

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF MBEYA)
AT MBEYA

MISCELLANEOUS CIVIL APPLICATION NO. 17 OF 2019

(From the High Court of Tanzania at Mbeya in PC Probate Appeal No. 1 of 2013. From the District Court of Mbeya at Mbeya in Probate Appeal No. 09 of 2012. Originating from the Urban Primary Court in Probate No. 10 of 2011.)

FATUMA SAID.....APPLICANT

VERSUS

JUMA ABINALA.....1ST RESPONDENT

USWEGE M. MWANGOMANGO.....2ND RESPONDENT

RULING

Date of Last Order: 17/04/2020

Date of Ruling : 11/06/2020

MONGELLA, J.

Fatuma Said, the applicant herein, is seeking for orders from this Court granting her extension of time within which to lodge notice of intention to appeal to the Court of Appeal of Tanzania and to file an application for leave to appeal to the Court of Appeal against the decision of this Court in Probate Appeal No. 1 of 2013. The application is made under section 11 (1) of the Appellate Jurisdiction Act, Cap 141 R.E. 2002, Order XLIII Rule 2 and section 95 of the Civil Procedure Code, Cap 33 R.E. 2002. In the chamber summons, the applicant states that the application is supported

by the affidavit of the applicant, Fatuma Said and one Stambuli Ahmed, a learned State Attorney. However, I have gone through the Court file and found no affidavit attached of the said Stambuli Ahmed.

The applicant enjoyed legal services of Ms. Rose Kayumbo, learned advocate while the respondent enjoyed legal services of Ms. Mary Gatuna, learned advocate. It was argued by written submissions filed in this Court by the parties as per scheduled orders.

In her submission Ms. Kayumbo argued that after the decision by this Court was delivered the applicant lodged an application for leave to appeal to the Court of Appeal within time. However, the said application was withdrawn with leave to re-file whereby the prayer was granted subject to limitation of time. Then later they noted that time had already elapsed and hence this application.

Before I proceed with the rest of her submission, I wish to consider the legal issue raised by Ms. Gatuna in her submission regarding the appropriateness of the applicant's application in this Court. In her submission, Ms. Gatuna submitted that she noted that the applicant is praying for extension of time for leave to appeal to the Court of Appeal while in reality she ought to have applied for extension of time for leave to file an application for a certificate on point of law to the Court of Appeal. She argued that the applicant did not move this Hon. Court properly by applying for something which is inapplicable because the matter on which an appeal is sought emanates from Probate No. 10 of 2011 in the Urban Primary Court and is made under section 11 (1) of the Appellate

Jurisdiction Act, Cap 141 R.E. 2002. On these bases Ms. Gatuna argued that the application is incompetent before the Court and ought to be struck out with costs.

Responding to this legal issue, Ms. Kayumbo argued that Ms. Gatuna has introduced something that has not been argued in the submission in chief by raising a purported preliminary objection. She argued that the preliminary objection does not suffice to be as such because Ms. Gatuna failed to provide sufficient particulars as per the Written Laws (Miscellaneous Amendment) Act No. 8 of 2018 which has amended various laws including the Appellate Jurisdiction Act used by the applicant in lodging the current application. She argued that there is nowhere stated or provided that leave to appeal to the Court of Appeal in matters originating from Primary Court is no longer a requirement. She referred to the case of **James Burchard Rugemalira v. The Republic**, Criminal Application No. 59/19 of 2017 (CAT at DSM, unreported) and argued that the preliminary objection does not give the applicant a room to understand and respond properly as per the legal principle settled in this case whereby the Court insisted on the need to do away with surprise to the court and the other party when raising preliminary objection.

Before I deliberate on this issue, I wish quote the prayers by the applicant as stated in chamber summons. The said prayers go like:

- 1. That this Honourable Court be pleased to extend the time upon which the applicant to lodge his notice of intention to appeal to the Court of Appeal of Tanzania in respect*

of Probate Appeal No. 1 of 2013 by Honourable Ngwala, Judge.

2. *That this Honourable Court be pleased to extend the time upon which the applicant may make an application for leave to appeal to the Court of Appeal against the decision of Hon. Ngwala, Judge dated 18/01/2018."*

The legal issue raised by Ms. Gatuna in fact centres on the second prayer whereby the applicant is seeking for extension of time within which to apply for leave to appeal to the Court of Appeal. Ms. Kayumbo is of the stance that this legal point is baseless and improperly raised as the applicant did not have a chance to understand and respond. My position however, is different as I find the legal point raised to be relevant given the nature of the matter whereby it emanated from the primary court. In my considered view, a point of law can be raised at any stage of the proceedings by either any of the parties or by the court *suo motu* so long as parties are accorded the opportunity to address the court on the same. See: ***Oil Com Tanzania Ltd v. Christopher Letson Mgalla***, Land Case No. 29 of 2015 (HC at Mbeya, unreported). Ms. Kayumbo cited the case of **James Burchard Rugemalira** (*supra*) and argued that the applicant was not in a position to understand and respond to the legal point. In my settled view I find the said case distinguishable to the one at hand. In the ***Rugemalira case*** the preliminary objection was raised with no sufficient details and the matter was argued orally whereby the applicant was taken by surprise during the oral hearing as to the details of the preliminary objection. In the case at hand the legal point was raised and explained by the respondent's counsel in her written submission whereby

the applicant's counsel had ample time to read, understand and reply thereof.

Like I pointed out earlier, the legal point is based on the applicant's second prayer for extension of time within which to lodge an application for leave to appeal to the CAT. Ms. Gatuna's contention is to the effect that the applicant was supposed to seek extension of time to file an application for certificate on point of law and not for leave to appeal as she did. The application at hand as evidenced in the chamber summons is brought under section 11 (1) of the Appellate Jurisdiction Act. The provision states:

*"Subject to subsection (2), **the High Court** or, where an appeal lies from a subordinate court exercising extended powers, the subordinate court concerned, may extend the time for giving notice of intention to appeal from a judgment of the High Court or of the subordinate court concerned, for making an application for leave to appeal **or for a certificate that the case is a fit case for appeal**, notwithstanding that the time for giving the notice or making the application has already expired."*

Since the matter emanated from the primary court, the applicant while making the application at hand was supposed to be mindful of the provisions of section 5 (2) (c) of the Appellate Jurisdiction Act which states:

"No appeal shall lie against any decision or order of the High Court in any proceedings under Head (C) of Part III of the Magistrates' Courts Act, unless the High Court certifies that a point of law is involved in the decision of order."

[Emphasis added]

Head (C) of Part III of the Magistrates' Courts Act provides for the appellate and revisional jurisdiction of the High Court in relation to matters originating from primary courts. I agree with both counsels' argument that the law does not require the applicant, in a case emanating from primary court, to seek for leave to appeal to the Court of Appeal. However, the law, as per the provisions I have cited above, is very certain to the effect that a certificate on point of law has to be sought from the High Court where a party wishes to appeal to the Court of Appeal on a matter emanating from the primary court. I therefore subscribe to Ms. Gatuna's contention that the applicant has prayed for a nonexistent remedy and thus the application becomes incompetent before this Court.

The applicant and her advocate ought to ask themselves questions as to what use shall it have if this Court decides to grant the application for extension of time to apply for leave to appeal to the Court of Appeal. Under which law shall they bring the said application? In my view they shall be engaging in a futile exercise and wasting the time and resources of the court and both parties as the law requires one to seek for certificate on point of law and not for leave to appeal. Under the circumstances the only remedy is therefore to strike out the application as I hereby do. Each party to bear his/her own costs.

Dated at Mbeya on this 11th day of June 2020.




L. M. MONGELLA
JUDGE

Court: Ruling delivered in Mbeya in Chambers on this 11th day of June 2020 in the presence of Ms. Rose Kayumbo, for the applicant and Ms. Mary Gatuna for the respondent.


L. M. MONGELLA
JUDGE