

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT SUMBAWANGA

MISC. LAND APPLICATION NO. 17 OF 2019

***(Original Land Application No. 26/2011 District Land and Housing
Tribunal Rukwa)***

KHALFAN SEBA KAKULI APPLICANT

VERSUS

NASRA KHALID HAMED RESPONDENT

RULING

W.R. MASHAURI

28/04/2020 & 28/05/2020

In this application, the applicant is seeking leave for appealing to the Court of Appeal against the decision and order of the court in Miscellaneous Land Application No. 07/2019. However, in so doing, the respondent herein submitted preliminary objection basing on two points as follows;

1. That, the application is hopelessly statutory time barred.
2. That, the purported application suffers improper and or non-citation of enabling provision of the law hence this court has no jurisdiction to grant orders sought in chamber summons.

During the hearing of this Preliminary Objection, the applicant was represented by Mr. Baltazar S. Chambi, learned advocate, meanwhile the respondent was represented by Mr. Deogratius P. Sanga, learned advocate, and both parties settled on exchanging blows on this Preliminary Objection by way of written submissions, which was undoubtedly granted by this court.

In his submission in support of this Preliminary Objection, the counsel for the respondent argued that under Rule 45 (a) of the Tanzania Court of Appeal Rules, 2009 as amended under Rule 6 of the Tanzania Court of Appeal (Amendments) Rules, 2017 is clear as white as snow that where an appeal lies with the leave of the High Court like the case at hand, an application for leave is supposed to be lodged within thirty (30) days from the date of decision.

Mr. Sanga, counsel for the respondent continued arguing that the applicant's application is time barred as he stayed reluctant until lapse of four months from the date of delivery of judgement which was delivered on 24th day of January, 2019. As he discovered that he was out of statutory time to file application for leave as required by law so that he would be allowed to appeal to the court of appeal, on 23rd day of May, 2019 the applicant filed an incompetent application for extension of time to file leave to appeal to the court of appeal.

However, the applicant noticed that his application is incompetent for non-citation of the proper provision of the law, on 24th day of June, 2019 the applicant moved this court with a prayer to amend his application or and in alternative the court to struck out the said application with leave to re-file a proper application. Mr. Sanga submitted that, to reasons best known to the

applicant, on 8th day of July, 2019 he did not re-file **an application for extension of time to file leave** but he filed WITHOUT LEAVE the **application for leave to appeal**. To him (Mr. Sanga) believes this to be great procedural evil which has not only defiant this court's order dated 24th June, 2019 but also an application which is hopelessly time barred as it was filed beyond 30 days from the date of the judgement as there has never been an order for leave to appeal the same out of statutory time since the previous application for extension of time was not heard in merit been struck out by this court. Concluding in his first point for the Preliminary Objection, Mr. Sanga argued that both previous applications by the applicant were statutory time barred, be it that of 23rd May, 2019 or that of 08th July, 2019 for they were both preferred in contravention of rule 45 (a) of the Tanzania Court of Appeal Rules, 2009 as amended under rule 6 of the Tanzania Court of Appeal (Amendments) Rules, 2017. That being the case the only remedy for an application which is time barred under the dictates of section 3 (1) of the Law of Limitation Act, 1971 Cap 89 (R.E 2002) is an order for dismissal NOT struck out and thus he urges this temple of justice to proceed and dismiss this application.

Arguing for the second point of the Preliminary Objection, Mr. Sanga submitted that this application suffers improper and or non-citation of enabling provision of the law hence this court has no jurisdiction to grant orders sought in chamber summons. He argued that, assuming the application was competent still the court has no jurisdiction to grant the orders sought since the applicant pegged his application under Section 47 (1) of the Land Dispute Court Act Cap 216 which is quite inapplicable for leave.

Mr. Sanga continued by submitting that it should be remembered the said section 47 (1) was deleted and amended by section 9 of the Written Laws Miscellaneous Amendments Act No. 8 of 2018 and under the particular amendment the enabling provision is Section 47 (2) of the Act and Section 47 (1) of the Act as cited. He (Mr. Sanga) believed the court was not properly moved, and argued failure to cite specific subsection cannot move the court to grant the prayer sought hence the court lacks jurisdiction and thus renders the application fatally defective and for this fact the learned counsel for the respondent cited the case of **EDWARD BACHWA & OTHERS vs. ATTORNEY GENERAL & ANOTHER Civil Application No. 128 of 2006 CAT Dar Es Salaam**, (Unreported) at page 7 and 8 which stated that;

"Wrong citation of the law, section subsection or and paragraph of the law or non-citation of the law will not move the court to do what is asked and renders the application incompetent."

Mr. Sanga conclusively insisted that, the counsel for the applicant did not cite Section 47 (2) of the Act, which he believes to amount to non-citation and in the very premises the only reward to such application is an order for dismissal.

In reply to the submission made by the counsel for the respondent, Mr. Chambi, counsel for the applicant submitted that they do not agree with the submission of Mr. Sanga that their application is time barred. He submitted that, the court order to re-file was given on 24/06/2019 requiring them to do so within 21 days of the particular order. On 9/07/2019 they presented the application to the court, only 13 days to time from the order, so he believes they were well within time.

On the Second point that they brought their application under improper or non-citation, Mr. Chambi submitted that his camp does not agree to this. He submitted that their application was properly brought to court citing the provisions required which are Sections 47 (1) of the Land Disputes Court Act Cap 216 as amended by Section 9 of the Written Laws (Miscellaneous Amendment) Act No. 3 of 2018. Mr. Chambi submitted that, this Section 9 amends Section 47(1) of the Land Disputes Court Act Ca 216 by deleting it and substituting for the same subsection (1) and adding thereto subsection (2) which carter for leave to appeal. Therefore, in their application they have clearly stated that the application brought to this court is made under the provision of section 47 (1) of the Land Disputes Court Act, not as before its amendment but as it is now after amendment No.3 of 2018 in its Section 9. Mr. Chambi concluded by submitting that, Section 47 (1) of the stated law to be read by excluding the provision of it before the amendment No. 3 of 2018 and not to contain the latter provisions which will read to include subsection (2) which was added thereon, and to him this is the proper comprehension of their citation thus one cannot find anything faulting in their citation.

In rejoinder submission made by the counsel for the respondent, Mr. Sanga, submitted by insisting that the applicant filed a new application **(application for leave to appeal to the court of appeal)** which is quite different from what was ordered to be filed by this court, as it was earlier that the applicant filed an incompetent application for extension of time as a result it was struck out with leave to be re-filed, but the applicant acted on the contrary to the order of re-filing a competent application for extension of

time to file leave for appealing instead he filed an application for leave to appeal which is different from the incompetent application that was struck out.

On their side, Mr. Sanga submitted that a question to ask is whether what was granted by this court in its order dated 24th June, 2019 was leave to refile the struck-out application or an extension of time for the applicant to file leave to appeal to the court of appeal. In their observation what was granted was leave to re-file the application and not extension of time and therefore the applicant was suppose to file a competent application for extension of time and an application for leave as he did. He continued by submitting that in avoiding confusion, the time they were referring is not the 21 days granted by the court for the applicant to re-file his competent application rather it is the time prescribed in law within which an application for leave to appeal to the court of appeal should be made to the High Court to wit; 30 days from the date the judgement of the High Court subject to such an application was made.

Conclusively, Mr. Sanga submitted by quoting the tenable provision he believed the applicant's camp would have used in their application which was section 47 (2) of the Land Disputes Courts Act, Cap 216 since it is the one which provides for leave and supposed to be used as enabling provision in application for leave.

After keenly reading the submissions from both camps, I realized that determining the issue of time in the applicant's application would be enough to settle this Preliminary Objection, and that being said I may not need to waste time in discussing the second point raised by the respondent's camp.

This matter concerns land, no wonder it is in the High Court (Land Division) and it was registered as Miscellaneous Land Case No. 17 of 2019. It is bright as a broad day light that a party who is aggrieved by the decision of the High Court (Land Division) arising from any land matter is entitled to appeal to the Court Appeal with leave from the same High Court. This is provided under Section 47(1) of the Land Disputes Courts Act Cap 216, later on referred to as the Act, which reads: -

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

The above provision was before the section was amended by Section 9 of the Written Laws (Miscellaneous Amendment) Act No. 3 of 2018 as stipulated in full as follows herein;

"The principal Act is amended in section 47, by-

(a) deleting subsection (1) and substituting for it the following:

(1) A person who is aggrieved by the decision of the High Court in the exercise of its original jurisdiction may appeal to the Court of Appeal in accordance with the provisions of the Appellate Jurisdiction Act.

(b) adding immediately after subsection (1) the following:

*(2) A person who is aggrieved by the decision of the High Court in the exercise of its revisional or appellate jurisdiction may, **with leave of the High Court or Court of Appeal**, appeal to the Court of Appeal."*

The word "may" here is to be construed as an option to any person to the case who wish to appeal. If an aggrieved person opts to appeal to the Court of Appeal, he must seek and obtain leave of the High Court. This view was also the stand in the Court of Appeal case of **BENJAMIN MANOTA & OTHERS v. GEITA GOLD MINE LTD & OTHERS Civil Appeal No. 44 of 2015 CAT Mwanza** (Unreported).

In addition to the above elaboration, the said leave to appeal to the court of appeal is provided under Rule 45 (a) of the Tanzania Court of Appeal Rules, 2009 as amended under Rule 6 of the Tanzania Court of Appeal (Amendments) Rules, 2017 to be thirty (30) days from the day of the decision.

In his affidavit, at paragraph 3 Mr. Chambi, learned counsel for the applicant swore to this court that immediately after delivery of the judgement of an earlier suit which he also represented the applicant, they expressed the intention of appealing against the particular judgement to the Court of Appeal by notice dated 01/02/2019 serving the respondent with a copy. He also swore, at paragraph 4 that on 23/05/2019 he presented to this court an application No. 07/2019 seeking leave to file an appeal to the Court of Appeal of Tanzania as required by the law, the application which was struck out on 24/06/2019 by this court with leave to file the same afresh, hence the current application.

However, in so doing the learned counsel for the applicant has not shown anywhere in the records that, after notifying this court of their intention to appeal to the court of appeal, he did file the application for leave within the statutory time which is thirty (30) days as discussed above. It is well understood that, filing an intention to appeal does not suffice to file the application for leave to appeal to the Court of Appeal out of statutory period not if unless the extension of time has been sought and granted. As per the submission made by Mr. Chambi, after filing a notice to appeal on 01/02/2019, he was supposed to file the application for leave to appeal to the Court of Appeal on or before 23rd February, 2019, to my disappointment he did not. The importance of statutory time limitation was discussed in the case of **MUSTAFA ATHUMANI NYONI v. ISSA ATHUMANI Civil Appeal No. 351/17 of 2018 [2019] TZCA 250** as herein;

"It is well established that the underlying policy rationale for periods of limitation, statutory or elementary such as Rule 45(b) include that of diligence in the speedy determination of disputes with a reasonable, rather than an unreasonable or inordinate length of time; of fairness to the opposing party who is not to be the subject of an indefinite threat of being dragged into Court undetermined dates by an applicant who does not pursue his or her remedies timely; interminably and at promoting certainly in the rights and title of preventing the potential loss of evidence, oral or document and of public interest in the timely resolution of disputes. "The diligence rationale is that one expects an applicant to act diligently and not to "sleep over their rights".

In this case at hand, the underlying policy was Rule 45(a) of the Tanzania Court of Appeal Rules, 2009 as amended under Rule 6 of the Tanzania Court of Appeal (Amendments) Rules, 2017. To that Rule, it is my understanding by the reading of it that an applicant who fails to meet the time prescribed there-under is not without a remedy. However, such slip-up could be corrected, because the access to do so is widely open for any belated extension of time and on a showing of good cause.

Now since in this case at hand, there was no any application for extension of time sought and granted, I therefore sustain the Preliminary Objection on the first ground, and find no utility to discuss the second ground. As a result, this application has no legs to stand on and to that effect it is hereby dismissed.

I make no order as to costs.

It is accordingly ordered.




W. R. MASHAURI

JUDGE

28/05/2019

- Date - 28/5/2020

Coram - Hon. W.M. Mutaki - DR

For Applicant - Absent
Applicant

For Respondent - Mr. Sanga – Advocate & holding brief for Mr.
Chambi for Applicant
Respondent present

B/C - Zuhura

Court:

Ruling delivered in present of Mr. Sanga Advocate for Respondent and holding brief Mr. Chambi for Applicant.

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W.M. MUTAKI
DEPUTY REGISTER
28/5/2020