IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

(CORAM: MBAROUK, J.A., MWARIJA, J. A. And MWANGESI, J.A.)

CIVIL APPLICATION NO. 421/17 OF 2016

JUMA RAMADHANI MKUNA..... APPLICANT

VERSUS

ALHAJI HATIBU A. KILANGO .....RESPONDENT

(An application for leave to appeal to the Court of Appeal from the Judgment of the High Court of Tanzania at Tanga)

(Khamis, J.)

dated 14th day of August, 2015

in

Land Appeal No. 10 of 2015

RULING OF THE COURT

23rd & 27th April, 2018

MWARIJA, J.A:.

By a notice of motion filed on 25/8/2016, the applicant brought this application seeking an order granting him leave to appeal to this Court against the decision of the High Court (Khamis, J.) in Land Appeal No. 10 of 2015. The application is supported by an affidavit sworn by the applicant, Juma Ramadhani Mkuna.

In moving the Court; the applicant has cited Rules 45 (b) and 48 (1) and (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules) as enabling provisions for the application.

The decision giving rise to the application arose from Land Case Appeal No. 10 of 2015 in which the applicant was the respondent while the present respondent was the appellant. The appeal originated from Korogwe District Land and Housing Tribunal (the Tribunal) in Application No. 169 of 2012. In that application, the applicant was declared the lawful owner of the disputed house valued at Tshs. 10,000,000/= situated at Kediboma in Kilindi district.

On appeal to the High Court vide the above stated appeal, the decision of the Tribunal was reversed whereby the present respondent was declared the lawful owner of the house. The appellant was aggrieved and thus desired to appeal. Since an appeal to the Court on the decisions of the High Court in land cases is subject to the leave of the High Court under S. 47 (1) of the Land Disputes Courts Act [Cap. 216 R.E. 2002] (Cap. 216), the applicant filed in the High Court, Tanga District Registry, Misc. Land Application No. 57 of 2015 for that

purpose. He was however unsuccessful. The application was struck out on account that it was incompetent.

Still desirous of appealing to the Court, the applicant brought this application which, from the provisions of Rule 45 (b) of the Rules cited by the applicant, is intended to be by way of second bite.

At the hearing of the application, the applicant appeared in person, unrepresented. On his part, the respondent appeared also in person, unrepresented.

Before the matter could proceed to hearing, the Court raised *suo motu* the issue whether or not the application is competently before it. As stated above, the application for leave to appeal which was filed in the High Court was not determined on merit. It was struck out on the ground that it was incompetent. It is trite position that the effect of striking out a matter is to render it nonexistent. It means therefore that, if the applicant intended to pursue the matter, he should have either started the process afresh or appealed against that decision of the High Court.

When these matters were brought to the attention of the parties who, as stated above, were unrepresented, they did not have anything to submit in response, understandably because they are matters of law. They left the issue to the Court to decide it in the way it deemed fit.

Given the position stated above, it is obvious that this application is misconceived for two reasons: Firstly, since the application for leave in the High Court was struck out, not refused, the applicant could not come to this Court by way of a second bite. Rule 45 (b) of the Rules states as follows:-

"45. In Civil matters-

(a) ....

(b) Where an appeal lies with the 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 added].

Since therefore, in this case, the application before the High Court was not determined on merit, the applicant could not bring an application before the Court by way of a second bite.

Secondly, even if the application for leave would have been refused by the High Court, since the applicant is intending to appeal against the decision of the High Court arising from a Land case, the Court has no jurisdiction to grant leave to appeal under S.47 (1) of Cap. 216. That section provides as follows:

" 47 (1) Any person who is aggrieved by the decision of the High Court on the exercise of its original, revisional or appellate jurisdiction, ***may with the leave of the High Court appeal to the Court of Appeal*** *in accordance with the Appellate Jurisdiction Act, 1979."*

[Emphasis added].

It is plain from the above quoted provision of Cap. 216 that it is the High Court which is vested with exclusive jurisdiction to entertain an application for leave to appeal to the Court. The court does not have such jurisdiction. In the case of **Felista John Mwenda v. Elizabeth Lyimo,** MSH Civil Application No. 9 of 2013 (unreported), the Court had this to say on that position:

> *"The Court of Appeal, in terms of the clear provisions of section 47 (1) of Cap. 216 lacks jurisdiction to entertain the application."*

See also the cases of **Tumsifu Anasi Maresi v. Luhende Jumanne Selemani & Another,** Tbr. Civil Application No. 184/11 of 2017, **Elizabeth v. Justine John Leiyan**, Civil Appeal No. 99 of 2016 and **Nuru Omari Ligolwile v. Kipwele Ndunguru,** Civil Application No. 42 of 2015 (all unreported).

For the reasons stated above, there is no gainsaying that this application is incompetent. As a consequence, we hereby strike it out.

Since the points which have disposed of the application were raised by the court *suo motu,* we order each party to bear its own costs.

DATED at **TANGA** this 24th day of April, 2018.

M. S. MBAROUK
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

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

E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL