IN THE COURT OF APPEAL OF TANZANIA
AT MOSHI

(CORAM: KOROSSO, J.A., KIHWELO, J.A., And RUMANYIKA, J.A.)

CIVIL APPLICATION NO. 247/05 OF 2020

JOSEPH PAUL KYAUKA NJAU ..... 1ST APPLICANT
CATHERINE PAUL KYAUKA NJAU ..... 2ND APPLICANT

VERSUS

HYACINTHA PAUL KYAUKA NJAU ..... 1ST RESPONDENT
EMMANUEL PAUL KYAUKA NJAU ..... 2ND RESPONDENT

(Application for stay of Execution against the Judgment and Decree of the High Court of Tanzania, at Moshi)

(Mwingwa, J)

Dated the 09th day of March, 2021
in
Probate and Administration Consolidated Applications No. 34 of 2010 and No. 14 of 2014

.....

RULING OF THE COURT

12th & 18th July,2023

KOROSSO, J.A.:

The applicants had filed an application in the High Court of Tanzania at Moshi in Probate and Administration Cause No. 34 of 2010 and No. 14 of 2014 which were later consolidated. The applicants are amongst the children of the late Paul Kyauka Njau (the deceased) who passed away interstate on 17/2/2002. Upon his death and the requisite application, two of the deceased's children, Febronia and Emmanuel

Paul Kyauka Njau were on 27/10/2003 appointed as the co-administrators of the deceased's estate.

According to the applicants, the appointed administrators filed the accounts and requisite inventory of the estates of the deceased, and the applicants were not allocated anything in the distribution of the relevant properties in the estate of the deceased and not all of the deceased properties were part of the distribution. Aggrieved by the said distribution of the deceased estate by the administrators, the applicants lodged Probate and Administration Application No. 34 of 2010 and No. 14 of 2014, which were later consolidated as hinted above. In the applications, the applicant's complaint was that the estate of the deceased was not proportionally and or equitably distributed amongst the rightful heirs, and that the co-administrators have been partial since they had distributed the biggest share of the estate to the first wife of the deceased unjustifiably. It was thus their prayer that, their appointment as administrators of the deceased estate be revoked and new administrators be appointed to proceed with the administration of the estate of the deceased. The other complaint was that, the sale of Plot No. 16 Block "M" IV Majengo, Msitu Street be declared null and void on the ground that the administrators had used the proceeds for their own benefit, thus they be ordered to refund Tshs. 7,900,000/=.

The High Court's decision of 9/3/2016 (Mwingwa, J. as he then was) was in favour of the respondents dismissing the application. Unperturbed, still dissatisfied, on 13/5/2016, the applicants lodged a Notice of Appeal and on 3/5/2016 filed an application of stay of execution, Civil Application No. 3 of 2016. Due to errors discerned in Civil Application No. 3 of 2016, upon their prayer, the Court on 11/12/2019 granted leave to amend the application and thereafter refile it within 14 days. This is what led to the filing of the instant application.

Important to note that the instant application is an amended one upon an order of the Court dated 11/12/2019 brought by way of notice of motion pursuant to rule 11(3), (6) and (7)(a), (b), (c) and (d) of the Tanzania Court of Appeal Rules, 2009 (the Rules). It is supported by a joint affidavit of the applicants deponed by Joseph Paul Kyauka Njau.

On the part of the respondents, they resisted the application through an affidavit in reply sworn by Daniel Haule Ngudungi, learned Advocate.

On 12/7/2023 when the application came for hearing before us, Ms. Stella Simkoko, learned Advocate represented the applicants and the respondents enjoyed the services of Mr. Daniel Ngudungi, learned Advocate.

When given an opportunity to amplify the substance of the application, Ms. Simkoko informed the Court that there have been further developments in the matter, in that, the Civil reference the applicant had sought to challenge the decision of the single Justice of appeal (Mwangesi, JA, as he then was) on second bite which was relied upon to ground the current application was recently dismissed by the Court on 4/7/2023. She contended that upon the dismissal of the Civil Reference mentioned above, the applicants on 10/7/2023 filed an application for an extension of time to file revision on the impugned decision of the High Court in Consolidated Misc. Probate and Administration Application No. 34 of 2010 and No. 14 of 2014. In consequence, Ms. Simkoko prayed that in the interest of justice in terms of rule 4(2) of the Tanzania Court of Appeal Rules, 2009 (the Rules), the applicants be allowed to amend the notice of motion and the supporting affidavit so that it reflects that it is grounded by the said filed application.

When queried by the Court about the status of the notice of appeal filed on 13/5/2016 to challenge the impugned decision of the High Court (Mwingwa, J) referred to in paragraph b(6) of the amended notice of motion and averred in paragraph 7 of the supporting affidavit as it relates to the prayer sought, the learned counsel informed us that

she intends to withdraw it since she was under the misguided belief that after the dismissal of their Civil Reference by the Court, the notice of appeal was automatically no longer viable.

Mr. Ngudungi on the other hand began by lamenting the fact that the matter has been pending in court for about 21 years since the year 2002 and that the respondents have not enjoyed the benefits of the decree in their favour due to various applications initiated by the applicants. He argued that the current application has been overtaken by events. He then gave a brief history stating that the current application was filed in the year 2016, in the year 2019 the applicants prayed and were granted leave to amend the notice of motion, relying on an application for an extension of time to apply for leave to appeal which was pending in Court on second bite after being refused by the High Court. He contended further that the said application was first refused by a single Justice of the Court and, recently on 4/7/2023, the reference application before a panel of three Justices of Appeal was dismissed, meaning that the course has sailed.

The learned counsel for the respondent argued having filed a notice of appeal against the impugned judgment of the High Court, the applicants' intention had been to process an appeal as reflected in all

their applications. However, after the sail shifted, upon the dismissal of the reference application, the applicants have now shifted and allege to have initiated a process of revision, whilst the notice of appeal is still pending, in contrast to settled principles of law on the subject, he argued. Mr. Ngudungi asserted that the informal prayer by the applicants' counsel for the amendment of the notice of motion grounded on an intended revision is not tenable stating that there is no such room under rule 50(1) and (2) of the Rules, a contention we have noted to be misconceived since rule 50(2) of the Rules so permits. On the application of rule 4(2) of the Rules to seek such amendment, he adamantly rejected it stating that what the applicants seek is invariably to install a new application under the disguise of an amendment and thus, the discretion which they want the Court to exercise in granting their prayer under said rule is injudicious.

The learned counsel for the respondents further stated that in this application the applicants have to show cause why execution should not proceed but only where they follow the established procedures. He concluded by arguing that prayers moving the Court to exercise its discretion should be where there is a genuine course and not like what is before the Court, it is time for the applicants to let go and let litigation reach its end so that the decree-holders benefit and enjoy the fruits of

the decree, he asserted. Mr. Ngudungi thus implored us to find the sought prayer inconsequential and strike out the application having been overtaken by events.

Ms. Simkoko's rejoinder was to reiterate her submission in chief and argued that the applicants should not bear the burden for the time it has taken to process their rights which they are still in pursuit of. She thus prayed for their prayer to be granted.

Having heard the rival submissions from the parties and gone through the record of the application, worth noting is the fact that the instant application was filed prior to the ushered-in amendments in the Rules by GN 344 of 2019, and thus the conditions introduced by the amendment with regards to applications for stay of execution do not apply to it except for the necessity to show that an appeal has been initiated. Undoubtedly, the requirement for a notice of appeal or to show there is a process to appeal the impugned decree was there.

In the instant application, the applicants had relied on a notice of appeal filed to ground the application since at the time they were still in pursuit of an appeal against the impugned judgment and decree of the High Court. However, as argued by both the counsel for the applicants and the respondents, that boat has sailed with the dismissal

of the civil reference seeking to be granted an extension of time to file leave to appeal, a requisite requirement for the applicants to pursue an appeal to this Court. According to the learned counsel for the applicant, it is the dismissal of the reference application that prompted the applicants to initiate a process in pursuit of a revision, hence, filing an extension of time to file a revision and the prayer to amend the notice of motion of the instant application so that it should reflect the current position and do away with the initiated process to appeal which is the basis of the instant application. Noteworthy is the fact that the Court was not availed with a copy of the said filed application for an extension of time to file revision for the reason that they were yet to be availed of the number of registration for the application.

In the circumstances, we are of the view that the issue before us is whether the application to amend the notice of motion so that it reflects that an appeal is no longer pursued and instead a revision is being sought to warrant us to exercise our discretion under rule 4(2) of the Rules and grant the prayer.

Mr. Ngudungi adamantly objected to the prayer by the applicants' counsel finding it inconceivable and improper while the counsel for the applicants contends that it will be in the interest of justice to grant their

prayer. She also acknowledged the fact that despite having initiated the process for revision, she has yet to withdraw the notice of appeal filed for the intended appeal, which is now not possible after their reference against the decision by a single justice for an extension of time to file leave to appeal was dismissed as alluded to above. We agree with Mr. Ngudungi that in the obtaining circumstances, amending the notice of motion of the instant application will not be in the interest of justice for the following reasons: **One,** as conceded by the learned counsel for the applicants, amendment of notice of motion in the instant application will entail changing the foundation grounding the application, that is, the notice of appeal against the impugned decision and also either amending the affidavit supporting it and/or filing a supplementary affidavit so that it augurs with the amended notice of motion. This in essence will be similar to filing a new application altogether since the substance of the application will change, which we find to be improper and not in the interest of justice. **Two**, alive to the observation we made when we granted leave to amend the notice of motion in the Order delivered on 11/12/2019 that: -

> "... *we are of the view that a party should be freely given a chance to amend a Notice of Motion of his/her own making so as to rectify*

apparent defects with such an order as to costs as the Court may deem fit to impose."

Plainly, the current prayer for substitution of the notice of motion falls under the same vein, but it differs from the first application because there are no apparent defects to rectify. We are alive to the fact that a party may apply for an amendment at any time as expounded under rule 111 of the Rules for appeals and we believe this is also the spirit of rule 50 of the Rules for applications to the Court. However, we believe that such an amendment should be entertained where there are apparent defects as stated by the Court when it granted leave to the applicant to amend the instant application alluded to above. We are of the firm view that an amendment of an application that will change the context, cause, or foundation of the original application should not be entertained.

In the instant application, clearly, the civil reference to revamp the intended appeal against the impugned decision was relied upon by the applicants under paragraph b(6) of the amended notice of motion and paragraph 15 of the supporting affidavit in processing the instant application, and having been dismissed is thus no longer there. Undoubtedly, it renders the current application without the base to stand on that is, overtaken by events and thus incompetent.

In the end, we are of the view that the counsel for the applicant has not provided any substantive reasons to move us to exercise our discretion and grant the prayer to amend the notice of motion. Consequently, the application is struck out, and in the circumstances, each party to bear its own costs.

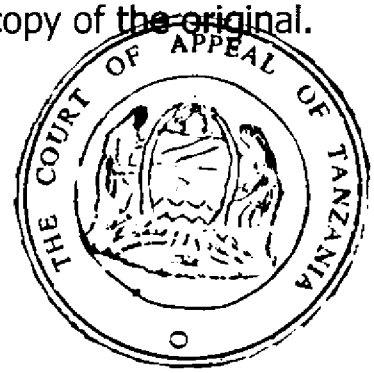
DATED at **MOSHI** this 15th day of July, 2023.

W. B. KOROSSO
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Ruling delivered this 18th day of July, 2023 in the presence of Mr. Daniel Ngudungi, learned counsel for the Respondent via Video Link at Dar es salaam, 1st applicant in person and in the absence of Ms. Stella Simkoko counsel for the Applicant though duly informed is hereby certified as a true copy of the original.



A.L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL