IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

Misc. Civil Application No. 04 of 2020

(Originate from the Appl. For Execution No. 13 of 2010 in the District Land and Housing Tribunal for Arusha at Arusha)

KHADIJA MOHAMED.....APPLICANT

VERSUS

SHARUBANO OMARI.....RESPONDENT

RULING

09/07/2020 & 25/08/2020

GWAE, J

Before this court, is an application for extension of time brought by the applicant under section 14 (1) of the Law of Limitation Act Cap 89 R.E 2002. The applicant is seeking for an order to extend time to enable him to file an application for revision out of time.

The applicant's chamber summons is accompanied by a an affidavit of Mr. Reginald Rogati Lasway, the applicant's advocate whose affidavit is to the effect that the delay to file revision was as a result of the applicant prosecuting her cases in wrong courts until when Hon. Mwenempazi, J in the course of delivering the judgment in Land Appeal No. 49 of 2018 advised the applicant to pursue her matter through filing a revision to the High court.

The respondent, through his counter affidavit, strongly refuted what the applicant has stated in his affidavit and by stating that the applicant has not demonstrated any sufficient reason for delay and the application before this court is without any basis and is unfounded in the fact and law. Further to that, the respondent also stated that the applicant cannot act on the advice given by the respondent, which she is aggrieved with and has exhibited his grievances by filing a notice of appeal to appeal to the Court of Appeal.

For the purpose of this application I find it relevant to give brief facts which have prompted this application. From the records it appears that the respondent herein had filed a land case before the Nduruma Ward Tribunal against the applicant claiming a piece of land on Plot No. 7 Block 2 located at Nduruma area in Arusha Region vide Application No. 2 OF 2009. The judgment of the Ward Tribunal was entered in favour of the respondent who eventually filed an application for execution (Application NO. 13 of 2010). The applicant was however aggrieved by the way the execution was carried out by the court broker. She alleges that the court broker had handed over to the respondent another land (Plot No.9 Block 2) contrary to what was stated in the decision of the Ward Tribunal. (Bad enough, the copy of the decision from Nduruma Ward Tribunal has not been attached to this application).

Aggrieved by the execution process the applicant decided to file a fresh suit in the District Land and Housing Tribunal through Land Application No. 67 of 2011 the application which was dismissed for being Res judicata. Again the applicant was dissatisfied with the decision of the

District Land and Housing Tribunal (DLHT) dated 6th December 2016. He appealed to the High Court where the court upheld the decision of the DLHT that the matter was Res judicata. In addition to that the Hon. Judge advised the applicant to file revision if she is dissatisfied with the action of the court broker. Acting on the advice given above, the applicant has now filed this application for extension of time to enable her to file the revision.

This application was disposed of by way of written submissions and parties enjoyed good legal services from the following advocates namely; **Mr. Reginald Rogati Lasway** and **Mr. Gwakisa Kakusulo Sambo** respectively.

In support of her application, the applicant was guided by the principles enunciated in the case of Alliance Insurance Corporation vs. Arusha Art Limited Civil Application No. 512/2 of 2016 quoting the case of Lyamuya Construction Company Ltd vs. Board of Registered Trustee of Young Women's Christian of Tanzania, Civil Application No. 2 of 2010 (unreported).

On the first principle that the applicant must account for all the period of delay, the applicant submitted that, the applicant has spent almost nine (9) years in court prosecuting cases in wrong channel thus the delay by the applicant is not an actual delay but rather a technical delay. To cement his argument the applicant's advocate cited the judicial precedents in **Fortunatus Masha v. William Shija and Another** [1997] TLR 154 and **Zahara Kitindi and Dominic B. Francis vs. Juma**

Swalehe and 9 others Civil Appeal 4/05/2017 (unreported-CAT) at Arusha.

On the second principle that the delay should not be inordinate the applicant submitted that indeed the delay was excessive but reasonable since the applicant has spent a lot of time in prosecuting her cases in wrong channels until when she was advised to follow a proper channel.

As to the third principle, that the applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action that he intend to take, the applicant submitted that the applicant has showed high level of diligence even when she was prosecuting her cases in wrong channels she has been timely filing them and even the present application has been filed promptly after the delivery of the judgment by the High Court.

Regarding to the fourth principle of illegality, the applicant stated that there are points of law which needs the attention of this court as the execution was wrongly done by the court broker as he handed over another piece of land to the respondent different from what was ordered in the Ward Tribunal.

In response, the respondent first prayed for adoption of her counter affidavit and went on submitting that, the actual remedy which was available for the applicant was to file review or complaint to the same tribunal which appointed the court broker if he has acted contrary to the directions of the court and not to file revision because it is not the tribunal which did not abide to the order but the court broker.

The respondent further submitted that, the applicant has failed to meet the conditions for extension of time as demonstrated in the case of **Lyamuya**(supra) in the following manner;

First, the applicant has not accounted for the days of delay from when this matter was filed in the ward tribunal to when the present application was filed, i.e (3/5/2011 to 14/1/2020) which is a total of nearly 9 years and six months. And if at all the applicant has acted on the advice given by Hon. Mwenempazi, J yet she has not given an account of delay of **38** days being the days when the judgment was delivered by Hon. Mwenempazi to the time this application was filed. In addition to that, the respondent was of the view that if the applicant has acted on the advice given by Hon. Mwenempazi, J of filing a revision, why the applicant filed a notice of appeal to the Court of Appeal against the decision of Hon. Mwenempazi, J. According to the respondent the applicant is trying to ride on two horses at the same time.

The respondent further submitted that there was no technical delay as alleged by the applicant, as the documents were properly filed and also there is no any demonstrated illegality by the applicant citing the case of **Ngao Godwin Losero vs. Julius Mwarabu,** Civil Application No. 10 of 2015, (Unreported) where an applicant who alleges illegality in applications for extension of time the illegality must be apparent on the face of the record, not one that would be discovered by a long drawn argument or process.

In his short rejoinder, the applicant stated that on the issue of the presence of a notice to appeal to the Court of Appeal is not true and there is no proof to that effect. And even if the applicant had filed a notice of appeal, it constitutes a mere intention to appeal and not the actual appeal adding that, the notice has automatically been withdrawn for failure to file an appeal within 60 days as per Rule 91 (a) of the Court of Appeal Rules, 2009.

Also on the issue of account of 38 days of delay, the counsel for the applicant argued that, by the time the judgment was delivered the trial Judge had already been transferred to another working station and the judgment was delivered by the Deputy Registrar. Therefore it became difficult to obtain certified copies of the judgment on time. On top of that the learned counsel went on arguing that by the time the judgment was delivered it was during court vacation period.

I have dispassionately considered this application together with the parties' rival submissions and I find it apposite to start by addressing on the notice that is said to be filed in the Court of Appeal. Going by the records, this issue was raised by the respondent in the counter affidavit however the said notice was not attached thereto as rightly argued by the applicant's counsel. In rejoinder the applicant's counsel refuted on the presence of such notice as there was no any proof on that. Further to that, the counsel went on saying that even if the applicant had filed the said notice it became withdrawn after the lapse of 60 days as per Rule 91 (a) of the Tanzania Court of Appeal Rules.

Since it is quite unclear from the records and through the parties' pleadings whether the applicant had filed the notice of appeal to appeal to the Court of Appeal, the applicant's counsel was thus required by this court to address it on the said notice of appeal. The counsel told this court that it is true as asserted by the counsel for the respondent that they filed the notice of appeal immediately after delivery of the judgment by Hon. Mwenempazi, J however he contended that, the same is deemed to have been withdrawn as per rule 91 (a) of the Tanzania Court of Appeal Rules, 2009.

In determining this issue I will be guided by the recent decision of the Court of Appeal in the case of **Serenity on the Lake Ltd vs. Dorcus Martin Nyanda,** Civil Revision No. 1 of 2019 CAT Mwanza (Unreported) in which the following cases were cited with approval; In the case of **Tanzania Electric Supply Company Limited vs. Dowans Holdings S.A. (Costa Rica) and Dowans Tanzania Limited (Tanzania),** Civil Application No. 142 of 2012 the Court of Appeal stated that;

> 'It is settled in our jurisprudence, which is not disputed by the counsel for the applicant, that the lodging of a notice of appeal in this Court against an appealable decree or order of the High Court commences proceedings in the Court. We are equally convinced that it has long been established law that once a notice of appeal has been duly lodged, the High Court ceases to have jurisdiction over the matter".

From the above decision, I am settled in mind that as the purpose of a notice of appeal is to initiate the appeal process to the Court of Appeal, it follows that, the notice of appeal that was filed by the applicant ousted the

jurisdiction of this court to entertain the matter including this application. Having realized that there is a notice of appeal lodged and in line with the above decisions I think the proper procedure is to pave way for the appeal process to proceed and if at all the applicant is no more interested in appealing then she should follow proper procedures as per rule 89 (1) of the Court of Appeal Rules. If at all this court entertains this matter any order from it will have no backing of the law and therefore illegal. In the case of **Ramadhani Maabadi and another vs. Maka Serafini**, Civil Application (unreported), the court Appeal had these to say;

> "The notice of appeal becomes purposeless and lifeless. unless its existence is extended , it must be deemed to be withdrawn It has no business remaining in the registry, the court has a duty to flush it out regardless of how its existence comes to its notice, this because this court is a court of justice and not of the parties.....
>
> Since the respondent has lodged a notice of appeal on 2/6/2014 no essential steps have been taken in the proceedings with a view to instituting the appeal. This is almost two years. The said notice has outlived its usefulness and can no longer be left to remain in the register of civil appeals.....In terms of Rule 91 (a) of the Rules, we order that the said notice of appeal be deemed to have been withdrawn upon the expiry of the prescribed period of sixty days after lodging the notice of appeal".

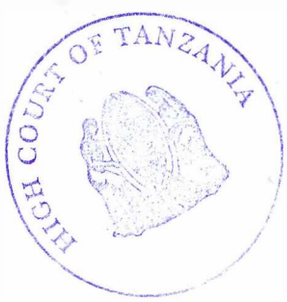
In the case cited above, it was the applicants(judgment holder) of the decision of this court's decision desired to be appealed and it was the applicants who lodged a motion to have the notice of appeal filed by the respondent withdrawn under Rule 89 of the Court of Appeal Rules, 2009 whereas in the instant application the notice of appeal was filed by the

applicants and not by the respondent. I think in this situation, while I am agreeing with and adhering to the principle enunciated above, the proper procedure for the applicants was to either formally give notice the Court of Appeal of their intention to withdraw the notice before lodging this application or any other procedural mode to first have the notice of appeal withdrawn.

It is always advisable that, a litigant cannot run two horses at a time. The applicants were to ensure that the notice of appeal that they duly filed to the Court of Appeal is withdrawn first and thereafter they could lodge this application. Hence the authority cited and position laid down in the case of Maabadi's case supra), to my view is distinguishable from the present application. This applicant is therefore incompetent and it amounts to abuse of court process.

That being told and discussed, this court therefore lacks jurisdiction to entertain this matter, and therefore I find no need to waste the court's precious time discussing on the merit of the application. Accordingly, this application is dismissed in it's entirely with costs.

It is so ordered.



M.R.GWAE
JUDGE
26/08/2020