IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MBAROUK, J.A., LUANDA, J.A., And MUSSA, J.A.)

CIVIL APPLICATION NO. 40 OF 2015

ARUNABEN CHAGGAN MISTRY.....APPLICANT
VERSUS
NAUSHAD MOHAMED HUSSEIN..... 1ST RESPONDENT
MOHAMED RAZA MOHAMED HUSSEIN.....2ND RESPONDENT
THE ATTORNEY GENERAL.....3RD RESPONDENT
ASSISTANT REGISTRAR OF TITLES MOSHI.....4TH RESPONDENT

(Application to examine and revise the Ruling and Order of the High Court of Tanzania at Arusha)

(Moshi, J.)

Dated 18th day of September, 2015
in
Land Review No. 7 of 2014

RULING OF THE COURT

10th & 16th February, 2016.

LUANDA, J.A.:

The applicant, through Mr. John Materu learned counsel, has filed the application for revision. The application was made under s. 4 (3) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002 and Rule 65 (1) (2) (3) and (4) of the Court of Appeal Rules, 2009 (the Rules).

Briefly the background of the application is to this effect. On 24/8/2012 the High Court of Tanzania sitting at Arusha (Nyerere, J.) dismissed the suit filed by the applicant. In that suit the applicant had sued the respondents for a declatory Order that he was the lawful owner of the suit property and other ancillary reliefs in connection with the suit property. The applicant is aggrieved by that decision. He intends to appeal to this Court.

But an appeal to this Court on land matters is not automatic. An aggrieved party has to seek leave in the same High Court. The applicant was very much aware of that requirement, he sought leave. Before the application came for hearing, it met with a preliminary objection in that the application for leave was filed outside the prescribed time. Moshi, J. sustained that point of objection. She dismissed the application.

The applicant did not give up, he went back to the High Court. This time he made an application for a review so that the High Court substitutes the dismissal order with an order of striking it out. Again the High Court (Moshi, J.) dismissed it for lack of merits. Undaunted, the applicant has come

to this Court for a revision, hence this application. The application was cause listed and it was to come for hearing on 10/2/2016.

On 30/1/2016 Mr. Loomu Ojare who advocated for the 1st and 2nd respondents raised an objection as to the competency of the application. The objection runs as follows:-

> *That the Applicant's application for revision is patently un-procedural, incompetent and misconceived in law; as the Applicant has a remedy by way of a second bite application.*

So, this is the Ruling in respect of the objection raised.

Mr. Ojare argued to this effect that since the High Court had dismissed the application for leave for being time barred, then the avenue open for him was to go to the Court of Appeal as provided under Rule 45 (b) of the Rules and not to go to the same High Court for review and then in this Court by way of revision. The applicant adopted a wrong procedure. And it cannot be said he was blocked by judicial process. In any case, he went on, review caters for minor changes and not drastic ones. It is Mr. Ojare's submission

that to change an order of dismissal to striking out is a major one. The application is misconceived, it should be dismissed with costs, he concluded.

Mr. Juma Ramadhani, learned Principal State Attorney who appeared for the 3rd and 4th respondents had nothing to say. On the other hand Mr. Materu said, he could not go to the Court of Appeal because of the decisions of the two cases of this Court namely **Alfred Matei v. Bernard Shara and Three Others,** Misc. Civil Application No. 6 of 2009 (unreported) and **Ital African Transporters Ltd v. Giafar M. Beder** [1999] TLR 251 which barred the applicant to file a second bite in this Court. As to why he filed a review in the High Court he said he did that because the application for leave was dismissed and not struck out. His intension is, if the order of dismissal is changed to read strike out, he would be in a position to start afresh an application for leave in the High Court. He prayed the objection be overruled with costs.

Mr. Ojare reiterated his position.

We have given a deep thought to the matter. We wish to begin by explaining the scheme for an application for leave to appeal to the Court of

Appeal both to the High Court and upon refusal for the second bite in the Court of Appeal.

Rule 45 of the Rules put in place the procedure as to how, it should be applied for, where it should be made and the time frame. As to the place it is in the High Court first by way of chamber summon supported by affidavit; whereas in the Court of Appeal by notice of motion supported by affidavit and it is made in the Court upon refusal in the High Court. In both, the time within which to apply is 14 days from the date of the decision in question.

In the instant case, the High Court dismissed the application for leave for being filed outside the prescribed time of 14 days. Definitely that decision of the High Court arose from an application for leave. Going by the scheme explained above, we are of the settled view that the proper forum for redress in respect of that decision is the Court of Appeal through another application commonly known as second bite. We are further of the view that the question as to whether the order of dismissal falls within the ambit of refusal is not the business of the party to decide. It is the Court of Appeal which has the mandate to do so upon being properly moved. The two cases Mr. Materu cited as the authorities are distinguishable.

In **Ital African case** *(supra)* the High Court (Kileo, J as she then was) struck out the application for leave because it was incompetent. The application did not specify the provision under which relief was being sought and failed to annex to the application the ruling that was intended to be appealed against. When the applicant made an application in the Court of Appeal for second bite, the Court of Appeal refused to entertain it as the High Court was yet to decide. The Court of Appeal said:-

> *"... the purported application was something which did not exist in law and which therefore, she could not entertain. So that in law there has been no application to the High Court for leave to appeal."*

The facts of this case are different from our case under discussion.

In **Alfred Matei case** *(supra)* the applicant intended to seek for an extension of time to file an application for leave to appeal to the Court of Appeal. But the applicant did not cite the enabling provision under which the application was filed. The Court on page 3 of the Ruling said:-

> *"The application before us is incompetent for failure to cite the provisions under which the applicant is*

moving the Court. The Court has on several occasions reiterated this position."

The Court then went on to say we quote:-

"A point we make out for the benefit of the applicant is that his remedy still lies in the High Court."

The facts of that case and our case are also different.

That said, we agree with Mr. Ojare that the application is misconceived. The same is dismissed with costs.

It is so ordered.

DATED at **ARUSHA** this 15th day of February, 2016.

M. S. MBAROUK
JUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

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

E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL