IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: MUSSA, J.A., LEVIRA, J.A. And KEREFU, J.A.)

CIVIL APPLICATION NO. 477/03 OF 2018

CHARLES S. KIMAMBO.....APPLICANT

VERSUS

1. **CLEMENT LEONARD KUSUDYA** *(As an Administrator of the Estate of the Late LEONARD KUSUDYA)*
2. **NATIONAL BANK OF COMMERCE**

..... **RESPONDENTS**

(Application for Leave to Appeal to the Court of Appeal against the Decision of the High Court of Tanzania at Dodoma)

(Mansoor, J)

Dated the 23rd day of June, 2017
In
Misc. Civil Application No. 44 of 2016

RULING OF THE COURT

18th & 23rd September, 2019

KEREFU, J.A.:

The applicant, CHARLES S. KIMAMBO, brought this application for leave to appeal to the Court of Appeal after the High Court had refused his first application for leave. The application is by way of Notice of Motion which is predicated under Section 5 (1) (c) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002 (the AJA) and Rules 45 (b) and 48 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The

application is supported by an affidavit of Cheapson Luponelo Kidumage, learned counsel for the applicant.

According to the record of the application, the dispute between applicant and the respondents started on 27th December, 1993 when the applicant purchased a house located at Plot No. N80 Block "B" Mpwapwa District in Dodoma Region at the tune of Tshs 2,100,000/= from the 2nd respondent through a public auction. After payment of the purchase price, the ownership of the said house was transferred to the applicant via Title Deed No. 762-DLR L.O No. 48185 of 5th May, 1994. In 1996, the applicant together with the 2nd respondent instituted a suit Civil Case No. 20 of 1996 before the District Court of Dodoma (Dyansobera-RM, as he then was) claiming for the following reliefs:-

(a) a declaration that the sale conducted by the 2nd plaintiff (2nd respondent herein) was legally valid;
(b) eviction order directing the defendant (1st respondent herein) to grant vacant possession of the suit premises;
(c) a declaration that the 1st plaintiff (applicant herein) is the lawful owner of the suit premises; and
(d) costs of the suit.

The said suit was concluded via a consent judgment between the parties entered on 19th March, 1999 where it was agreed that the purchase price will be refunded to the applicant. That, after payment of the said money, the applicant should give vacant possession to the 1st respondent. The 1st respondent failed to refund the said money as agreed and the applicant applied for execution of the consent judgement on 3rd May, 1999 claiming for vacant possession of the disputed premises. However, the said application was determined in the favour of the 1st respondent who was given a period of ninety (90) days to refund the purchase price as per the consent judgement. Aggrieved, the applicant lodged a Civil Revision No. 5 of 2012 before the High Court of Tanzania at Dodoma (the High Court) (Mohamed, J). The said application was struck out for being incompetent. The applicant resorted to administrative remedy which did not work out and decided to follow legal procedures. Discovering that he was out of time, he decided to lodge the Civil Application No. 44 of 2016 before the High Court (Mansoor, J) seeking for extension of time to file an application for revision. However, the said application was dismissed. Again, aggrieved by that decision, the

applicant lodged Misc. Civil Application No. 32 of 2017 for leave to appeal to the Court of Appeal before the High Court (Kalombola, J). On 16th July, 2018 the application for leave was refused, hence this application which was lodged on 30th July, 2018. The 1st respondent resists the application and has filed an affidavit in reply. It is noteworthy that, the 2nd respondent did not file an affidavit in reply and this is an indication that she is not opposing the application.

At the hearing of the application, the applicant was represented by Mr. Cheapson Luponelo Kidumage, learned counsel, whereas the 1st respondent was represented by Mr. Elias Michael Machibya, learned counsel. The 2nd respondent though duly served on 4th September, 2019 did not enter appearance and, as such, the hearing had to proceed in her absence in terms of Rule 63(2) of the Rules. It is also important to note that there were no written submissions filed by the parties and thus, they addressed the Court under Rule 106 (10) (b) of the Rules as amended by GN. No. 344 of 2019.

Before we proceeded to determine the merit or otherwise of the application, we found it apposite to satisfy ourselves on the nature of the application taking into account that:-

(a) The notice of motion has indicated that the applicant is aggrieved by the decisions of the High Court in Misc. Civil Application No. 44 of 2016 and in Misc. Civil Application No. 30 of 2017. The said Misc. Civil Application No. 30 of 2017 is nowhere mentioned in the supporting affidavit and is not even attached to the application; and

(b) The supporting affidavit has indicated a long historical account of what transpired and do contain information which is not supported by the record of the application. For instance paragraph 10 had wrongly indicates that the Civil Case No. 20 of 1996 was instituted by the 1st respondent against the applicant, while *'Annexure A3'* to the same affidavit shows that the said suit was instituted by the applicant and the 2nd respondent against the 1st respondent.

We thus invited Mr. Kidumage to clarify on those matters. Mr. Kidumage readily conceded to the pointed anomaly and added that, in its current form the application is not clear and is confusing. He thus implored the Court to accord him the opportunity to rectify the said anomaly in terms of Rule 50 (2) of the Rules. He said, if allowed can manage to lodge the amended application within seven (7) days.

On his part, Mr. Machibya vehemently objected to the prayer for amendment made by Mr. Kidumage, though he also said, he had since perused the notice of motion and the supporting affidavit and noted the said defects pointed by the Court and admitted by Mr. Kidumage. He argued further that, all identified defects in the notice of motion and the supporting affidavit are due to the negligence of Mr. Kidumage. It was his further view that, since it was due to negligence the prayer for amendments cannot be entertained. Mr. Machibya lamented that the matter is long overdue and due to negligence the applicant had been lodging defective applications that ended up being declared incompetent by the court or the applicant filing matters without taking essential steps. Expounding further on his contention, he referred us to paragraph 10 of

the reply affidavit by the 1st respondent filed in Court on 5th September, 2019 and argued that the intended appeal was supposed to be lodged within sixty (60) days from the date of lodging the notice of appeal on 28th June, 2017, but to-date the applicant has failed to lodge the intended appeal. He argued that, in the circumstances, even the principle of overriding objective cannot be invoked to condone the applicant's negligence and/or inaction, because the same was not introduced to do away with the well-established principles and procedures of the Court of Appeal. He, however, submitted that if the Court will find the prayer by Mr. Kidumage valid, then the respondent should be awarded costs.

In rejoinder submission, Mr. Kidumage emphasized for his prayer to be granted to enable the Court to determine the matter on merit. As for the costs he submitted that the same should be on course.

On our part, after having examined the record of the application, the notice of motion, the supporting affidavit and considered the submissions made by the counsel for the parties, it is clear that there are some anomalies and uncertainty in relation to this application.

There is also no dispute that the notice of motion and the supporting affidavit contains information which does not reveal the factual

situation of the dispute between the parties hence misleading and create unnecessary confusion as intimated by Mr. Kidumage. Though, we are in agreement with Mr. Machibya that the matter is long overdue, but it is also on record that for a quite sometimes the applicant was before the courts' corridors pursuing different applications. We have also noted that, the applicant has filed the current application without undue delay soon after the refusal of the first application by the High Court.

On account of the identified uncertainty and confusion surrounding the documentation regarding this application, we believe that it will not be in the interest of justice to strike out the application as this will make the applicant indulge in a hassle of pursuing the entire process afresh which is not in line with the overriding objective principle geared at timely resolution of disputes.

In this regard, we accede to the prayer for amendment of the application and grant leave to the applicant to amend the application in

terms of Rule 4(2) (a) and (b) of the Rules. The applicant has to do so within seven (7) days from the date of delivery of this ruling. Costs to be on course. In the meantime, hearing of the application is deferred to a date to be fixed by the Registrar.

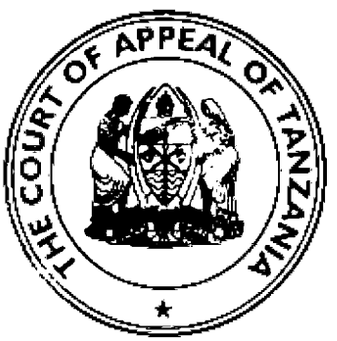
DATED at **DODOMA** this 20th day of September, 2019.

K.M. MUSSA
JUSTICE OF APPEAL

M.C. LEVIRA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Ruling delivered on this 23rd day of September, 2019 in the presence of Mr. Cheapson Kidumage, counsel for the Applicant and Mr. Cheapson Kidumage for Elias Machibya, counsel for the 1st and 2nd respondent respectively is hereby certified as a true copy of the original.



E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL