IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: OTHMAN, C.J., KIMARO,J.A.,And MASSATI, J.A.)

CIVIL APPLIACATION NO.10 OF 2011

MEPOROO RISON .....APPLICANT

VERSUS

ELISA SANGETI.....RESPONDENT

(Application under Rule 4(2)(a), (b),(c) of the Court of Appeal Rules 2009 in respect of the execution of the Judgment of the High Court of Tanzania at Arusha)

(Sambo, J.)

dated 20th September, 2010

in

Civil Appeal No.13 of 2009

.....

RULING OF THE COURT

27th September, & 1st October, 2012

KIMARO, J.A.:

Before the Court is a notice of motion under Rule 4(2) (a), (b), and (c) of the Court of Appeal Rules, 2009 in which the applicant, under legal representation by Mr. Nelson Merinyo learned advocate, is asking the Court to strike out the notice of appeal of which he is not certain of its existence. The application is supported by the affidavit of the learned advocate and that of the applicant.

The application emanates from Civil Case No. 20 of 1991 between Paulo Tillya and Isaack Abed. Isaack Abed was the respondent's father. Paulo Tillya won the suit hence becoming the decree holder and Isaack Abed, the judgment debtor. In the execution of the decree to enable the decree holder realise the amount of compensation he was claiming from the judgment debtor, a seven acre farm the property of Isaack Abed was attached and sold in public auction to Meporoo Rison, the applicant. The farm was handed over to the applicant by a letter dated 8th July, 1994 from Robert Mamiro, Court broker of North Tanzania Auction Mart (And Court Brokers) who carried out the execution.

It appears that the applicant has not been able to occupy the farm. Since then the respondent has been contesting for the ownership of the farm. First he filed objection proceedings challenging the sale. He was not successful. Second, he filed a suit in the Primary Court claiming ownership of the land. He claimed that his father gave him the farm. However, he was not successful. It was then that the applicant filed Civil Case No.73 of 2009 in the Court of Resident Magistrate at Arusha, against the respondent claiming for compensation for trespass. He won the suit. The respondent's appeal to the High Court was dismissed.

The gist of the applicant's complaint, according to Mr. Merinyo learned advocate who represented the applicant at the hearing of the application is that his request to the High Court to have the trial court record remitted back for execution has not been successful. He was informed that there is a pending application filed by the respondent in which he was seeking for extension of time to file an appeal to the Court of Appeal. However, contended the learned advocate, he has neither been served with a notice of appeal, nor the application for extension of time from the respondent. He said that is what prompted him to file the application.

The application was heard exparte under Rule 63(2) of the Court of Appeal Rules, 2009. The Court was satisfied that the respondent was duly served. One, through Mughwai and Company Advocates who represented the respondent in both the trial court and in the High Court. However no advocate from the firm appeared. Second, the respondent was also served personally by a Court process server and he signed the summons acknowledging receipt of the same but he failed to enter appearance and there was no explanation given for the non appearance.

As the learned advocate was required to explain to the Court why he chose to take a legal action against a matter which should have been

pursued administratively, he said it is because the matter has taken a long period and the applicant is an old man. In his considered opinion, the respondent is trying to deny the applicant justice through the process of the court. He prayed that the Court deals with the matter as it deems fit.

Admittedly the application was filed prematurely. The perusal of the Court records show that it is true that there is a pending application filed by the respondent in which he is seeking for extension of time to appeal out of time. That is Miscellaneous Civil Application No. 83 of 2010. The application was filed on 20th October, 2010 through ERV 40325119. It is supported by the affidavit of the respondent and he shows that he filed a notice of appeal and also wrote a letter to the court requesting for the supply of copy of proceedings, and copied the same to the applicant. However, such annextures are not there. The learned advocate for the applicant said he has not been served with the documents. It is not the duty of the Court at this moment to find out what is the true position. That duty rests exclusively on the High Court where the application is still pending.

An important observation we make from the record of the application is that there has never been any attempt taken by the High Court to have the parties served for the hearing since the filing of the application. The

application came before Shayo, J. as he then was, on 26th October, 2010. The parties were absent. There was no order made to have the parties served. The application was called on subsequently several times. On 5th May, 2011; 4th August, 2011; 27th October, 2011; 15th March, 2012 and on 13th June, 2012. The last time it was called by the Court was on 29th August, 2012 and it was adjourned for mention to 13th February, 2013. In all occasions the application was called on, it was attended to by either the District Registrar or Acting District Registrar who have no jurisdiction to hear the application. The parties were absent. Reasons for their absence are not recorded and no order was made at any of the dates in which the application was called on, to serve the parties.

On our part, we admit that this is not a pleasing situation on the part of the court. Indeed it is a sign of irresponsibility. Whatever proceedings are filed in Court, the responsible officers are obliged to take the necessary steps, in accordance with the law, to have the parties served so that the proceedings can be determined. When there is failure to take the necessary steps, as in Misc. Civil Application No 83 of 2010, the parties are not only inconvenienced, but we witness, as in this application, filing of unwarranted applications, and complaints against the court which cannot be defended. Such attitudes should be totally discouraged.

We agree with the learned advocate for the applicant that the matter has taken several years. As already said it is not a pleasing situation and we urge all judicial officers to refrain from such attitudes. Given the observation we have already made concerning Misc. Civil Application No. 83 of 2010, we order that the application should be placed before the Judge in Charge for reassignment to another Judge. The judge assigned the application should have the same determined as expeditiously as possible. That said, we reiterate our earlier position that the application before us is premature. It is accordingly struck out. There is no order for costs.

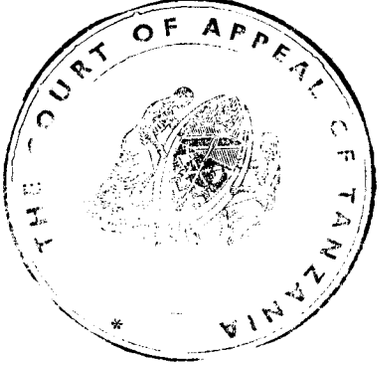
DATED at ARUSHA this 1st day of October, 2012

M. C. OTHMAN
CHIEF JUSTICE

N. P. KIMARO
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



M. A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL