IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MUSSA, J. A., MWARIJA, J. A., And MWANGESI, J.A.)

CIVIL APPLICATION NO. 14 OF 2016

DR. MILCAH KALONDU MREMA ---------- APPLICANT

VERSUS

T. I. B DEVELOPMENT BANK LIMITED ---------- 1st RESPONDENT

ARUSHA BLOOMS COMPANY LIMITED ---------- 2nd RESPONDENT

(Application from the ruling and order of the High Court of Tanzania at Arusha)

(Dr. Opiyo, J.)

Dated 1st March, 2015

In

Miscellaneous land Application No. 84 of 2015

RULING OF THE COURT

27th Febr. & 8th March 2018

MWANGESI, J. A.:

The applicant herein, was dissatisfied by the decision of the High Court in Land Case No. 79 of 2014, and was desirous to challenge it in this Court. She did lodge an application seeking for leave to appeal under section 47 (1) of the Land Disputes Courts Act, Cap 216 R.E 2002 (**the Land Courts Act**), section 5 (1) (c) of the Appellate Jurisdiction Act, Cap

141 R.E 2002 (**AJA**) and Rule 45 (a) of the Court of Appeal Rules, 2009, (**the Rules).** Nonetheless, on the date when the application for leave was called on for hearing, it was struck out for not being accompanied by the copies of judgment, decree and/or order for which the appeal was being preferred from.

Subsequent to the striking out of the application, the applicant lodged the instant application to this Court for a second bite. The application to this Court is by way of notice of motion made under Rules 45 (b) and 49 (1) of **the Rules** and section 5 (1) (c) of the **AJA**. It is supported by an affidavit of Mr. John Faustin Materu, the applicant's learned counsel. Additionally, the learned counsel lodged written submissions in amplification of the notice of motion in terms of Rule 106 (1), which has on the other hand, been responded to by the first respondent under Rule 106 (8) of **the Rules**. There is no written submission in reply by the second respondent.

When the application was called on for hearing on the 27th day of February, 2018, Mr. John Materu learned counsel entered appearance for the applicant whereas, the appearance of Mr. Omar Iddi Omar also learned

counsel, was in representation of the second respondent. Mr. Omar Iddi Omar did as well inform the Court that, he was holding brief for Professor Gamariel Mgongo Fimbo learned counsel, who was representing the first respondent, with full instructions to proceed.

Before the learned counsel from either side proceeded to unleash their rival arguments on the application, the Court *suo motu* prompted them to address it on the competence of the application, regard being on two aspects; **Firstly**, in view of the wording under section 47 (1) of **the Land Courts Act**, of which, its full citation will be given later, which seemingly, vests exclusive jurisdiction to the High Court, and **secondly**, on the fact that, the application for leave to appeal to this Court which was previously made to the High Court, was struck out for being incompetent.

Incidentally, the competence of application in regard to the second aspect, was noted to have been argued by the first respondent in her written submission in opposition to the application. In that regard, we invited Mr. Materu to address us on the first aspect only after which, he would wait to respond to the submission made by his learned friend Mr.

Omar on the second aspect, which had been argued in the written submission on behalf of the first respondent.

Submitting on the first aspect, Mr. Materu was of the firm view that, the application is properly before the Court. The learned counsel argued that, the application is in compliance with the provisions of Rule 45 (b) of **the Rules**, which provides for a second bite before this Court, where the first application before the High Court is refused. In fortification to his averment, he placed reliance on the decision in the case of **Awinie Mtui and Three Others Vs Stanley Ephata Kimambo,** Civil Application No. 19 of 2014 (unreported).

When he was asked by the Court on whether or not, the wording of section 47 (1) of the **Land Courts Act**, was giving exclusive jurisdiction to the High Court in so far as leave to appeal to this Court is concerned, his response was that, it was not. The learned counsel added that, even though, the provision does not specifically state so, inference has to be drawn from the wording of sub-section 3 of the same section, where it has been provided that, the procedure for appeals to the Court of Appeal under this section, shall be governed by the Court of Appeal Rules.

On his part, Mr. Omar had little to chip in on the issue as to whether or not, this Court enjoys concurrent jurisdiction with the High Court under section 47 (1) of the **Land Courts Act**, in dealing with leave to appeal to the Court. Instead, he confined himself on the second aspect, which had been covered in the written submission in opposition to the application by the first respondent.

The learned counsel argued in his submission that, since the earlier application by the applicant before the High Court was struck out, the effect was as if there had never been an application at all. Under the circumstances, he argued, the filing of the application before this Court has infringed the provision of Rule 47 of **the Rules,** which directs that, where the application may be made either to the High Court, it shall in the first instance be made to the High Court. In reliance to his submission, he referred us to the decision of this Court in **Ital African Transporters Limited Vs Giafar M. Beder** [1992] TLR 251.

In a free advice to his learned friend, Mr. Omar submitted that, the remedy for the applicant after the earlier application had been struck out for want of competence, was to present a fresh proper application before

the same High Court. The learned counsel did therefore, urge us to strike out the application.

In response to the submission by his learned friend on the second aspect, Mr. Materu argued that, the act by the High Court to strike out the applicant's application, was interpreted to mean that, it had refused to grant the sought leave to appeal. According to him, the only available remedy, was to come to this Court for a second bite, which is the import of the provisions of Rule 45 (b) of **the Rules.** He thus reiterated his stance that, the applicant was justified to come to this Court by the application at hand.

The issue for our deliberation and determination, is whether or not, the instant application is properly before this Court. We propose to start with the second aspect in which, we subscribe to what was submitted by the learned counsel for the respondents. Since the earlier application by the applicant for leave to appeal was struck out by the High Court because it was incompetent, as submitted by Mr. Omar, the effect was tantamount to having been no application at all, that was lodged in Court. Under such situation, the act by the applicant to lodge the instant application to this

Court, he skipped the High Court and thereby, contravening the provisions of Rule 47 of **the Rules** which stipulates that:

> *"Whenever application may be made either to the Court or at the High Court, it shall in the first instance be made to the High Court or tribunal as the case may be, but in any criminal matter the Court may in its discretion, on application or of its own motion give leave to appeal or extend the time for the doing of any act, notwithstanding the fact that no application has been made to the High Court."*

This Court (the late Kisanga, J. A), while interpreting the provisions of Rule 44 of the then Court of Appeal Rules, 1979, which is equivalent to the current Rule 47 of **the Rules** in a similar situation as the one under discussion in **Ital African Transporters Limited Vs Giafar M. Beder** (supra) did state that:

> *"The application is not properly before the Court because it contravenes the provisions of Rule 44 of the Court of Appeal Rules, 1979 requiring such application to be made to the High Court first, the applicant must first make a valid application to the*

High Court before knocking on the door of the Court of Appeal; in this case no valid application had been made to the High Court in the first instance."

The foregoing position notwithstanding, it is also noted that, the leave being sought by the applicant in the application, is for appealing against a decision concerning a land matter, of which its application ought to be made under the provisions of section 47 (1) of the **Land Courts Act.** This constitutes the first aspect of the point of law raised by the Court.

The provisions of section 47 (1) of the **Land Courts Act,** which governs the procedure for appealing against land matters from the decision of the High Court, bears the following wording:

"47. Appeal from the High Court.

(1) *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 of the High Court,*** *appeal to the Court of Appeal in accordance with the Appellate Jurisdiction Act."*

[Emphasis supplied]

The question that arises from the wording of the provision quoted above, is as to whether or not, it can be construed to vest jurisdiction in the Court of Appeal to deal with leave for appealing against a decision made by the High Court. In moving us to answer the question in the affirmative, Mr. Materu referred us to the decision in the case of **Awinie Mtui and Three Others Vs Stanley Ephata Kimambo** (supra). When the learned counsel was asked by the Court as to whether in the said case, the issue of jurisdiction of this Court under the provisions of section 47 (1) of the **Land Courts Act** was raised, his answer was in the negative.

The question of jurisdiction of this Court under the provisions of section 47 (1) of the **Land Courts Act,** has been put clear by the Court in a number of decisions including the case of **Felista John Mwenda Vs Elizabeth Lyimo,** Civil Application No. 9 of 2013 (unreported). In that case, the applicant moved the Court of Appeal to entertain an application for leave under section 47 (1) of **the Land Courts Act** after his first application before the High Court was refused. The Court stated that:

"The Court of Appeal, in terms of the clear provisions of section 47 (1) of Cap. 216, lacks jurisdiction to entertain the application."

In yet another case of **Nuru Omary Ligalwike Vs Kipwele Ndunguru,** Civil Application No. 42 of 2015 (unreported), where the applicant had preferred her application for leave to appeal to this Court under section 5 (1) (c) of **AJA,** the Court held in its ruling that:

*"It is quite apparent that, the applicant believes the phrase – **'leave of the High Court or the Court of Appeal'**, gives an applicant choice of forum to apply for leave to appeal from the decision of the High Court sitting as a 'Land Court' under the Land Courts Act. With respect that is not. The applicant should not have come to this Court to seek leave by way of section 5 (1) (c) of the AJA because section 47 (1) of the Land Courts Act, exclusively vests that jurisdiction on the High Court."*

The foregoing stance has further been maintained by the Court in **Elizabeth Losujaki Vs Agnes John Losujaki and Another,** Civil Application No. 99 of 2016, and **Tumsifu Anasi Maresi Vs Luhende**

Jumanne Selemani and National Microfinance Bank Limited, Civil Application No. 184/11 of 2017 (both unreported).

Guided by the above named decisions, we hold that the application before us is improper. We accordingly strike it out. And the fact that, the point was raised by the Court *suo motu*, we make no order as to costs.

Order accordingly.

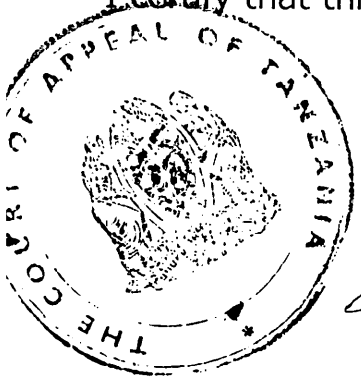
DATED at **ARUSHA** this 7th day of March, 2018.

K. M. MUSSA
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

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



E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL