti @ William Kafit Lubundalila @ William Kafiti iduba @ William Kafiti Lubandalila Kafiti. The Respondents were not satisfied by the said decision as result thereof, they successfully appealed to this Court in Civil Appeal No. 37 of 2022. The Applicants were aggrieved by the Judgement of this Honourable Court hence they are now seeking for leave to appeal to the Court of Appeal of Tanzania.

During hearing of this Application, the Applicants were represented by Mr. Emmanuel John, the learned counsel while the Respondents enjoyed the service of Mr. Deocris Rutahindurwa, the learned counsel. Hearing proceeded orally.

Staggering the floor, Mr. Emmanuel submitted that they have already filed a notice of appeal and now they are seeking for leave to appeal to the Court of Appeal of Tanzania. He highlighted the grounds at paragraph 7 of the Affidavit and submitted on the first ground that, the Applicants are seeking for leave to appeal so that the Court of appeal may determine as to whether the issue regarding deceased bequeathing property to himself was part of first issue. He added that there was no framed issue concerning appearance by caveator. As such parties were not given an opportunity to be heard.

On the second ground, Mr. Emmanuel submitted that leave is requested so that the Honourable High Court may determine whether it was proper to vary the pleadings as it was not among the issues before the District Court. I should however agree that the learned counsel was not prepared enough to allow me to understand what he meant by this ground.

Submitting on the third ground, Mr. Emmanuel argued that there was misapplication of Indian Succession Act of 1865 particularly, section 54 of the Act. He said, the law applicable was the Probate and

administration of the Estate Act and not Indian Succession Act. He was of the view that the Honourable Court wrongly applied the said law.

Arguing on fourth ground, Mr. Emmanuel contended that leave is sought so that the Court of Appeal of Tanzania may determine whether it was correct to hold that any beneficiary who attested the will is not supposed to benefit from it. On this he said, the Will is kind of transfer of property and the wife or husband is supposed to witness if the property is owned jointly. He lastly beseeched this court to grant leave to appeal to the Court of appeal of Tanzania.

On his part, Mr. Rutahindurwa opposed the Application and submitted further that it was questionable for the testator to give to himself the properties. He said in the circumstances the proper law was the Indian Succession Act and not the Probate and Administration of Estate Act because the religion is determined by the modes of life of the deceased. He added that since it was resolved that he professed Christianity as dominant life style, the law applicable was Indian Succession Act. That the position could be different had the

law applicable was Local Customary order where the wives are allowed to witness the Will.

In rejoinder, Mr. Emmanuel submitted that in order to know whether the name reflected on the Will belonged to the deceased depended on the evidence short of which the right to be heard was curtailed. He lastly reiterated what he submitted earlier during submission in chief.

Indeed, in the case of ***Rutagatina V. the Advocate Committee & Another***, Civil Application No. 98 of 2010, CAT Dar es Salaam (unreported), the noted that;

*Application for leave is usually granted if there is good reason, normally on a point of law or on a point of public importance that calls for this court's intervention. Indeed, on the aspect of leave to appeal the underlying principle was well stated by this Court in **Harban Haji Mosi and Another Versus Omar Hilal Seif and Another**, Civil Reference No. 19 of 1997 (unreported) thus:-*

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 features as to require the guidance of the Court of Appeal. The purpose of the provision is therefore to spare the court the specter of unmeriting matters and to enable it to give adequate attention to cases of true public importance.

In line with the above, needless to say, leave to appeal is not automatic. It is within the discretion of the Court to grant it. The discretion must, however be judiciously exercised on the materials before the court. 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 (see: ***Buckle v. Holmes (1926) ALL E.R. Rep. 90 at page 91***). However, where the grounds are frivolous, vexatious or useless or hypothetical, no leave will be granted.

I will start with whether the issues raised by the Applicants are of general importance or raise a novel point of law. Said before, the

second ground was not clearly explained by the Applicant's counsel and therefore I will not touch it.

On the first ground, Mr. Emmanuel submitted that leave is sought so that the Court of appeal may determine as to whether the issue regarding deceased bequeathing property to himself was part of first issue. He added that there was no framed issue concerning appearance by caveator. As such, the parties were not offered an opportunity to respond to the said issue. The Applicants have raised the issue of right to be heard and being one of the constitutional rights, I see no reason not to allow it. In the circumstances, I allow it.

As correctly evaluated by the appellate Court, the evidence by PW1 one Gaudencia Magesa Mashimba, PW4 one John Phares, PW5 one Father Mahehela, DW1 one Pudensiana William Kafiti, DW2 one Stephene William Kafiti and DW3 one Kalunde William Kafiti revealed that the deceased's life was hybrid in the sense that he practiced customary mode of life and professed Christianity. However, Christianity dominated the deceased's life.

Having determined the modes of life, the appellate court resolved that the mode of life of the deceased was hybrid between customary and Christianity and proceeded to apply section 54 of the Indian Succession Act to determine whether the Will was defective. In the end, the Court resolved that the Will was not defective for being attested by the deceased's wives as per section 54 of the Act however any beneficiary attest the Will is not supposed to benefit from it. The Will was found to be defective in addition because the diseased bequeathed some properties to himself.

It is not in controversy that what determines the applicable law is the deceased's way of life (see ***Re Innocent Mbilinyi (1969) HCD 283***, ***Re Estate of the late Suleiman Kusundwa (1965) EA 247*** and ***Benson Benjamini Mengi & 3 others v. Abdiel Reginald Mengi & another Probate Cause No. 39 of 2019***). In this case, the deceased's way of life was found to be hybrid, a mixture of customary and Christianity way of life. The question to me is whether, having found that the deceased mode of life was hybrid, the Principle of Dominance was properly invoked leading to the application of the Indian Succession Act. To me, this is a novel issue

of law which need a determination of the Court of Appeal of Tanzania. The determination of this issue will also resolve the fourth ground as raised in the Affidavit. The third and fourth grounds therefore have merit and I proceed to allow them.

In the result, Leave to Appeal to the Court of Appeal of Tanzania is hereby granted. Considering the circumstances, there will be no order as to costs.

I order accordingly.

DATED at **MWANZA** this 7th November, 2023.




H.S. MTEMBWA
JUDGE