IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 180 OF 2016

1. THE NATIONAL HOUSING CORPORATION
2. LARS ERIC HULSTROM .....APPLICANTS
3. MANYONI AUCTIONEERS

VERSUS

JING LANG LI.....RESPONDENT

(Application for extension of time to file a Supplementary Record of Appeal in Civil Appeal No. 52 of 2016 arising from the decision of the High Court of Tanzania at Dar es Salaam)

(Ngwala, J.)

Dated the 27th day of April, 2012

In

Land Case No. 129 of 2006

RULING

28th June & 11th July, 2016

JUMA, J.A.:

This application was brought under Rules 2, 10 and 96 (6) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The three applicants, National Housing Corporation, Lars Eric Hulstrom and Manyoni Auctioneers are seeking the following orders:-

1. This Court be pleased to make an order, for extension of time within which the Applicants to file a supplementary record of appeal, in substitution of the record filed on 18th April, 2016, because the existing record has omitted proceedings of the High Court (Land Division) for extension of time to lodge a notice of appeal, to apply for leave to appeal and grant of leave to appeal against the decision of the Hon. Madam Justice Ngwala in Land Case No. 129 of 2006 delivered on 27th April, 2014, which were presided over by Hon. Madam Justice De Mello, and terminated on 31st October, 2014.

2. This Court be pleased to make an order, and grant leave to the Applicants to file a supplementary record of appeal, in substitution of the record filed on 18th April, 2016, because the existing record has omitted proceedings of the High Court (Land Division) for extension of time to lodge a notice of appeal, to apply for leave to appeal and grant of leave to appeal against the decision of the Hon. Madam Justice Ngwala in Land Case No. 129 of 2006 delivered on 27th April, 2014, which were presided over by Hon. Madam Justice De Mello, and terminated on 31st October, 2014.

3. Costs of this Application.

4. *Any other relief(s) this Honourable Court may deem fit and just to grant.*

The application is supported by affidavits of John Laswai (the Principal Legal Officer of the first applicant, the National Housing Corporation), Lars Eric Hulstrom (the second applicant) and that of Joseph Nyambekwa (the third applicant and proprietor of the Manyoni Auctioneers). In the supporting affidavits, the applicants recapitulate how after obtaining record of proceedings and a certificate of delay on 17th February, 2016, they filed their appeal against the decision of Ngwala, J. by lodging their memorandum and record of appeal on 18th April, 2016 to initiate Civil Appeal No. 52 of 2016.

Upon receiving the notice of hearing of their Civil Appeal No. 52 of 2016, the applicants discovered that they had inadvertently failed to include the proceedings in the High Court (Land Division) in Miscellaneous Land Application No. 102 of 2014 relating to the application to lodge the notice of appeal and those relating to application seeking leave to appeal and the leave to appeal were all missing. According to the affidavits, failure to include the missing documents was in part caused by the bulky nature of the record and

the mixing up of the proceedings. It was also averred that the period when the applicants realized that some record of proceedings were missing was well after the fourteen (14) days prescribed by Rule 96 (6) of the Rules and it was just before the hearing of their Civil Appeal No. 52 of 2016 was scheduled for hearing before the Full Court on 30th June, 2016.

The respondent JING LANG LI has resisted the motion chiefly by way of an affidavit in reply accompanied with a Notice of Preliminary Objection both dated and filed in this Court on 22nd June, 2016. The Notice of Preliminary Objection contains the following grounds:-

> *1. That the Notice of Motion filed by the Applicants is incurably defective for containing omnibus prayers some of which cannot be granted by a single Justice of Appeal;*
>
> *2. That the application is incompetent and defective for lack of enabling provision of the law to sustain a prayer for leave to file a supplementary record of appeal; and*
>
> *3. That the Court has not and is not properly moved by the Applicants.*

At the hearing of this application on 28th June, 2016, Dr. Masumbuko Lamwai learned counsel, was in attendance to represent the first applicant. Mr. Peter Swai, learned counsel appeared for the second applicant. Dr. Lamwai informed the Court that he was also holding brief for Mr. Alex Mgongolwa, learned counsel for the third applicant. Dr. Lugemeleza Nshala, learned counsel, appeared for the respondent. The Court had to deal with preliminary objections raised by the respondent.

Supporting the first ground of preliminary objection, Dr. Nshala submitted that the Notice of Motion seeks two distinct prayers, prayer seeking an extension of to file supplementary record, and prayer for an order to allow the applicants to file supplementary record of appeal. Dr. Nshala asserted that the two distinct prayers are not only omnibus hence defective in terms of Rule 60 (1) of the Rules, but are also beyond the realm of a single Justice of Appeal. The learned counsel argued that while the first prayer in the application for extension of time is properly before a Single Justice, but the second prayer seeking to file a supplementary

record of appeal falls under the jurisdiction of the Full Court. To cement his legal proposition that the instant motion cannot be adjudicated upon by a Single Justice of the Court, Dr. Nshala placed reliance on the decision of the Court in **Rutagatina C.L. vs. The Advocates Committee & Clavery Mtindo Ngalapa,** Civil Application No. 98 of 2010 (unreported), specifically what the Court stated on page 4 and later page 7:

> *"...Thus, occurs to us that there is no room in the Rules for a party to file two applications in one, as happened here.*
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> *Under the relevant provisions of the law an application for extension of time and an application for leave to appeal are made differently. The former is made under Rule 10 while the latter is preferred under section 5 (1) (c) of the Appellate Jurisdiction Act read together with Rule 45. So, since the applications are provided for under different provisions it is clear that both cannot be 'lumped' up together in one application, as is the case here.*
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> .....
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> .....
>
> *In both applications the jurisdiction is also different. An application under Rule 10 is at the exclusive domain of*

this Court. Under Section 5 (1) (c) of the Appellate Jurisdiction Act and Rule 45 of the Rules both the High Court and this Court have jurisdiction to determine applications for leave to appeal."

Dr. Nshala concluded his submissions on the first ground of objection by reiterating his stand that a Single Justice of the Court cannot under the Rules determine the two distinct prayers brought under one application.

On the combined second and third grounds of objection, Dr. Nshala submitted that Rules 2, 10 and 96 (6) which the applicants cited, are not enabling provisions to move the Court entertain the second prayer for an order to file a supplementary record of appeal. Beginning with Rule 10 of the Rules, the learned counsel contended that this provision is appropriate for seeking an order for the extension of time to file a supplementary record of appeal, and serves no enabling role the applicants' prayer for leave to file a supplementary record of appeal.

He similarly contended that Rule 96 (6) of the Rules cannot help the applicants in so far as the lack of enabling provisions is concerned because it only allows the appellant to file documents omitted from the record of

appeal as long as the filing is done within 14 days of lodging the record of appeal. Dr. Nshala insisted that Rule 96 (6) the applicants had no justification to cite Rule 96 (6) it does not cover documents that are filed after the expiry of 14 days window.

In so far as Dr. Nshala is concerned, he submitted that the proper enabling provisions which the applicants should have cited is Rule 4 (2) (a) of the Rules or Rule 111 of the Rules which they did not cite. The learned counsel submitted further that even Rule 2 of the Rules which the applicants cited, is not an enabling provision.

In his final analysis of the three grounds of objection, Dr. Nshala urged me to sustain the objections and strike out the application with costs.

In reply, Dr. Lamwai expressed himself that the three points of preliminary objection are uncalled for and should not be sustained. He disagreed with the learned counsel for the respondent that the two prayers in the Notice of Motion are omnibus and cannot be determined by a Single Justice. He referred me to Rule 60 of the Rules and submitted that only those applications that are envisaged under sub-rule (2) of Rule 60 are

ones reserved for determination by the Full Court. All the remaining categories of applications not covered under Rule 60 (2) fall within the jurisdiction of the Single Justices. The relevant Rule 60 provides:

> *60.-(1) Every application other than an application included in sub rule (2) shall be heard by a single Justice save that application may be adjourned by the Justice for determination by the Court.*
>
> *(2) The provision of sub-rule (1) shall not apply to –*
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> > *(a) an application for leave to appeal: or*
> >
> > *(b) an application for a stay of execution; or*
> >
> > *(c) an application to strike out a notice of appeal or an appeal: or*
> >
> > *(d) an application made as ancillary to an application under paragraph (a) or (b) or made informally in the course of hearing.*

Dr. Lamwai submitted that the prayers in the instant application before me do not fall under the exclusive jurisdiction of Full Court under sub-rule (2) of Rule 60 which covers applications— for leave to appeal, for

a stay of execution, or to strike out a notice of appeal or an appeal. As a result, Dr. Lamwai submitted, prayers disclosed in the Notice of Motion must be determinable by the Single Justice and are properly before a Single Justice of the Court.

Dr. Lamwai did not accept the proposition that the decision of the Court in **Rutagatina C.L. vs. The Advocates Committee** is applicable to the circumstances pertaining to instant motion that decision regarded an omnibus application to be one which embraces orders are grantable under different provisions of the law and which are tenable before different composition of the Court, that is, the Single Justice of the Court or the Full Court. The learned counsel pointed out that the two prayers in the application before me are both tenable before a Single Justice of Appeal under the Court of Appeal Rules.

He further distinguished Court's decision in **Rutagatina C.L. vs. The Advocates Committee** (Supra) to the extent that it disclosed a material breach of Rule 60 (1) and (2) of the Rules which is not the case with respect to the instant application.

Submitting to oppose grounds two and three of the preliminary objection, Dr. Lamwai did not agree with the contention by the learned counsel for the respondent that the Court has not been enabled by proper provisions of the Rules to determine the second prayer seeking an order to file supplementary record of appeal.

The learned counsel for the first applicant illustrated the significance of citing Rule 96 (6) in the notice of motion to be designed to draw the attention of the Court that the discovery of the missing parts of the record of Civil Appeal No. 52 of 2016 were missing took place many days after the period of 14 days for the appellants to file Supplementary Record of Appeal had expired. He submitted that unlike the appellant, the respondent in an appeal has an avenue for filing a supplementary record of appeal under Rule 99 where the record of appeal filed by the appellant is insufficient or defective. There are no similar provisions under the Rules specifically permitting the appellants to file supplementary record of appeal after the expiry of 14 days, he added.

Dr. Lamwai submitted that Rule 111 which pertains to applications for amendment of notice of appeal or notice of cross-appeal or

memorandum of appeal or any other part of the record of appeal cannot apply in the circumstances of the instant application where the a portion of proceedings have been completely omitted from the record.

The learned counsel for the first applicant underscored the enabling importance of Rule 2 in so far as it enacts the inherent power of the Court to do justice befitting an occasion like the present application calls for. He submitted the inherent power of the Court under Rule 2 can be invoked alone or together with power of the Court under Rule 4 (2) (a) of the Rules. As long as Rule 2 of the Rules has been cited, he urged against the striking out of the instant application before me. Dr. Lamwai concluded his submissions by urging me to overrule the three points of objection and costs should await the outcome of the impending appeal.

On his part, Mr. Peter Swai, learned counsel for the second applicant expressed that he had nothing to add over what Dr. Lamwai has submitted on and with whom he was in total agreement with.

In his rejoinder, Dr. Nshala reiterated the decision of the Court in **Rutagatina C.L. vs. The Advocates Committee** (Supra) is applicable to the instant application to prohibit omnibus applications. He further

reiterated that the applicants should have cited Rules 111 or 4 (2) (a) to enable the Court to be seized with jurisdiction.

Both counsel are on a common ground that the first in the motion seeking an extension of time to file a supplementary record of appeal is within the scope of the power of a Single Justice of the Court. Dr. Nshala has placed much reliance in the decision of the Court in **Rutagatina C.L. vs. The Advocates Committee** (Supra) to the extent of urging me to apply its principle as a guide in the determination of the question whether prayers in the Notice of Motion before me are omnibus and should be struck out.

With regard to the second prayer in the Notice of Motion, I have read the scope of Rule 60 of the Rules in determination whether this second prayer is reserved to the Full Court. Dr. Lamwai is correct in asserting that applications which are exclusively reserved to the Full Court are clearly specified under paragraphs (a), (c), (c) and (d) of sub-rule (2) of Rule 60. I agree with learned counsel for the first applicant that an application for an order to allow the appellant to file a supplementary record of appeal outside the 14 day grace period provided for under Rule 96 (6) of the Rules

is not amongst the applications under Rule 60 (2) exclusively reserved to the Full Court. Having found that a Single Justice of the Court can determine an application to file a supplementary record of appeal, I should point out here that **Rutagatina C.L. vs. The Advocates Committee** (Supra) is not of any help in determination of the question whether an application for an order to file a supplementary record of appeal is reserved to the Full Court. In that decision the Full Court dealt with *"two basic prayers.* ***Extension of time to file an application for leave to appeal*** *AND* ***leave to appeal against the decision of the Full Bench of the High Court****..."* The Court in in **Rutagatina C.L** the omnibus nature of the application before by pointing out that an application for extension of time is heard by Single Justice but the application for leave is in terms of Rule 60 (2) (a), determined by the Full Court, hence the omnibus nature of the application.

Dr. Nshala asserted that the two prayers in the Notice of Motion are distinct and should have been brought separately or be regarded as omnibus. With due respect, I do not think the two prayers, for extension of to file supplementary record and the prayer for an order to allow the filing

of supplementary record of appeal are so distinct and separate that they should be subject of two distinct and separate applications or else be condemned to be omnibus. There is no doubt in my mind that the Court has consistently held to be defective and reason of being omnibus, combination of prayers determinable by Full Court with those determinable Single Justice of the Court. In **Jamila Kamali vs. Mohamed Ngunguti and Amina Swaibu Ngunguti,** BK Civil Application No. 1 of 2012 (unreported):

> *"...As it is therefore, this Court has accepted omnibus applications as a legal practicability, basing itself on the decision in the MIC (TANZANIA) Limited case (supra). There is, however, a qualification attacked here, and this is that an omnibus application should not combine prayers attendable by a single justice together with prayers attendable by a full Court."*

In **Hamisi John vs. Halfan Jandu Mkumbo,** Civil Application No. 9 of 2015 (unreported) the Court stated:

> *"...In the case of **Babie Hamad Khalid v. Mohamed Enterprises (T) Ltd and 2 others,** Civil Application No. 6 of 2011, the applicant combined an application for*

extension of time to institute a notice of appeal and an application for stay of execution. The Court observed that combining of the two applications, one of which is within the jurisdiction of a single Justice and the other which is within the jurisdiction of three Justices, rendered the application incompetent."

In the circumstances of this motion before me, it is a legal practicability, so to speak, for both prayers in the motion to be combined in a single application without being struck down. The application for extension of time to file the omitted record of appeal and the application for an order to file seamlessly lead to the other and should be heard together by Single Justice of the Court.

In the result, the first ground of preliminary objection fails in its entirety.

The main question outstanding for my determination from submissions on second and third grounds of objection is whether, by failing to cite Rule 4 (2) (a) or Rule 111, the application should be struck out for want of enabling provisions. Dr. Nshala has maintained that Rules 2, 10

and 96 (6) cannot clothe the Court with jurisdiction to issue an order for the applicants to file a supplementary record of appeal. The learned counsel for the respondent thinks that Rules 4(2) (a) and 111 of the Rules which were not cited are the missing enabling provisions.

On his part, Dr. Lamwai asserted that in the circumstances of this application where appellants have no provisions under the Court of Appeal Rules, 2009 to file supplementary record of appeal outside the 14 day period provided under Rule 96 (6), by citing Rules 2 and 96 (6), the applicants are sufficiently enabled to be heard in their application.

With due respect, both learned counsel are correct to observe that as the Tanzania Court of Appeal Rules, 2009 now stands, the respondents in appeals have more latitude under Rule 99 for filing supplementary record of appeal where the record of appeal earlier filed by the appellant concerned, is insufficient or defective. The appellants have very limited latitude of fourteen (14) days under Rule 96 (6) within which to file supplementary record of appeal. The Rules are silent if the appellant wishes to file the supplementary record after the expiry of the prescribed fourteen (14) days.

Realizing that the Rules have no specific provisions guiding the appellants wishing to file supplementary record of appeal beyond the period of fourteen days, Dr. Nshala has suggested a resort to either Rules 4 (2) (a) or 111. Rule 4 (2) (a) deals with matters, for which there are no enabling provision under the Rules or any other written law. Rule 111 provides the enabling provision to "*allow amendment of any notice of appeal or notice of cross-appeal or memorandum of appeal, as the case may be, or any other part of the record of appeal, on such terms as it thinks fit.*" Dr. Lamwai asserted that Rule 2 which obliges the "*Court to have due regards to the need to achieve substantive justice in the particular case.*"

From submissions of the two learned counsel, I am prepared to hold that since the enabling provision for the appellants seeking to file supplementary record of appeal beyond the period prescribed under Rule 96 (6) is not settled, by either clear provisions of the Rules or precedent set by the Court; no point of law can be said to exist to justify the striking out of an application on a preliminary ground of objection. I have also taken into account the fact that the dispute between the parties has clearly

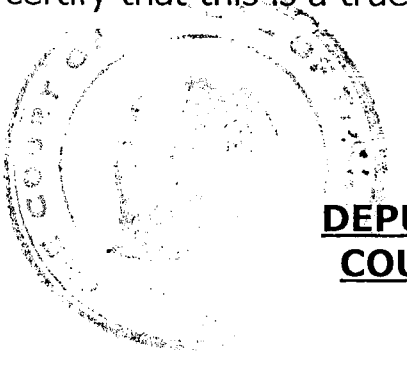
taken an inordinately long time from the moment in 2006 when the respondent filed the Land Case No. 129 of 2006. The dispute has not lived up to Latin phrase— "*Interest Reipublicae Ut Sit Finis Litium*" (Transl. The interest of the Republic as whole to ensure that litigation comes to speedy conclusions).

In the upshot of the foregoing, the second and third grounds of objection are similarly overruled. The Civil Application No. 180 of 2016 shall be heard on merit on a date to be fixed by the Registrar. Costs shall abide the outcome of the appeal. It is so ordered.

DATED at **DAR ES SALAAM** this 30th day of June, 2016.

I.H. JUMA
JUSTICE OF APPEAL

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



E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL