IN THE HIGH COURT OF TANZANIA

(IN THE DISTRICT REGISTRY OF MWANZA)

AT MWANZA

MISC. LAND APPLICATION NO. 68 OF 2020

EMMANUEL MAKAMBA ..... APPLICANT

VERSUS

BODI YA WADHAMINI JIMBO KUU MWANZA ..... RESPONDENT

RULING

23rd, & 30th October, 2020

ISMAIL, J.

This is a ruling on preliminary objections, taken at the instance of the respondent, to the effect that the instant application suffers from a couple of defects. The alleged defects are to the effect that:

1. *That the Court is not properly moved to grant the prayers sought due to non-citation of the specific provision of the Land Disputes Courts Act, Cap. 216 R.E. 2019; and*
2. *That the application is hopelessly time barred.*

The application which is under the cosh has been preferred under the provisions of section 47 (2) of the Courts (Land Disputes Settlements) Act,

Cap. 216 R.E. 2019, and it seeks to move the Court to certify that there is a point of law that is of sufficient importance to warrant consideration of the Court of Appeal of Tanzania by way of appeal. The impending appeal seeks to impugn the decision of the Court (Hon. Tiganga, J.), delivered on 05th May, 2020, dismissing the appeal that was preferred by the applicant, against the decision of the District Land and Housing Tribunal for Mwanza at Mwanza.

When the matter came up for hearing on 23rd October, 2020, the applicant was represented by Mr. Mathias Mashauri, learned counsel, while Mr. Innocent Kisigiro, learned advocate appeared for the respondent.

Submitting in respect of the first ground of objection, Mr. Kisigiro argued that section 47 (2) of Cap. 216 cited as an enabling provision is not proper for granting the relief sought. The learned counsel argued that pursuant to an amendment introduced in 2017, the relevant provision for seeking a certification on a point of law is section 47 (3), which deals with certification on a point of law for matters which originate from the Ward Tribunal. Mr. Kisigiro further contended that it would be different if sub-sections 2 and 3 had been cited together, as the Court would easily ignore the irrelevant provision and proceed on the basis of the relevant provision.

Owing to this anomaly, the learned counsel prayed that the application be struck out with costs.

With respect to the second ground of objection, the learned counsel contended that, in terms of Rule 44 (1) (b) of the Court of Appeal Rules, GN. No. 368 of 2009 (as amended), an application such as this one is to be filed within 14 days from the date on which the decision sought to be appealed is delivered. He contended further that Rules 49 and 50 are to the effect that time can be excluded automatically if there is a document to be attached and that the same is yet to be furnished. Noting that the impugned decision was delivered on 5th May 2020, the instant application was late by 67 days to the date when the same was filed *i.e.* 13th July, 2020. Mr. Kisigiro further argued that, in the absence of any extension of time, the instant application is time barred. He prayed that the same be dismissed with costs.

Submitting in rebuttal of the first ground of objection, Mr. Mashauri argued that the provision used is appropriate. He contended that section 47 (2) of Cap. 216 has not undergone any amendments and it reads as it is now, and it is enough to move the Court to grant the application. With respect to sub-section 3, Mr. Mashauri argued that the said provision is not

an enabling provision. He submitted that the objection is devoid of any merit.

With respect to the 2nd ground, Mr. Mashauri contended that the application is timeous because the time frame set out for that matter is thirty days from the date of the decision. The learned counsel submitted that, whereas the impugned decision was delivered on 5th May, 2020, and a copy thereof was served on the applicant on 18th June, 2020, the instant application was filed in Court on 13th July, 2020. Mr. Mashauri submitted that the law has since changed and the position, as it currently obtains, is that, where the judgment is delivered to a party belatedly, time spent on following up the decision is excluded. This is in terms of section 19 (2) of the Law of Limitation Act, Cap. 89 R.E. 2019, which provides for an automatic exclusion where the applicant has made initiatives but the court has delayed in furnishing a copy of the decision. The learned counsel recounted the applicant's actions by submitting that he requested for a copy of the judgment and proceedings which were furnished to him on 18th June, 2020, the same day the Deputy Registrar informed him of the readiness of the said decision. To fortify his view, he cited the decisions of the Court of Appeal of Tanzania in ***Juma Omary & 6 Others v. The***

Director, Mwanza Fishing Industry, CAT-Civil Application No. 14 of 2014 (unreported); and ***The Registered Trustees of the Marian Faith Healing Centre @ Wanamaombi v. The Registered Trustees of the Catholic Church Sumbawanga Diocese***, CAT-Civil Appeal No. 64 of 2006 (unreported). Mr. Mashauri argued that, taking a cue from the cited decisions, the instant application is timeous as it was filed 25 days after the copies of the judgment, decree and the proceedings had been furnished. He urged the Court to overrule the objection and hold that the application is perfectly in order.

In his rejoinder submission, Mr. Kisigiro reiterated what he submitted in chief. He maintained that under the revised edition of Cap. 216, the relevant enabling provision is section 47 (3) of Cap. 216 and not otherwise.

With respect to the second ground, he argued that no exclusion can be accorded to the time during which the applicant was chasing copies of the judgment and decree. The learned counsel argued that Cap. 89 does not apply to matters which are referred to the Court of Appeal, meaning that the cited cases are distinguishable. Mr. Kisigiro further argued that documents which were awaited were not necessary in the preference of

the instant application. He reiterated his rallying call that the application is time barred and it ought to be dismissed with costs.

Let me tackle this matter in the order in which the grounds were presented. With respect to propriety of the provision under which the application is preferred, the contention by the respondent's counsel is that sub-section 3 is the appropriate enabling provision and not sub-section 2 cited by the applicant. The applicant holds the view there is nothing irregular in this respect. I subscribe to the view held by Mr. Kisigiro. Following the amendment effected to the Cap. 216 by Act No. 8 of 2018, applications for certificates on a point of law are now governed by section 47 (3) of Cap. 2016 which states as follows:

> *"Where an appeal to the Court of Appeal originates from the Ward Tribunal, the appellant shall be required to seek for the Certificate from the High Court certifying that there is a point of law involved in the appeal."*

This is unlike sub-section 2 which deals with applications for leave for appeals against decisions of the Court in exercise of revisional or appellate jurisdiction. By preferring the present application under sub-section 2, the applicant moved this Court through a wrong provision of the law. Having

cleared the first part of this ground, the second part involves determining the resultant consequence of the applicant's erroneous conduct. Whereas the applicant argues that this error is trifling and curable by invoking the principle of overriding objective, enshrined in section 3A of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019 (as amended by Act (No. 3) No. 8 of 2018), the respondent's contention is that this an incurable defect that renders the application liable to striking out.

Let me underscore the legal position in this respect. It is to the effect that non-citation or wrong citation of the enabling provisions of the law renders the application incompetent. This enduring position has been stressed in numerous decisions of this Court and the Court of Appeal of Tanzania, some of which are: ***Robert Leskar v. Shibesh Abebe***, CAT-Civil Application No. 4 of 2006; ***Hussein Mgonja v. The Trustees of the Tanzania Episcopal Conference***, CAT-Civil Revision No. 2 of 2002 (AR); ***Anthony Tesha v. Anita Tesha***, CAT-Civil Appeal No. 10 of 2003; ***Fabian Akonaay v. Matias Dawite***, CAT-Civil Application No. 11 of 2003; ***Aloyce Mselle v. The N.B.C. Consolidated Holding Corporation***, CAT-Civil Application No. 11 of 2002 (all unreported); and

China Henan International Cooperation Group v. Salvand K.A. Rwegasira [2006] TLR 220.

In ***Robert Leskar v. Shibesh Abebe*** (supra) the learned upper Bench made the following splendid observation:

> *"It is equally settled law that non citation of the relevant provisions in the notice of motion renders the proceeding incompetent."*

The quoted excerpt set the tone for the subsequent decision of the Court of Appeal in ***Hussein Mgonja v. T.E.C.*** (supra), in which the application was struck out on the ground of incompetence for "failure to move the Court properly". The superior Court held as follows:

> *"If a party cites the wrong provision of the law the matter becomes incompetent as the Court will not have been properly moved".*

A more comprehensive position in this regard was stated by the full bench of the Court of Appeal of Tanzania in ***China Henan v. Salvand K.A. Rwegasira*** (supra). The superior Court took the view that such failure constitutes *"a fundamental matter which goes to the root of the matter ..... Once the application is based on wrong legal foundation, it is*

bound to collapse". Underscoring that the magnitude of the error, the learned Bench held:

> *".... worse still the error in citing a wrong and inapplicable rule in support of the application is not in our view, a technicality falling within the scope and purview of Article 107A (2) (e) of the Constitution. It is a matter which goes to the very root of the matter ...."*

Inspired by the reasoning in the ***Rwegasira case***, I hold the view that the applicant's misstep in this matter is not an error which may be considered to be a mere technicality which can be cured by the overriding objective as Mr. Mashauri would want me to believe. It is far mightier than that, and the obvious consequence is to render the application incompetent. I hold that the objection on wrong citation of the enabling provision is meritorious and I sustain it.

While this ground of objection is enough to dispose of this application, I feel constrained to say a word or two about the respondent's second limb of the objection. As highlighted above, the contention by the respondent's counsel that the application is time barred has been shrugged off by the applicant's counsel. The latter holds the view that, having applied section 19 (2) of Cap. 89, the application is timeous.

Let me begin by reproducing the substance of section 19 (2) which provides as follows:

> *"In computing the period of limitation prescribed* ***for an appeal, an application for leave to appeal, or an application for review of judgment****, the day on which the judgment complained of was delivered, and the period of time requisite for obtaining a copy of the decree or order appealed from or sought to be reviewed, shall be excluded."* [Emphasis supplied].

As rightly submitted by Mr. Mashauri, the cited provision excludes time that a party spent in seeking to be furnished a copy of the decree or order sought to be appealed from or reviewed. It is also apparent that such exclusion only occurs in respect of limitation period in appeals, applications for leave and/or applications for review. This means that, in respect of all other matters, such exclusion is inapplicable. This includes matters such as the instant application in which a certification on a point of law is sought.

True, as well, is Mr. Kisigiro's contention that such exclusion would only apply in cases where such decree or order is a vital attachment which cannot be dispensed with. This is probably the reason why the law has narrowed down to a trio of instances i.e. appeals; applications for leave;

and applications for review. In this case, the applicant's counsel has not convinced the Court that an application for a certificate on a point of law would not be filed without a copy of any of the documents that the applicant had applied for and was yet to be furnished.

The other contention which is plausible, in my view, is that, unlike in the cited decisions of ***Juma Omary*** and ***Wanamaombi cases*** in which the contentions were in respect of appeals to this Court both of which were refused, in the instant case, the impending appeal is against the decision which was delivered by the Court and it lies to the Court of Appeal. In the latter, issues that relate to time prescription are governed by the Court of Appeal Rules, GN. No. 368 of 2009 (as amended) and not Cap. 89. This means, therefore, that the cited decisions cannot draw any semblance of similarity to the instant case as to create an inspiration that can move this Court to align its reasoning to it.

In view of the foregoing arguments, I am convinced that, since this application does not enjoy the exclusion that is enshrined in section 19 (2) of Cap. 89, the same was filed out of time and therefore time barred. This ground of objection is also meritorious and I sustain it.

In the upshot, I uphold the objections raised by the respondent and I dismiss this application with costs.

It is so ordered.

DATED at **MWANZA** this 30th day of October, 2020.

M.K. ISMAIL

JUDGE

Date: 30/10/2020

Coram: Hon. M. K. Ismail, J

Applicant: Mr. Mashauri, Advocate

Respondent: Mr. Mashauri, Advocate for Mr. Kisigiro, Advocate

B/C: B. France

Court:

Ruling delivered in chamber, in the presence of Mr. Mathias Mashauri, Advocate for the applicant and holding brief for Mr. Kisigiro, Advocate for the respondent, this 30th day of October, 2020.

M. K. Ismail

JUDGE

At Mwanza

30th October, 2020