

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

CIVIL APPLICATION NO. 49 OF 2004

In the Matter of an Intended Appeal

BETWEEN

DEUSDEDIT KISISIWE..... APPLICANT

AND

PROTAZ BILAURO..... RESPONDENT

**(Application for Extension of Time from the
decision of the High Court of Tanzania
at Dar es Salaam)**

(Bubeshi, J.)

**dated the 18th day of February, 2001
in**

Civil Revision No. 11 of 2000

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R U L I N G**

KAJI, J.A.:

In this application, by notice of motion, the Court is
being moved:

“to enlarge time within which the
applicant can be allowed to file an
application for leave before the Court;
and to be granted leave to appeal to the
Court”

The application is supported by an affidavit deposed by E.A. Msuya, learned Counsel, who had the conduct of the matter before the Courts below and before this Court. The facts leading to this application can briefly be stated as follows:-

In 1999 the respondent PROTAZ B. BILAUURI instituted a suit before Kisumu District Court against the applicant for, *inter alia*, a declaration that he is the lawful owner of Plot No. 712 Block 'J' Mbezi. The applicant who was the defendant, resisted and filed a written statement of defence in time, according to paragraph 3 of the affidavit.

But when the matter was called on for hearing, it was ordered to proceed *ex parte* on the ground that there was no written statement of defence. The applicant protested but his protest was turned down. He lodged an oral complaint to the then Judge Incharge of Dar-es-Salaam Registry (Chipeta, J. as he then was) who called the record for inspection/revision. Revisional proceedings were

instituted, apparently under Section 44 (1) (a) of the Magistrates Courts Act, 1984 (Civil Revision No. 11 of 2000). On 8.2.2001 the Court (Bubeshi, J. as she then was) dismissed the application on the ground that the applicant should preferably have lodged an appeal rather than an

application for revision. The application for revision was dismissed with costs.

The applicant was aggrieved. He applied before the same Court for leave to appeal to this Court against that decision.

On 26th March, 2004 the High Court (Massati, J.) refused to grant leave. Consequent to that refusal, the applicant, who had already lodged a notice of appeal on 13.2.2001 against the decision of 8.2.2001 in Civil Revision No. 11 of 2000, lodged this application in this Court.

Mr. Mfalila, learned counsel for the respondent, at first was under the impression that the application is for leave to appeal to this Court against the decision of Massati, J. refusing to grant leave to appeal against the decision of Bubeshi, J (Rtd) – (paragraph 2 of the counter affidavit). After some oral clarification by the applicant's counsel that the applicant is seeking leave to be allowed to file his application for leave out of time, he offered no resistance. But he was of the view that, since the applicant had applied for the necessary documents in time, and the Registrar of the High Court delayed to supply him with the same, he should have applied to the Registrar of the High Court to issue him with a certificate for excluding the time the

Registrar took to supply him with the same, as provided for under Rule 83 of the Court Rules, 1979. In that respect, he said, the application would be in time, and there would be no need for applying for extension of time. In reply Mr. Msuya, learned counsel, submitted that Rule 83 applies to appeals only and not to application as well.

As observed earlier, this application is for extension of time within which to apply for leave to appeal to this Court. Although basically it has not seriously been controverted by the respondent,

yet this does not preclude the Court from considering whether the applicant has shown sufficient reasons for his delay, and whether the intended appeal has arguable points.

I have carefully considered the applicant's affidavit together with the annextures thereat. The High Court (Massati, J.) ruling which refused to grant leave to the applicant to appeal to this Court against Bubeshi's decision was delivered on 26th March, 2004 (Annextures MSK - 6 (i) and (ii)). The applicant applied for copies of the ruling and order on the same day (MSK - 7). He was supplied with the same on 14th April, 2004 and filed this application on the same day (Annexure MSK - 8). Under the circumstances I am satisfied that the applicant was diligent and he did all

that was within his powers, and that the delay was beyond his control. The delay was with sufficient reason.

On whether the intended appeal has an arguable point, the applicant has listed down the following points:-

- a) Whether an appeal is an alternative of the powers vested onto the High Court under Section 44 (1) (a) of the Magistrates Courts Act, 1984 in which the High Court is empowered to exercise supervisory powers over subordinate courts
- b) Whether under the circumstances of this case the applicant was required to prefer an appeal and not invoke the supervisory powers of the High Court as a requirement of the law
- c) Whether the order sought to be revised by the High Court had been overtaken by events and an appeal against the same is merely an

academic exercise.

Looking at their face value, they appear to be arguable. May be they will be more clear upon submission at the hearing.

On whether Rule 83 of the Court Rules 1979 applies also in respect of applications of this nature, I think the answer is in the negative. In my view, Rule 83 is applicable to appeals only.

It is upon the above reasons that I allow the application. Leave is granted to the applicant to appeal to this Court against the decision of Bubeshi, J. (as she then was) dated 8th February, 2002. According to the circumstances of the case, it is desirable that each party should bear his costs. It is so ordered.

DATED at DAR ES SALAAM this 4th day of February, 2005.

S.N. KAJI
JUSTICE OF APPEAL

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

(S.M. RUMANYIKA)
DEPUTY REGISTRAR