IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

CIVIL APPLICATION NO. 330/11 OF 2022

HAMIS MDIDA ..... 1ST APPLICANT
SAID MBOGO ..... 2ND APPLICANT

VERSUS

THE REGISTERED TRUSTEES
OF ISLAMIC FOUNDATION ..... RESPONDENT
[Application for Extension of time to apply for leave to appeal to the Court and subsequently leave to appeal to the Court of Appeal of Tanzania against the Judgment of the High Court of Tanzania at Tabora]

(Mallaba, J.)

dated the 26th day of July, 2016

in

Land Appeal No. 41 of 2015

.....

RULING OF THE COURT

27th September, & 4th October, 2023

KAIRO, J.A.:

In this application the applicant is seeking for the following orders:

(a) *Extension of time to file an application for leave to appeal to the Court.*

(b) *Leave to appeal to the Court.*

The application is by way of notice of motion preferred under rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules) and section 47 of the Land Disputes Courts Act, Cap 216 R.E. 2019 (hereinafter the LDC Act).

It is supported by an affidavit affirmed by Musa Kassim, learned counsel (as he then was) who was previously representing the applicants.

On the other hand, the respondent filed an affidavit in reply sworn by Mr. Method Raymond Gabriel Kabuguzi, who also raised a preliminary objection (the PO), the notice of which was filed on 12th September, 2023 to the effect that the application contains two prayers which are omnibus, thus the same should be struck out with costs for want of competence.

As per the practice of the Court, once a preliminary objection is raised in an appeal or application, the Court is required to dispose it first before embarking on determining the substantive appeal or application on merit. In the same vein, I will first determine the PO raised.

At the hearing of the application Mr. Kelvin Kayaga, learned counsel appeared for the applicants and he was accompanied by the 2nd applicant who was also present in Court. On the other hand, Mr. Amos Gahise, learned counsel appeared for the respondent.

In his brief submission in support of the PO, Mr. Gahise contended that, the application before the Court is omnibus as the applicant has combined together two unrelated prayers. He pointed out that the prayer for an extension of time to file leave was preferred under rule 10 of the Rules while the prayer for leave was brought under section 47 (2) of the LDC Act which suggest that they were supposed to be applied differently. He argued that since the prayers are provided under provisions of different laws, it is obvious that lumping them together in one application is improper. He contended that one application was to be preceded by the other. Elaborating, Mr. Gahise argued that the application for extension of time was supposed to start first and once granted, then application for leave would have followed. To buttress his argument, he cited the case of **Hamza K. Sungura vs. The Registered Trustees of Joy in the Harvest,** Civil Application No. 90/11 of 2022 and **Mrs. Lily Marandu t/a Loly Enterprise vs. Arusha International Conference Centre,** Civil Application No. 34 of 2015 (both unreported). He added that the two prayers were to be applied in separate applications.

Mr. Gahise went on to submit that by their nature, the two prayers were to be determined by two distinct forums, thus lumping them together is an abuse of the Court process as the cited case of **Mrs. Lily**

Marandu (supra) observed. He concluded by praying the Court to strike out the application with costs for being omnibus thus, incompetent.

In his reply, Mr. Kayaga conceded that the application is omnibus and further that, the two prayers cannot be determined by a single Justice. He however, refuted the prayer to strike out the application as argued by Mr. Gahise.

According to him, a single Justice can proceed to determine the first prayer regarding extension of time to file leave. It was his contention that the Court has been properly moved to determine the first prayer and a single Justice has the mandate to proceed in determining it. He referred the Court to the case of **Ally Salim Said (Administrator of the Estate of the Late Antar Said Kleb) vs. Iddi Athumani Ndaki,** Civil Application No. 450/17 of 2021 (unreported) to fortify his arguments. It was his contention that the Court in the cited case was faced with a similar scenario wherein similar prayers were before the Court. That the Court proceeded to determine the prayer which was within its mandate and finally granted the first prayer concerning an extension of time to file leave. He added that, the contents of the notice of motion and the supporting affidavit suffice to enable the Court proceed with the determination of the first prayer. He thus, beseeched the Court to follow

the stance it took in **Ally Salim Said** (supra) and proceed to determine the first prayer on merit. He added that, despite the pointed out procedural irregularity to combine two prayers, he invited the Court to invoke the overriding objective principle (Oxygen Principle) to salvage the application from being struck out by determining the first prayer on merit and overrule the preliminary objection raised.

Addressing the cited case of **Hamza K. Sungura** (supra), Mr. Kayaga argued that the learned advocate did not specify or point out which part of the case was supporting his arguments. He contended that after going through it, he found the same to be irrelevant to the case under consideration.

As for the case of **Mrs. Lily Marandu t/a Loly Enterprise** (supra), Mr. Kayaga argued that, the circumstances of the two cases are different. He clarified that the prayers in the cited case was for extension of time to file stay of execution and prayer for stay of execution. Thus, according to him, the two cases were distinguishable. He added that, in both of the cited cases, the issue as to whether the Court was competent to determine them was not raised. As such, both cases were irrelevant.

In his rejoinder, Mr. Gahise submitted that, nowhere in the cited case of **Ally Salum Said** (supra) was it stated that there was an objection

raised to determine the application, otherwise a ruling to that effect would have been seen in the case. It was his contention that, if there was any objection to that effect, the Court would have found that the parties were prejudiced and thus reach into a different conclusion. He argued that, the cited case cannot apply in the circumstances where PO was raised and thus the two cases are distinguishable. He reiterated his prayer for the Court to find that the application is incompetent and strike it out as a consequence, with costs.

I have dispassionately examined the entire documents of the application and thoroughly considered the rival arguments by the advocates for the parties.

Both counsel are at idem that the application contains two unrelated prayers, thus omnibus. Further, they are also at one that the said prayers as they are, cannot be determined by a single Justice for lack of mandate to do so. The point of departure, however, is the effect of the said omnibus application.

It is the argument of Mr. Gahise that, the application, being omnibus, is incompetent before the Court and thus has to suffer the effect of being struck out as a consequence. He sought reliance on two

unreported cases of **Hamza K. Sungura** (supra) and that of **Lily Marandu** (supra) to buttress his argument.

On the other hand, Mr. Kayaga contended that, since a single Justice has the mandate to determine the first prayer on extension of time to file leave, then, she should proceed to do so on merit and leave the other prayer about leave, unattended. To fortify his argument, he referred the Court to unreported case of **Ally Salum Said** (supra) into which he argued that the Court took a similar stance.

Further to that, he implored the Court to invoke the overriding objective principle to serve the application from being struck out.

In his move to convince the Court to incline with his arguments, Mr. Kayaga distinguished the cases cited by the applicant arguing the same to be irrelevant to the case under consideration. I share the same sentiments as regards the irrelevancy of the case of **Hamza K. Sungura** (supra) to the matter at hand. The cited case dealt with an extension of time to apply for review, while the matter at hand concerns an omnibus application. However, I am of a different opinion regarding the case of **Mrs. Lily Marandu** (supra). Though the application therein concerned two prayers for an extension of time to file an application for stay of execution and for an order staying the execution, I am of the view that

the cited case shares the same principle with the one at hand that bars the institution of an omnibus application.

I have gone through the cited case of **Ally Salim Said** (supra) and noted with appreciation the position we gave therein. However, in my view, the two cases are distinguishable. I will explain: -

In the cited case, the Court was called upon to determine the propriety or otherwise of the second limb of the prayer, that is an application for leave to appeal, and its effect. But in this application, the issue is the propriety of the omnibus application before the Court and its effect. In my view, the issues discussed in each of the two cases pre-suppose two distinct outcomes. This is in line with the long-established principle of law that, each case is to be decided on its own set of facts and prevailing circumstances. [See: **Athumani Rashid vs. Republic,** Criminal Appeal No. 110 of 2012] (unreported). In other words, the Court in the cited case did not discuss the effect of the omnibus application rather, the legality of a single Justice to hear and determine the second prayer concerning leave.

That apart, the forums for the two cases are also distinct in the sense that, in the cited case, both prayers were to be determined by the Court, one sitting as a single Justice and another as a panel of the Court.

But in the matter at hand, though similar prayers, but one was to be determined by a single Justice and the other by the High Court which has exclusive Jurisdiction as per the enabling provision. I am of the opinion that the High Court in this regard is another forum altogether in terms of Jurisdiction and hierarchy.

Although Mr. Gahise also distinguished the two cases arguing that no objection was raised in the case cited by Mr. Kayaga, However, with respect, I do not subscribe to his distinguishing reason as the objection was raised in the course of submissions by the parties' counsel, that is why the Court had the opportunity to address the point as it did.

In his further effort to convince the Court not to strike out the omnibus application, Mr. Kagaya requested the Court to determine one prayer on extension of time which the Court has the jurisdiction to deal with. Without hesitation, I decline the request for a clear reason that; it is not the duty of the Court to pick the grains from the chaff. A party has to be certain of what he/she needs from the Court and the manner of getting the same in terms of forums, instead of lumping together various unrelated prayers and later plead with the Court to pick which is proper and deal with it. To say the least, this is not permitted.

Having found that the two prayers were combined together in one application which procedurally is not permissible, the wanting question is the consequence.

We have stated in in our various decisions that, an omnibus application is incompetent and the only remedy available is to strike it out. [See: **Rutagatina C. L. vs. the Advocates Committee and Clavery Mtindo Ngalapa**, Civil Application No. 98 of 2010, **Ally Ally Mbegu Msilu vs. Juma Pazi Koba (Administrator for the Deceased Estate of the late Hadija Mbegu Msilu**, Civil |Application No. 316 01 of 2021 (both unreported).

I understand that Mr. Kayaga had sought the indulgence of the Court through the invocation of the oxygen principle inviting the Court to proceed with the determination of the first prayer which the single Justice is mandated to deal with instead of striking out the application. The principle has been introduced in our laws by the Written Laws (Misc. Amendments) (No.3) Act, No. 8 of 2018 with a purpose of breathing life to cases which otherwise would have died for technicalities. I asked myself whether the invocation of the oxygen principle is acceptable in the circumstance of the matter at hand. With much respect, the answer is in the negative and the reason is not farfetched: legally, an incompetent

matter is a non-starter and in fact, is equated with a non-existing matter. I thus fail to comprehend how can life be breathed into the matter which does not exist, like the one at hand.

That apart, the overriding objective principle does not apply to defeat the mandatory procedural requirement which in this aspect, demands the filing of two prayers in two separate applications. In fact, courts have been cautioned not to apply the oxygen principle blindly. I am fortified in this stance by the case of **Martin D. Kumalija & 117 Others vs. Iron and Steel Ltd,** Civil Application No. 70/18 of 2018 (unreported) into which the Court tested the applicability of the principle. In that occasion the Court emphasized the need to apply the overriding objective principle without offending clear position of the legal requirement, be it substantive or procedural. The Court among other things had this to say: -

> *"While this principle is a vehicle for attainment of substantive justice, it will not help a party to circumvent the mandatory rules of the Court."*

In another case of **SGS Societe Generale de Surveillance SA and Another vs. VIP Engineering & Marketing Ltd And Another,** Civil Appeal No. 124 of 2017 (unreported) the Court observed as follows when turned down the invitation to invoke the principle:-

"The amendment of Act No. 8 of 2018 was not meant to enable parties to circumvent the mandatory rules of the Court or turn blind to the mandatory provisions of the procedural law which go to the foundation of the case"

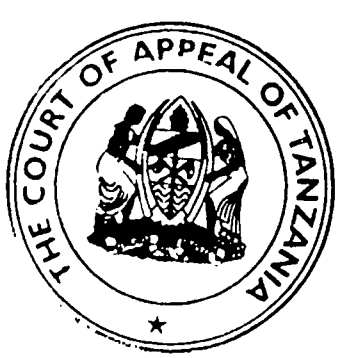
With the same spirit, since the procedural requirement demands for the filing of the prayers in separate applications, the Court cannot permit the circumvention of the said requirement under the pretext of invoking the overriding objective principle. I thus find the invitation is misplaced. In the end, I sustain the preliminary objection and strike out this omnibus application with costs.

It is so ordered.

DATED at **TABORA** this 4th day of October, 2023.

L. G. KAIRO
JUSTICE OF APPEAL

Ruling delivered this 4th day of October, 2023 in the presence of Mr. Kelvin Kayaga, the learned counsel for the Applicants and Mr. Amosi Gahise, the learned counsel for the Respondent, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL