IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

HIGH COURT OF TANZANIA

MOSHI SUB-REGISTRY

MISCELLANEOUS LAND CASE APPLICATION NO. 22 OF 2023

(C/F DC Civil Appeal No. 08 of 2022 in the High Court of Tanzania Moshi District Registry originating from Probate and Administration Cause No. 01 of 2021 in the District Court of Moshi at Moshi)

1. FLORA MTUI
2. JANE KIRAMA NGOWI ..... **APPLICANTS**
3. VERONICA GERALD RWEGASORE
4. JOYCE JULIUS LESHABARI

VERSUS

GILIAD SHIJA MIHAMBO.....RESPONDENT

RULING

Date of Last Order: 08.02.2024
Date of Ruling : 27.03.2024

MONGELLA, J.

This is an application for leave to appeal to the Court of Appeal filed under **Section 5 (1) (c) of the Appellate Jurisdiction Act** [Cap 141 RE 2019]; **Rule 45 (a) of the Tanzania Court of Appeal Rules, 2009** and **Section 47 (2) of the Land Dispute Courts Act,** [CAP 216 RE 2019]. The applicants are seeking to appeal against the decision of this court in DC Civil Appeal No. 08 of 2022 delivered on 23.06.2023.

The application was supported by the sworn affidavit of Mr. Chiduo Zayumba, learned advocate representing the applicants. It was duly opposed by the counter affidavit duly sworn by Mr. Charles Mwanganyi, learned advocate for the respondent.

The brief background of the application as depicted from Mr. Zayumba's affidavit is as follows: the applicants successfully objected the petition for letters of administration filed by the respondent with regard to the estate of the late Edith Kirama Ngowi. Their concern was that the respondent had not obtained consent from the five biological children of the late Edith. That, the list of the deceased properties included a property belonging to her daughter, a house located at Rauya Village and excluded a property belonging to the deceased, a house on plot No. 113 Block "CCC".

The respondent successfully appealed to this court and was appointed the administrator of the estate of the late Edith. Further that, in the said judgement, the presiding judge declared the respondent the owner of the house on plot No. 113 Block "CCC" and the deceased a custodian that held it in his behalf. The applicants filed their notice of appeal to the Court of Appeal and requested copies of proceedings. The applicants, averring that the intended appeal is neither frivolous nor vexatious and that they have an arguable case, have advanced the following issues on which they intend to appeal:

a) *Whether it was proper to appoint the Respondent administrator of the deceased's estate without a written consent of a single biological child out of all five children of the deceased.*

b) *Whether minutes of a Clan Meeting are sufficient to support a petition for letters of administration at District Court level.*

c) *Whether minutes of a Clan meeting which do not bear any signature of the deceased's children on the pages making decision is sufficient proof that the Petitioner was recommended by the Clan/beneficiaries to petition for letters of administration.*

d) *Whether it was proper to exclude among the deceased's property a house which was undisputedly solely constructed by the deceased, possessed by the deceased for fifty-two years, on the basis that among two out of four names in the title deed resembles the current Respondent's names.*

e) *Whether it was proper to find that the house was held by the deceased as a custodian of an infant child the Respondent when it was in 1969 without any statement that the deceased was holding the title as a guardian of the Respondent.*

The application was resolved in writing whereby both parties were represented by learned counsels. The applicants were represented by Mr. Chiduo Zayumba, while the respondent was represented by Mr. Charles Mwanganyi.

In his submission in chief, Mr. Zayumba contended that the intended grounds have established that there is an arguable appeal and

there is *prima facie* likelihood of success of the same. He so reasoned on the following arguments:

One, that there is a question on whether a petition for grant of letters of administration could be granted in the absence of consent from other heirs of the deceased. He argued that it is a cardinal principal of law that for one to be appointed an administrator, he or she must obtain consent from heirs. That, the same ought to be in prescribed form and in absence thereof, he must issue an affidavit on reasons why such consent was not obtained.

He averred that the applicant did not obtain consent nor did he file an affidavit to show why. He supported his argument with **Rule 39 (f) and 71(4) of Probate Rules** and the case of **Rashidi Hassan vs. Mrisho Juma** [1988] TLR 134. Arguing further he faulted this court for relying on the clan meeting in deciding that consent was given by the mentioned heirs. He challenged the minutes on the ground that the same were defective as: the minutes contain only three names of the deceased's children leaving out two others; that the names of the deceased's children purportedly appearing on minutes appear on a separate paper, which do not form part of the minutes. That the said names are only in the list of attendees not showing if the listed children gave their consent. He had the stance that attendance in the meeting does not amount to giving consent by the heirs.

Two, that the applicants intend to challenge whether it was proper for this court to award ownership of the house on Plot No. 113 Block "CCC" to the respondent while the issue on who the lawful owner was, was not determined at the probate court. He gave a brief history of the mentioned property which I find immaterial to produce given the nature of the application before me.

Three, that the applicants intend to address an issue of jurisdiction of a probate court to award ownership of property belonging to a deceased person to a petitioner for letters of administration of the deceased's estate. Further that, whether such a party could stand as a representative while holding a diverse interest from that of the deceased. He supported his averment with the case of **Samson Kishosha Gabba vs. Charles Kigongo Gabba** [1990] TLR 133. He contended further that the respondent ought to have let another person be appointed as administrator and the matter of ownership determined by land courts. He fortified his argument with the case of **Ibrahim Kusaga vs. Emannuel Mweta** [1986] TLR 26 (HC).

Four, that the applicants intend to challenge whether in civil proceedings a plaintiff can succeed merely on weakness of the defence case without considering other evidence. He argued that a party with heavier evidence ought to have won. Regarding the respondent's evidence, he alleged that the respondent did not present any evidence to prove his case. He considered the applicant's evidence being heavier than that of the respondent. He fortified his argument with the case of **Hemed Said vs. Mohamed**

Mbilu [1984] TLR 113 (HC) and **Anthony M. Masanga vs. Penina (Mama Mgesi) and Another** (Civil Appeal 118 of 2014) [2015] TZCA 556 reported on [2015] T.L.R. 46 [CAT].

Mr. Zayumba finalized his submission by stating that such legal points are worth of consideration of the applicant's application and prayed for it to be allowed with costs.

In reply, Mr. Mwanganyi commenced his submissions by giving a brief background of the matter which did not vary with the applicants' account. I shall therefore not reproduce it. With regard to gist of the applicant's application, he contended that prior to the court granting leave to appeal to the Court of Appeal, this court ought to ascertain whether there is a legal point worth of consideration by the apex Court. He backed his stance with the case of **Nurbhai Rattansi vs. Ministry of Water, Construction, Energy and Environment and Another** [2005] TLR 200.

He added that in granting leave, this court has to observe whether legal or factual arguments worthy of consideration by this court exist. He pointed out that this court ought not to consider whether the raised issues have merit as that would be determining the appeal. In that respect, he cited the case of **Lightness Damian & Others vs. Said Kasim Chageka** (Civil Application 450/17 of 2020) [2022] TZCA 713 TANZLII.

Further, he challenged Mr. Zayumba for arguing the appeal in his submissions instead of indicating that there is a point of law or matter of general importance worthy of determination by the Court of Appeal as directed in the case of **The Regional Manager TANROADs Lindi vs. Shapriya and Company Limited**, Civil Application No. 29 of 2012 CAT (unreported). Arguing further, he held the view that the points raised are neither points of law nor matters of general importance worthy to be considered on appeal.

He added that the issues raised were merely points of fact which require evidence for them to be determined. In that regard, he held the view that the applicants failed to demonstrate any point of law or arguable issue or matter of general importance to be determined. He cited the case of **Marcus Kindole vs. Buton Mdinde** (Civil Application 137 of 2020) 2021 TZCA 549 TANZLII. He finalized his submission by praying for the application to be dismissed with costs for being devoid of merit.

Rejoining, Mr. Zayumba challenged Mr. Mwanganyi saying that he ought to have indicated how the issues raised bare no point of law and are not matters of general importance thus unworthy of consideration by the apex Court. He held the view that the cited cases of: **Nurbhai Rattansi vs. Ministry of Water Construction Energy and Environment and Another** (supra) and **Lightness Damian & Others vs. Said Kasim Chageka** (supra) were distinguished and did not support the respondent's counsel's submissions. That, the two

cases require parties to only raise arguments both, legal and factual, something which he had done in his submissions in chief.

Further, he found Mr. Mwanganyi's assertion that, he argued the appeal on merit, misconceived. He contended that in addition to the famous criteria, there is also criteria that require indicating that there is a chance of success on the intended appeal. He cited the case of **British Broadcasting Corporation vs. Eric Sikujua Ng'maryo,** Civil Application No. 138 of 2004 in which such criterion was considered in an application for granting leave to appeal.

He maintained his arguments as to the presence of existing issues worthy to be considered by the Court of Appeal. In addition, he reiterated the arguments in his submission in chief pertaining to issues the applicants intend to have the Court of Appeal determine. He maintained his prayer for leave to appeal to be granted.

I have considered the rival submissions of both parties' counsels. Prior to determining this application, I wish to note that I am very well aware of the amendments introduced vide **Section 10 of the Legal Sector Laws (Miscellaneous Amendment) Act, No. 11 of 2023** that came into force on 1st December 2023. The said amendment has altered **Section 5 of the Appellate Jurisdiction Act**, by eliminating the requirement for parties to seek leave prior to filing their appeal to the Court of Appeal. In **Petro Robert Myavilwa vs Zera Myavilwa & Another** (Civil Application No. 117/06 of 2022) [2023] TZCA 17947

TANZLII, the Court of Appeal sitting with a single justice affirmed the amendments stating:

> "It is my interpretation, basing on the above exposition that, the changes have done away with leave requirement for one to appeal to the Court against the decision of the High Court regardless of whether the impugned decision is an order, decree, an ex-parte decree or a preliminary decree when exercising its original, appellate or revisional jurisdiction. In other words, obtaining leave has ceased to be a requisite before one can appeal to the Court effective from 1st December, 2023."

In the same case, it was ruled that the law amended is procedural thus bearing a retrospective effect. However, in the matter at hand, the amendment found the parties amid a fixed Schedule to file their written submissions issued on 19.10.2023. Considering the stage this matter had progressed into when the amendment took effect, I find it justiciable to determine this application for the interest of both parties, especially in consideration of time limitation to filing appeal in the Court of Appeal.

It is well settled that in granting leave to appeal to the Court of Appeal, the granting court ought to observe whether the issues raised by the applicant suffice as matters of general importance, or a novel point of law or establish a prima facie case or arguable appeal. This was well discussed in **British Broadcasting Corporation vs. Eric Sikujua Ng'maryo** (supra), in which the Court stated:

> "... leave to appeal is not automatic. It is within the discretion of the court to grant or to refuse leave. The discretion must, however be judiciously exercised and on the materials before the court... 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...However, where the grounds of appeal are frivolous, vexatious or useless or hypothetical, no leave will be granted."

See also; **Rutagatina C.L vs. The Advocates Committee & Another** (Civil Application No. 98 of 2010) [2011] TZCA 143; **Yusufu Juma Risasi vs. Anderson Julius Bicha** (Civil Appeal 233 of 2018) [2022] TZCA 174; **Lightness Damian & Others vs. Said Kasim Chageka** (supra) and; **Henry Julius Nyela vs. Sauda Mtunguja Rajabu** (Civil Application No. 514 of 2020) [2023] TZCA 115 (all available at TANZLII).

Contrary to a rather misconceived argument by Mr. Mwangani, arguable issues, novel point of law or matters of general importance can be factual or legal. This was well explained in the case of **Henry Julius Nyela vs. Sauda Mtunguja Rajabu** (supra) where the apex Court stated:

> "We start our determination by stating the law applicable in applications of this nature. As good luck would have it, the law on this area is fairly settled in this jurisdiction. **In applications for leave to appeal to the Court, what the court confronted with that application is supposed**

> **to do is to see if the intended appeal, prima facie, has some merits, whether factual or legal.** In applications of this nature, the courts have all along been wary to withhold leave to appeal to a superior court if there are grounds meriting the attention of that superior court. Put differently, leave to appeal from an order in civil proceedings will be granted where, prima facie, it appears to the court seized with that application that there are grounds of appeal which merit serious judicial consideration."

It is further well warned, as well put by Mr. Mwanganyi that in determining an application for leave to appeal, the court must warn itself against discussing raised grounds or issues as that would amount to determining the matter on merit. This warning was well embedded in the case of and **Lightness Damian & Others vs. Said Kasim Chageka** (supra)whereby the Court of Appeal stated:

> "In the light of the above stance of the law, and with respect to the learned judge, it seems clear to us that all that applicants are required to do in applications of this kind is simply to raise arguments whether legal or factual which are worth of consideration by the Court. Once they pass that test, the court is obligated to grant leave to appeal. It is not the duty of the judge to determine whether or not they have any merit."

While, it seems that Mr. Zayumba gave more details that are unnecessary while submitting on the said issues. He did not at any time depart from the subject of this matter which is to be granted

leave. I find that he was still able to adequately state issues that I believe are arguable and raise matters of general importance and thus worthy of the consideration of the Court of Appeal.

The said issues being: whether an administrator can be appointed without written consent of some of the biological children of the deceased; whether clan meeting minutes suffice to support a petition for letters of administration at the district court level; whether clan meeting minutes which do not bear signatures of deceased's children form sufficient proof that the petitioner for letters of administration was recommended by the beneficiaries of the deceased's estate; whether it is proper to exclude, in the deceased's estate, a house the deceased constructed and used for fifty two years.

Other issues are: whether it was proper for the court to hold that the house in question was held by the deceased as a custodian of an infant child (the respondent) since 1969 while there is no any statement to that effect; whether the court was justified to find the respondent a fit and trustworthy person to administer the deceased's estate while he had included his sister's house in the deceased's estate; and last, whether the plaintiff in civil proceedings can be awarded victory on the basis of the weakness of the defendant's case and not on the weight of his evidence.

In the foregoing, I hereby grant the applicants leave to appeal to the Court of Appeal against the Judgment and decree of this Court

in DC Civil Appeal No. 08 of 2022. Given the nature of the application, each party shall bear his/her own costs.

Dated and delivered at Moshi on this 27th day of March 2024.

L. M. MONGELLA

JUDGE