

**IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA**

(CORAM: KILEO, J.A., ORIYO J.A. And MMILLA J. A.)

MSH CIVIL APPLICATION NO 9 OF 2013

FELISTA JOHN MWENDA.....APPLICANT

VERSUS

ELIZABETH HARON LYIMO.....RESPONDENT

(Application from the decision of the High Court of Tanzania at Moshi)

(Munisi, J.)

**dated the 29th day of October, 2013
in
Land Case Appeal No 49 of 2011**

RULING OF THE COURT

4th & 8th September 2014

KILEO, J. A.:

The applicant, Felista John Mwenda filed an application in the Court by way of Notice of Motion in which she is seeking leave to appeal to this Court. The application was brought under Rules 45 (a), (b) and 46 (1) of the Court of Appeal Rules and Section 47 (1) of the Land Disputes Courts Act, 2002. The Notice of Motion contains one single ground – that the High Court did not properly evaluate the evidence adduced at the trial Tribunal that the respondent did not prove how she acquired the plot in dispute to become its owner.

At the hearing of the application the appellant appeared in person, without legal counsel. The respondent was represented by Mr. Elikunda George Kipoko, learned advocate. Before we had proceeded to the hearing of the application Mr. Kipoko asked us to allow him to address us on some preliminary issues. He informed us that he was just served with the Notice of Motion the day before the hearing and did not have time to formally raise the preliminary issues. That being the case we allowed him to address us on those issues.

The learned counsel submitted that the application was incompetent on account of the following grounds:

- 1. That in terms of section 47 (1) of the Land Disputes Courts Act, Cap 216 R. E. 2002 the applicant ought to have filed her application in the High Court.*
- 2. That in any case the application was not filed in time in view of the provisions of rule 45 (a) of the Court of Appeal Rules.*
- 3. That the Notice of Motion on the face of it did not specify the decision against which it is intended to seek leave to appeal.*

After Mr. Kipoko's submission we called upon the applicant to make a response. Being a lay person she did not have much to say. She insisted that she filed her application in the High Court. When she was queried about the issue of limitation period and failure to specify the decision against which it is intended to seek leave to appeal on the Notice of

Motion, the applicant asked us to hear her application in so far as the matter had reached the Court.

This matter need not detain us. It is clear from the title of the record before us that the application was filed in the Court of Appeal and is by way of Notice of Motion as is the practice of the Court unlike in the High Court where normally applications are by way of Chamber Summons. This disposes of the applicant's contention that she lodged her application in the High Court.

Section 47 (1) of Cap 216 which was one of the provisions under which the application was brought requires an applicant to obtain leave to appeal to the Court of Appeal from the **High Court**. (Emphasis provided) The provision states:

"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 the leave from the High Court (Land Division) appeal to the Court of Appeal in accordance with the Appellate Jurisdiction Act."

The Court of Appeal, in terms of the clear provisions of section 47 (1) of Cap 216 lacks jurisdiction to entertain the application.

On the issue of time bar we agree with Mr. Kipoko that the application was not timely filed. The decision against which it was intended to appeal was delivered on 29. 10. 2013. The application for leave to appeal was filed on 28. 11. 2013. This was 30 days after the decision against which it was desired to appeal was given. Going by the provisions of section 47 (3) of Cap 216 which stipulates that the procedure for appeals arising from matters in the Land Division of the High Court is to be governed by the Court of Appeal Rules, it follows that by virtue of rule 45 (a) of the Court of Appeal Rules, 2009 the applicant was required to file her application within 14 days of the decision against which it was desired to appeal. It is provided under rule 45 (a) as follows:

“where an appeal lies with the leave of the High Court, application for leave may be made informally, when the decision against which it is desired to appeal is given, or by chamber summons according to the practice of the High Court, within 14 days of the decision.”

The applicant was late to file her application by sixteen days.

Without the need of having to discuss the point on failure to specify the decision against which leave to appeal was being sought on

the Notice of Motion, we are satisfied that the above considerations are sufficient to dispose of the application which we find to be incompetent.

In consequence thereof, the application being incompetent, we have no other course to take but to strike it out as we hereby do.

Bearing in mind the relationship between the parties and the fact that costs were not pressed for, each party will bear its own costs.

It is ordered accordingly.


Dated at Arusha this 5th Day of September 2014.

E. A. KILEO
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

B. M. MMILA
JUSTICE OF APPEAL

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


E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL