IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: KILEO, J.A., KAIJAGE, J.A. And MUSSA, J.A.)

CIVIL APPLICATION NO. 19 OF 2014

1. AWINIEL MTUI
2. ROGATE MINJA ..... **APPLICANTS**
3. LILIAN MAMUYA
4. VODACOM

VERSUS

STANLEY EPHATA KIMAMBO
(Attorney for Ephata Mathayo Kimambo) ..... RESPONDENT

(Application from the ruling and order of the High Court of Tanzania at Arusha)

(Massengi, J.)

dated the 14th day of July, 2014

in

Misc. Civil Application No. 34 of 2014

RULING OF THE COURT

16th & 24th February, 2015

MUSSA, J.A.:

In the Arusha District Land and Housing Tribunal, the applicants herein successfully sued the respondent over a piece of land located at Moshono Ward, Arumeru District. On appeal, the High Court (Ngwala, J.), reversed the decision of the Tribunal in favour of the respondent.

Dissatisfied, the applicants mounted a Notice of appeal to this Court and, on the 14th March, 2014 they preferred an application, in the High Court, to be granted leave to appeal to this Court. The application was taken out under the provisions of section 47(1) of the Land Disputes Courts Act (LDCA); section 5(1) (c) of the Appellate Jurisdiction Act (AJA) and; Rule 45(a) of the Tanzanian Court of Appeal Rules, 2009 ("the Rules").

At the hearing of the application for leave in the High Court, the applicants were represented by Mr. Materu, learned Advocate, whereas the respondent had the services of Mr. Makange, also learned Advocate. From the very outset, Mr. Makange raised a preliminary point of objection to the effect that:-

> *"Once appeal proceedings to the Court of Appeal of Tanzania have been commenced by filing a Notice of Appeal, the High Court of Tanzania has no jurisdiction to grant the applicant with LEAVE to appeal to the Court of Appeal of Tanzania."*

Upon hearing either counsel, the High Court (Massengi, J.), upheld the preliminary point of objection and, in the upshot, the application for leave was dismissed. In dismissing the application, the learned Judge authoritatively relied on two decisions of this Court, namely **Aero Helicopter (T) Vs F.N. Jansen** [1990] TLR 14 and **TANESCO Ltd Vs Dowans Holdings and Another**, (unreported Civil Appeal No. 142 of 2012). It is, perhaps, pertinent to observe that the two decisions were referred and availed to the Judge by Mr. Makange, the learned counsel for the respondent.

Discontented, the applicants have presently refreshed their quest for leave before this Court, by way of a second bite. The application is by Notice of Motion, predicated under the provisions of section 5(1) (c) of AJA, as well as Rules 45 and 49 of the Rules. It is accompanied by an affidavit duly sworn by Mr. John Faustin Materu, the learned Advocate for the applicants. In addition, Mr. Materu has enjoined a written submission in support of the application. The application is being resisted by the respondent through an affidavit in reply duly sworn on his behalf by his learned Advocate, Mr. Herbert Eliakunda Samweli Makange. In support, Mr.

Makange has, just as well, filed a written submission to expound his points of contention.

Before us, the learned counsel for the applicant fully adopted the Notice of Motion, his affidavit as well as the written submission in support thereof. Expounding on the Notice of Motion, Mr. Materu commenced his oral submission with the contention that the High Court wrongly dismissed the application for leave on account of lack of jurisdiction. Elaborating, the learned counsel submitted that an application for leave to appeal to the Court of Appeal is a matter to which both this Court and the High Court have concurrent jurisdiction under section 5(1) (c) of AJA. In terms of Rule 47, he further argued, where both the High Court and this Court have concurrent jurisdiction, an application for relief ought to be made, in the first instance, in the High Court. To that extent, Mr. Materu insisted, the High Court was properly seized with the application for leave.

In reference to the decision of the High Court, Mr. Materu urged that the applicants had, indeed, lodged a Notice of Appeal to this Court but that event cannot be construed to ouster the jurisdiction endowed on the High Court to hear and determine applications for leave to appeal to the Court

of Appeal. The learned counsel for the applicant faulted the learned Judge in her reliance on the two decisions of this Court viz- *Aero Helcopter and TANESCO* (supra). Those decisions, he said, were focused on matters relating to stay of execution where, indeed, the High Court ceases to have jurisdiction once a Notice of Appeal is lodged in accordance with the governing provisions of the Rules. In the upshot, Mr. Materu urged us to grant the application for leave by way of a second bite with costs.

To counter the argument, Mr. Makange also adopted his affidavit in reply as well as the written submission. In a nutshell, the learned counsel for the respondent reiterated his reliance on the two referred decisions, namely, *Aero Helicopter and TANESCO.* In his submission, by dint of the reasoned holding of the two decisions, the disinclination of the High Court Judge to entertain the application cannot be faulted. Conversely, Mr. Makange urged that the application for leave by way of a second bite be dismissed with costs.

On our part, having dispassionately considered and weighed the learned advocates' rival arguments, we entirely subscribe to Mr. Materu's

contention that the jurisdiction of the High Court to hear and determine applications for leave to appeal to this Court is not ousted by the event of the desirous applicant lodging a Notice of Appeal. This jurisdiction is conferred to the High Court concurrently with this Court under the provisions of section 5(1) (c) of AJA. The High Court endowment is not, so to speak, ousted with the event of lodging a Notice of Appeal and, in fact, Rule 46(1) fortifies the event of filing a Notice of Appeal ahead of the application thus:-

> *"Where an application for certificate or for leave is necessary, it shall be made* ***after the notice of appeal is lodged."*** [Emphasis supplied].

As was correctly formulated by Mr. Materu, the learned Judge misinterpreted our decisions in *Aero Helicopter and TANESCO* which were exclusively focused on applications for stay of execution. True, as was stated in those two cases, in matters relating to stay of execution once a Notice of Appeal is filed under Rule 83, then the Court of Appeal is seized of the matter to the exclusion of the High Court. But, we should quickly

rejoin, applications for certificate on a point of law or leave to appeal are on a different footing. In this regard, we need do no more than reiterate what we stated in the unreported Civil Application No. 71 of 2001 – **Matsushita Electric Co. Ltd Vs Charles George t/a CG Travers**:-

> *"Once a Notice of Appeal is filed under Rule 76 then this court is seized of the matter in exclusion of the High Court* ***except for applications specifically provided for, such as leave to appeal or provision of a certificate of law."***
>
> [Emphasis supplied].

The bolded expression tells it all: Applications for leave to appeal and the provision of a certificate on a point of law are not caught up by the ouster rule. To this end, we are of the settled view that the application for leave was wrongly refused and dismissed by the High Court. That being so, having considered the Notice of Motion as well as the affidavits from either side, we are satisfied that the application is meritorious and, accordingly, the same is granted with costs to the applicants under the provisions of

section 5(1) (c) of AJA. The applicant should institute the appeal within sixty days from the date hereof. It is so ordered.

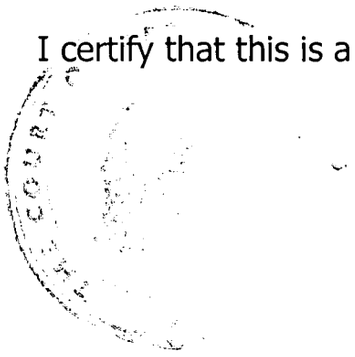
DATED at ARUSHA this 23rd day February, 2015.

E. A. KILEO
JUSTICE OF APPEAL

S. S. KAIJAGE
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

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



Z. A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL