

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 144 OF 2016

MERCY KIMAMBO.....APPLICANT

VERSUS

1. JAMAL HAMZA MOHAMED } RESPONDENTS
2. RASHID IDDI RASHID }

**(Application for extension of time to apply from the ruling and order of the
High Court of Tanzania at Dar es Salaam)**

(Mutungi, J.)

dated the 3rd day of December, 2013

in

Land Case No. 150 of 2010

RULING

29th November, 2016 & 8th February, 2017

MUSSA, J.A.:

In the High Court of Tanzania (Land Division), the applicant instituted Land Case No. 150 of 2010 against the respondents. The suit was however, resisted by the respondents who, inter alia, raised a preliminary objection to the effect that the same was *res-judicata*. As it turned out, the preliminary point of objection was upheld and the suit was, accordingly, dismissed with

costs (Mutungi, J.) in a Ruling which was handed down on the 3rd day of December, 2013.

Dissatisfied, on the 30th day of December, 2013 the applicant contemporaneously lodged a Notice of Appeal to this Court and a request, by letter, to the High Court (Land Division) to be supplied with certified copies of the proceedings, Ruling and the Drawn Order of the trial Court. Having laid a solid foundation for appeal purposes, somehow, the applicant dawdled along and, in the result, she failed to apply for the requisite leave to appeal in good time. To remedy the situation, the applicant instituted Miscellaneous Land Application No. 358 of 2014 before the same Court through which she sought extension of time within which to apply for leave to appeal. In those proceedings, the parties agreed and were allowed to argue the application by way of written submissions, whereupon a presentation timetable was drawn. For her part the applicant lodged the submissions belatedly, as it were, three days beyond the scheduled timeframe. In its deliberations, the High Court (Ndika, J, as he then was) took the position that the shortcoming was fatal and, in the result, the application was dismissed wit costs in a Ruling that was pronounced on the 29th April 2016.

A little later, on the 13th May, 2016 the applicant preferred the present application through which she replicates the quest for enlargement of time, seemingly, by way of a second bite. The application is by a Notice of Motion which is predicated under Rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules). The same is supported by an affidavit which is duly sworn by Ms. Mercy Kimambo, the applicant. In addition, the applicant lodged written submissions to buttress the application. It is, perhaps, noteworthy that, from the adversary side, the respondents have taken a passive gesture and, as a result, they have not countered the application in any way.

When the application was called on for hearing before me, the applicant was represented by Mr. Godfrey Ukwong'a, learned Advocate, whereas both the respondents did not enter appearance. I, however, ordered the hearing of the application to proceed in their absence in terms of Rule 63(2) of the Rules after it came to light that their legal representatives, namely, Ganrichie & Co. Advocates were duly served on the 10th November, 2016.

In his brief address, the learned counsel for the applicant fully adopted the Notice of Motion, the affidavit in support as well as the written submissions of the applicant. Elaborating on the reason for the delay, Mr.

Ukwong'a submitted that he was not present during the delivery of the impugned decision of the High Court. Soon after, he said, he started his annual leave and travelled to the Republic of Uganda and could not have, therefore, applied for leave since he was outside the jurisdiction of the Court. The learned counsel for the applicant also urged me to take into account the fact that the application is not countered by any argument from the respondents.

Quite apart from the arguments put forward by Mr. Ukwong'a, I asked him to comment whether the Court has, in the first place, jurisdiction to entertain the application at hand. His reply was in the affirmative on the assumption that a party who fails in his or her bid to obtain an extension in the high Court can always try a second bite in this Court under Rule 10 of the Rules.

My enquiry as to the competence of the application was prompted by the provisions of section 47(1) of the Land Disputes Courts Act, Chapter 216 of the Revised Laws (hereinafter abbreviated "LDCA") which stipulates:-

*"Any person who is aggrieved by **the decision of the High Court in the exercise of its original, revisional or appellate jurisdiction may, with***

leave of the High Court, appeal to the Court of Appeal in accordance with the Appellate Jurisdiction Act."

[Emphasis supplied]

In the unreported Civil Appeal No. 92 of 2004 – **Dero Investment Ltd Vs Heykel Berete**, where the appellant lodged an appeal without recourse to the leave of the High Court, this Court made the following observation on the provision:-

"It is apparent from the provision that all appeals to the Court of Appeal from decisions of the Land Division of the High Court are by leave of the Land Division of the High Court. As submitted by both counsel, this is a marked departure from what is provided in section 5(1) (a) of the Appellate Jurisdiction Act, 1979 as regards civil proceedings."

As it were, the Court in that case went ahead and held that parliament curiously intended every word of that provision and rejected an argument by counsel to the effect that the provision contradicts section 48(2) of the

LDCA which provides for the application of the Appellate Jurisdiction Act, Chapter 141 of the Revised Laws (hereinafter abbreviated "AJA") in appeal proceedings. In the end result, the appeal was struck out for incompetency.

Nonetheless, upon its proper construction, I take the position that section 47(1) of the LDCA only governs decisions of the High Court *"in the exercise of its original, revisional or appellate jurisdiction."* The other decisions or orders outside this ambit are, so to speak, not contemplated. To me, a decision of the High Court either granting or refusing an extension of time for making an application for leave under the provisions of section 11(1) of AJA does not fall under the ambit of section 47(1) of LDCA.

With the import of the referred provisions in mind, it is now opportune to pay homage to the mandate of this Court to grant extensions which is comprised in Rule 10 of the Rules:-

*"The Court may, upon good cause shown, **extend the time limited by these Rules or by any decision of the High Court or tribunal**, for the doing of any act authorized or required by these Rules, whether before or after the expiration of that time and whether before or after the doing of the*

act; and any reference in these Rules to any struck time shall be construed as a reference to that time as so extended”

[Emphasis supplied.]

To cull from the foregoing provision, the Court has jurisdiction to extend the time limited by the Rules or by any decision of the High Court or tribunal for the doing of any act. For instance, Rule 83(2) of the Rules requires every Notice of Appeal to be lodged within thirty days from the date of the decision against which it is desired to appeal. Thus, a party who fails to meet the time frame may invoke the provisions of Rule 10 of the Rules and seek enlargement of time to file the Notice belatedly. Nonetheless, in terms of Rule 47 of the Rules, the application shall, in the first instance, be made to the High Court or tribunal, as the case may be. In this regard, the Court has, upon numerous decisions, held that in terms of section 11(1) of AJA and Rule 10 of the Rules, this Court and the High Court have concurrent jurisdiction to grant extensions (see, for instance Civil Reference No. 12 of 1997 – **William Shija Vs Fortunatus Masha** [1997] TLR 213 (CA); and AR Civil Application No. 5 of 2006 – **Tanzania Revenue Authority Vs Tango Transport Company Ltd** (unreported)).

The position has always been that if a party is refused extension in the High Court, he/she can try a second bite under Rule 10 of the Rules. It remains to be considered, in this regard, whether or not an application for extension of time to file a leave to appeal in matters originating from LDCA is on different footing. To begin with, the time limits for leave to appeal in Civil matters are regulated by Rules 45 of the Rules which stipulates:-

(a) *Where an appeal lies with 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 fourteen days of the decision;*

(b) ***Where an appeal lies with leave of the court*** application for leave shall be made in the manner prescribed in Rules 49 and 50 and within fourteen days of the decision against which it is desired to appeal or, where the application for leave to appeal has been made

to the High Court and refused, within fourteen days of that refusal.

[Emphasis supplied]

I have supplied emphasis to Rule 45 (b) purposely to illustrate that the provision presupposes that the Court may only embark on a second bite after a refusal of an application for leave to appeal by the High Court *where an appeal lies with leave of the Court*. But, as I have already intimated, the jurisdiction of the High Court to grant an extension for leave to appeal is not contemplated by the provisions of section 47(1) of the LDCA. In my view, the applicable provisions are comprised in section 5(1) (c) of AJA which stipulates:-

*"5(1) In civil proceedings, except where any other written law for the time being in force, provides otherwise an appeal shall lie to the Court of Appeal –
(c) with leave of the High Court or the Court of Appeal, against every other decree, order, judgment, decision or finding of the High Court."*

Thus, to the extent that the jurisdiction of the High Court to grant or refuse an extension to file an application for leave in land matters is not in

the nature of its original, revisional or appellate jurisdiction, the High Court as well as the Court of appeal have concurrent jurisdiction. Furthermore, since the application was made and refused by the High Court, the present application by way of a second bite is properly before the Court.

Coming now to the merits of the application, the issue should not detain me unnecessary since, as hinted upon, the respondent did not counter the application in any way. That being the position, I find merits in the application which is, accordingly, granted. The applicant should launch the desired application within twenty one (21) days from the date of the delivery of this Ruling. Costs should abide by the result of the intended appeal. It is so ordered.

DATED at DAR ES SALAAM, this 31st day of January, 2017



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

K.M. MUSSA
JUSTICE OF APPEAL


E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL