

IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

CIVIL APPLICATION NO. 124/17 OF 2017

GODFREY M. NZOWA.....APPLICANT

VERSUS

1. SELEMANI KOVA
2. TANZANIA BUILDING AGENCY } **RESPONDENT**

**(Application for extension of time to lodge an appeal against the decision of
the High Court of Tanzania at Arusha)**

(Massengi, J.)

dated the 20th day of September, 2013
in
Land Case No. 12 of 2006

RULING

04th & 10th August, 2017

MWANGESI, J. A.:

In the instant application which has been made by way of notice of motion, the applicant is moving the Court to enlarge time within which he can institute an appeal to this Court to challenge the decision of the High Court of Tanzania at Arusha that was handed down on the 20th September 2013, (Massengi, J.) The application has been preferred under the

provision of Rule 10 of the Court of Appeal Rules, 2009 (the Rules), and has been supported by an affidavit that has been sworn by the applicant.

The application has on the other hand been resisted by the second respondent in the affidavit in reply, that was sworn by Sabina Silayo. Additionally, the second respondent did raise a preliminary objection in a notice that was filed on the 03rd day of August 2017. When the application was called on for hearing on the 04th day of August 2017, Ms Neema Mtayangulwa learned counsel being assisted by Mr. Modest Akida learned counsel, did enter appearance for the applicant, whereas, Messrs Sylivester Mwakitalu and Haruna Matagane, learned Senior State Attorneys, appeared for the second respondent. Ms Neema Mtayangulwa did as well hold brief for Mr. Paschal Kamala learned counsel, who advocates for the first respondent. In compliance with the common practice of the Court, the preliminary objection which was raised by the second respondent had to be disposed of first.

Expounding the preliminary objection, Mr. Mwakitalu learned Senior State Attorney did argue that, the application at hand which was instituted by the applicant on the 22nd day of November 2016, seeking for extension

of time within which to institute an appeal to the Court of Appeal to challenge the decision of the High Court in Land Case No. 12 of 2008 delivered on the 20th September 2013, was improperly before the Court. This was from the fact that, in terms of the provisions of Rule 90 (1) of the Rules, an appeal ought to be lodged within sixty days from the date on which the notice of appeal was lodged. Since the notice of appeal in the instant matter was lodged on the 23rd March 2016, by virtue of Rule 90 (1) of the Rules aforesaid, the appeal is time barred as it ought to have been lodged latest by the 20th May 2016.

The learned Senior State Attorney has asserted further that, in case the applicant did not manage to lodge his appeal within the sixty days stipulated by the law, he was obligated to file an application for enlargement of time within the subsequent sixty days. That was so from the fact that, an application for extension of time like any other application, is subject to the rules of limitation period, which is sixty days. Under the circumstances, the application by the applicant for extension of time in the instant matter ought to have been filed latest by the 21st July 2016. In lodging the application for extension of time on the 22nd November 2016,

he was out of time for about four months or so. To fortify his contention, the learned Senior State Attorney has sought refuge from the decision of this Court in the case of **Bank of Tanzania Vs Said Marinda and Thirty (30) Others**, Civil Reference No. 03 of 2014, where the principle of sixty days was promulgated under the spirit that, an applicant cannot go to Court to apply for extension of time as and when he/she wishes. In that regard therefore, the Court has been implored to find merit in the preliminary objection that has been raised, and it be pleased to sustain it by striking out the application with costs.

In response to what has been submitted by her learned friend, Ms Neema was of the view that, the preliminary objection is misconceived and unfounded. As such, the authority which his learned friend has cited in reliance to his argument, is misplaced as it is inapplicable to the circumstances of the matter under discussion. While she was at one with her learned friend in so far as the period of limitation was concerned, she was at variance with him as regards to when the limitation period of sixty days started to reckon in the instant application. In her view, the limitation period for this matter started to count from the date when the High Court

granted leave to the applicant to appeal to the Court of Appeal and not from the 20th May 2016 because by then, leave of the High Court to appeal against its decision to the Court of Appeal had not yet been obtained. Since leave to appeal was obtained on the 22nd February 2016, vide Miscellaneous Land Application No. 239 of 2016, if anything, the computation of the limitation period had to commence from then.

The learned counsel for the applicant has amplified the foregoing position by arguing that, the dispute between the applicant and the respondent was founded on a landed property. In terms of the provisions of section 47 (1) of the Land Disputes Courts Act, Cap 216, an appeal from the High Court to the Court of Appeal on matters pertaining to land disputes, is not automatic as leave has to be sought and obtained first. In the premises, it would be absurd or-else gambling, to apply for extension of time before leave was sought and granted by the High Court. What about if leave could not be granted? The learned counsel did ask. To that effect, she did humbly request the Court to find no merit in the argument fronted by her learned friend and hold that, the decision which he did cite in reliance to his submission, is distinguishable from the situation at hand.

Finally, the learned counsel for the applicant has complained about the act by the learned Senior State Attorney, to serve them with the notice of preliminary objection which they did raise, just one day before the hearing date. In so doing, she has argued, they did blatantly infringe the provisions of Rule 107 (1) of the Rules, which requires a notice of preliminary objection to be served to the other party at least three clear days before the hearing date. She has concluded her argument by urging the Court to dismiss the preliminary objection which has been raised on behalf of the second respondent with costs, and let the application for extension of time to be argued and determined on merits.

Mr. Mwakitalu learned Senior State Attorney, has in his brief rejoinder reiterated his stance that, the application at hand was time barred. He wondered to the conflicting arguments of his learned friend, who at one point she argued that, the computation of the limitation period had to start reckoning from when leave to appeal to the Court of Appeal was granted and yet, she did lodge the application for extension of time on the 22nd November 2016, before the alleged leave was granted on the 22nd February 2017. He did pose a question to his learned friend that, what was

the need for such an application for extension of time if leave had not yet been obtained? In his opinion, the contention of his learned friend was mere grappling aimed at assisting them to elude the limitation bar in which they were trapped. He did thus restate his previous stance that, the application was time barred and therefore, subject of being struck out.

As regards the complaint by the learned counsel for the applicant that, they were belatedly served with the preliminary objection and that, the provisions of Rule 107 (1) of the Rules was offended, his response was to the effect that, the provisions of Rule 107 (1) caters for appeals only and not for applications wherein, a preliminary objection can be raised at any time. The learned Senior State Attorney has thus reiterated his previous prayer for striking out the application with costs.

The issue for determination by the Court in the light of what has been submitted by the learned counsel for both sides above is whether the application by the applicant is time barred. My take off will be the provisions of Rule 90 (1) of the Rules that governs institutions of appeals. In its own wording it reads:

"90. - (1) Subject to the provisions of Rule 128, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged with-

(a)n/a

(b)n/a

(c)n/a

Save that where an application for a copy of the proceedings in the High Court has been made within thirty days of the date of the decision against which it is desired to appeal, there shall in computing the time within which the appeal is to be instituted be excluded such time as may be certified by the Registrar of the High Court as having been required for preparation and delivery of that copy to the appellant."

Admittedly, in line with the stipulation under the above quoted provisions of law, the reckoning of the limitation period for lodging the appeal at hand, had to start from the 22nd March 2016, when the notice of appeal was lodged. It was however the contention of the learned counsel

for the applicant that, in the instant matter, the reckoning could not start on the date when the notice of appeal was lodged because, the applicant was still processing for leave to appeal in compliance with the provisions of section 47 (1) of the Land Disputes Courts Act, which bears the following wording:

"47.- (1) 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 question which this Court had to ask itself in line with the foregoing two provisions of law, is whether there was any possibility for the applicant to lodge a legally sound appeal before being availed with leave of the High Court to appeal to the Court of Appeal. In view of the requirements under the provisions of Rule 96 of the Rules, my answer is in the negative. It is a requirement under Rule 96 (1) (i) of the Rules that, among the records that have to be contained in a memorandum of appeal is the order, if any giving leave to appeal. In that regard therefore, it was

imperative for the applicant to wait for the determination of the application for leave to appeal in compliance with section 47 (1) of the Land Disputes Courts Act, before he could institute his appeal because, the leave obtained, would have to constitute part of the records of appeal. My construction of the requirement under section 47 (1) of the Land Disputes Courts Act, is that, the order granting leave to appeal, forms part of the documents included in the proviso to Rule 90 (1) of the Rules, of which the period used in their preparation has to be excluded in computing the limitation period.

Since according to paragraph 10 of the supplementary affidavit that has been sworn by Neema Mtayangulwa in support of the application, leave to appeal to the Court of Appeal was granted by the High Court (Dr. Opiyo, J.), on the 22nd February 2017, then the question of time bar could not arise to an application that was lodged on the 22nd November 2016. In the event, the decision in the case of **Bank of Tanzania Vs Said Marinda and Others** (supra), is inapplicable to the circumstances of this case. To that end, the preliminary objection that was lodged by the second

respondent is hereby rejected, and the applicant will have his costs against the second respondent.

Order accordingly.

DATED at **ARUSHA** this 7th day of August, 2017

S.S. MWANGESI
JUSTICE OF APPEAL

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

A handwritten signature in black ink, appearing to read 'A.H. MSUMI', is written over a circular stamp or seal.

A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL