IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

CIVIL APPLICATION NO. 411/4 OF 2017

ALI CHAMANI ..... APPLICANT

VERSUS

1. **KARAGWE DISTRICT COUNCIL**
2. **COLUMBUS PAUL** } **.....RESPONDENTS**

(Application from the decision of the High Court of Tanzania at Bukoba)

(Mjemmas, J.)

dated the 11th day of May, 2011
in
Misc. Civil Application No. 21 of 2009

RULING OF THE COURT

23rd August & 6th September, 2018

MKUYE, J.A.:

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

(a) *extension of time for giving a notice of appeal against the High Court of Tanzania (Mjemmas, J) decision dated on 11/5/2011;*

(b) *extension of time to file an application for leave to appeal to this Court against the High Court of Tanzania (Mjemmas, J.) decision;*

(c) *leave to appeal to the Court of Appeal.*

The application is by way of notice of motion taken under Rule 10 and 45 (b) of the Tanzania Court of Appeal Rules, 2009 (the Rules) and section 47(1) of the Land Disputes Courts Act, Cap 216 R.E 2002 (the LDC Act).

It is supported by an affidavit deponed by the applicant.

The respondent on the other hand, filed an affidavit in reply deponed by Mr. Aaron Kabunga, learned advocate together with a preliminary objection, the Notice of which was filed on 9/8/2018 to the effect that:

(1) The application is irredeemably incurably incompetent and thus unmaintainable before the Court having been lodged as omnibus application.

(2) The application is irredeemably incurably incompetent for failure by the applicant to annex thereto the High Court proceedings from which the ruling and orders intended to be impugned emanate.

(3) The application is incurably incompetent for

failure by the applicant to annex thereto the drawn order of Misc. Civil Application No. 21 of 2009 of which this application is hinged.

(4) *The application is incompetent before the Court for lack of jurisdiction of extension of time in land matters in terms of section 47(1) of the Land Disputes Courts Act, Cap 216 R.E 2002."*

According to the practice of this Court where there is a notice preliminary objection raised in an appeal or application, the Court hears the preliminary objection first before allowing the appeal or application to be heard on merit. Hence, I allowed the preliminary objection to be heard first, before hearing of the application on merit.

At the hearing of the application, the applicant Alli Chamani appeared in person and unrepresented; whereas both respondents had the services of Mr. Aaron Kabunga, learned counsel.

In his submission in support of the 1st point of preliminary objection, Mr. Kabunga contended that the application is omnibus as the applicant has combined three applications among them two relating to extension of time to file a notice of appeal and extension of time to file an application for leave; and the last one relating to the leave to appeal to the Court of Appeal in one application. He pointed out that by bringing all the three applications in one application, he applicant contravened the spirit of Rules 45 – 66 of the Rules which depict a single application. While referring to the case of **Rutagatina C. L. v. The Advocates Committee and another,** Civil Application No. 98 of 2010 (unreported), he argued that the application was incompetent and hence, is liable to be struck out.

As regards to points Nos. 2 and 3 of the preliminary objection, Mr. Kabunga argued that, the application is not annexed with the proceedings and drawn order of the High Court in Civil Application No. 21 of 2009. He said, failure to attach the documents contravened Rule 49(3) of the Rules which requires the application for leave to be accompanied by the copy of decision and drawn order.

As to ground No. 4, Mr. Kabunga argued that, though the applicant has invoked section 47(1) of the LDC Act to move the Court, such provision does not vest jurisdiction to the Court to grant extension of time. He elaborated that, the said provision vests exclusive power to the High Court to grant leave to appeal to the Court of Appeal on land matters only. To bolster his argument, he referred me to the cases of **Masato Manyama v. Lushamba Village Council,** Civil Application No. 3/08 of 2016; and **Juma Ramadhani Mkuna v. Alhaji Hatibu A. Kilango,** Civil Application No. 421/17 of 2016 (CAT) (both reported). For those reasons, he argued that such anomalies were fatal irregularities and they rendered the application incompetent before the Court. He implored the Court to strike out the application with costs.

In reply, the applicant initially intimated his stance to object the preliminary objection. However, after some dialogue with the Court he conceded that the Court was not properly moved. He then made a very interesting prayer that even if the Court finds the application to be incompetent, it should not strike it out and instead it should invoke its revisionary powers and revise some irregularities and illegalities in the lower court's decisions. In this regard he

made reliance on the case of **Samwel Lukira v. Republic,** Criminal Appeal No. 72 of 2014 (unreported).

Mr. Kabunga rejoined by arguing that the case of **Samwel Lukira** (supra) was distinguishable to this case as in that case all proceedings of the lower courts were in the record of appeal unlike in this case which is a mere application. He wondered as to where the Court could access such documents.

I propose to begin with the 1st and 4th points of objection relating to omnibus application which I think they should not detain me much.

After having dispassionately examined the notice of motion and the reliefs sought by the applicant, I agree with Mr. Kabunga together with the applicant's concession that the application is not properly before the Court because of being omnibus. I say so because, it seeks three distinct reliefs which are **one**, extension of time to give a notice of appeal against the High Court decision; **two**, extension of time to file an application for leave to appeal to the Court of Appeal; and **three**, leave to appeal to the Court of Appeal. This application goes contrary to the spirit of Rules 44-66 which govern applications as they each provide for a distinct application according to the type or category of relief sought.

Fortunately, this is not a new invention. When the Court was faced with a situation like the one at hand in the case of **Rutagatina C. L** (supra), it observed as follows:

> *"A close look at the general scheme of the Court Rules, particularly Rules 44-46 appearing under PARTS III, IIIA and IIIB will show that all of them have one common feature. Each one of these rule as and where it is relevant refers to an application. None of them talks of applications. It follows that under the Rules it was never envisaged that an intended applicant would file applications. It is no wonder that Rule 49 prescribes the manner in which a formal application can be presented to the Court. Thus it* occurs *to us that there is no room in the Rules for a party to file two applications in one as happened here"*

In the matter under consideration, none of the provisions which were invoked by the applicant talk of applications, I think, in view of the above position of the law the applicant ought to file separate

applications instead of lumping all of them together in one application as he did because it amounts to omnibus application.

The problem of bringing different applications in one application was not the only shortfall. There is another shortfall which is centred on the manner the applicant moved the Court. In his application the applicant in moving the Court has invoked among other provisions section 47 (1) of the Act which provides for exclusive jurisdiction to the High Court to grant leave to appeal to the Court of Appeal. The said section provides as hereunder:

> *"Any person who is aggrieved by the decision of the High Court in the exercise of its original, revisional or appellate jurisdiction, may with the leave the High Court appeal to the Court of Appeal in accordance with the Appellate Jurisdiction Act,1979".*

Regarding the exclusivity of the jurisdiction of the High Court was reinstated in the case of **Felista John Mwenda v. Elizabeth Lyimo**, (MSH) Civil Application No 9 of 2013 (unreported) when the Court stated as hereunder:

"The Court of Appeal in terms of the clear provisions of section 47 (1) of Cap 216 lacks jurisdiction to entertain the application. (See also ***Paulina Thomas v. Prosper Mutayoba & Another, v.*** *Civil Application No. 77/8/2017 (unreported)."*

Also in the case of **Masato Manyama** (supra) the Court emphasized the same position and it stated as follow:

"... we fully subscribe to the above cited cases...the Court does not have jurisdiction to determine an application for leave to appeal against the decision of the High Court under section 47 (1) of the LDC Act..."

Similarly, in the case of **Juma Ramadhani Mkuna** (supra) the Court stated as hereunder:

" One, under section 47(1) of the LDCA, High Court is vested with exclusive jurisdiction on matters of leave to appeal to the Court. Two, the Court does not have jurisdiction to entertain

an application for leave to appeal against the decision of the High Court under section 47(1) of LDCA..."

In view of the above cited authorities, I am of the view that, the applicant was wrong to predict his application on among other provisions, section 47(1) of the LDC Act because the said provision does not vest the Court with the jurisdiction to entertain an application for leave to appeal against the decision of the High Court on land matters.

This also emphasizes that the applicant has brought an omnibus application and more worse with inclusion of two applications which fall within the domain of a single Justice if correctly made, and another one which fall within the domain of the High Court. I, therefore, find points No.1 and 4 of preliminary to have merit and I sustain them.

Besides that, the applicant has not attached the proceedings and the drawn order of Misc. Civil Application No 21 of 2009 which is sought to be impugned. Rule 49(3) of the Rules requires every application **for leave to appeal** to be accompanied with the decision to be appealed against. This pre-supposes that the application for leave to appeal was properly made before the Court. With regard to the application for extension of time, though it may not be relevant to the matter at hand,

with the wake of the Tanzania Court of Appeal (Amendment) Rules, 2017, GN No 362 of 2017 published on 22nd September, 2017, the applicant applying for extension of time on a second bite would also be required to attach the decision sought to be appealed against or a copy of a drawn order of refusal as per Rule 45 A of the Rules.

In this matter, in view of my finding that application for leave is not within the mandate of this Court, I think, the requirement is not applicable. This makes 2nd and 3rd points of objection to have no merit.

As regards to the applicant's prayer of not striking out the application and instead proceed to revise the irregular proceedings of the lower court, I agree with Mr Kabunga's proposition. I take that stance because in the case of **Samwel Rukuna**(supra) which was relied upon by the applicant, the Court, while relying on the case of the **Director of Public Prosecutions Vs Elizabeth Michael Kimemeta @ Lulu**, Criminal Application No 6 of 2010 (unreported), did not strike out the incompetent application but it proceeded with revising it because it was seized with the record of appeal. The Court in that case was able to detect such irregularity because the record of appeal before it was complete.

In the application at hand, the applicant has only attached the decisions of the District Court of Karagwe and the High Court without more. I think, in such a situation the Court cannot be better placed to detect the alleged irregularities and or illegalities to enable it revise the matter sought to be revised.

At any rate, I think the applicant's prayer may complicate the matter even more. This is because the powers for revision in terms of the provision of section 4(2) and (3) of the Appellate Jurisdiction Act, Cap 141 R.E 2002 are not within the domain of the single Justice but are rather within the domain of the panel of three Justices of Appeal. Hence, for the above reasons, I find that the applicant's prayer is not tenable.

In the final event, I find myself inclined to sustain points Nos. 1 and 4 of the preliminary objection and strike out the application with costs.

DATED at **BUKOBA** this 6th day of September, 2018.

R. K. MKUYE
JUSTICE OF APPEAL

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

E. Y. MKWIZU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL