IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MWARIJA, J.A., LILA, J.A., And KWARIKO, J.A.)

CIVIL APPLICATION NO. 568/17 OF 2017

BAGHAYO GWANDU ..... APPLICANT

VERSUS

MICHAEL GINYAU ..... RESPONDENT

(Application from the Ruling and Order of the High Court of Tanzania at Arusha)

(Opiyo, J.)

Dated 2nd day of June, 2017
in
(Misc. Land Application No. 178 of 2016)

RULING OF THE COURT

4th & 12th December, 2018

LILA, J.A.:

In this application for revision which is predicated under section 4(3) of the Appellate Jurisdiction Act, Cap. 141 R. E. 2002 and Rule 65(1), (2), (3) and (4) of the Tanzania Court of Appeal Rules, 2009 (the Rules), the applicant is moving this Court to examine and reverse the order made by the High Court (Opiyo, J.) on 02/07/2017 which struck out Miscellaneous Land Application No. 178 of 2016. In that application, the applicant was seeking leave to appeal to the Court against the

ruling and order of the High Court in Misc. Land Application No. 96 of 2016 and issue a certificate that there are points of law worth consideration by the Court of Appeal.

The application is supported by the affidavit of Baghayo Gwandu, the applicant. On 13/09/2017, the Applicant lodged written submission in support of the application whereas the respondent, with leave of the Court, lodged reply submission on 3/12/2018.

From the scanty information borne out by the record, the background of this matter can be traced way back to the year 2012 when the parties herein appeared before Masqaroda Ward Tribunal contesting over the ownership of a piece of land the size of which is not shown in the record. That was in Ward Tribunal Land Case No. 24 of 2012. The matter went on appeal to the Babati District Land and Housing Tribunal (the Tribunal) in Land Appeal No. 84 of 2014. It is, at least, clear from this stage that the respondent was the one who appealed to the Tribunal and the applicant was the respondent.

Aggrieved by the decision of the Tribunal, the applicant preferred an appeal to the High Court in Miscellaneous Land Appeal No.3 of 2015. It was ordered that the appeal be argued

by way of written submissions. But as it were, the applicant did not file submission as scheduled. Having realised that he was late, he applied for extension of time to file submission in Miscellaneous Land Application No. 03 of 2016 but the same was turned down and the appeal (Miscellaneous Land Appeal No. 3 of 2015) was consequently dismissed for want of prosecution by Massengi, J. on 9/5/2016. Still believing to be the rightful owner of the suit land, the applicant unsuccessfully lodged Miscellaneous Land Application No. 96 of 2016 seeking restoration of Miscellaneous Land Appeal No.3 of 2015. Undaunted, he lodged Miscellaneous Land Application No. 178 of 2016, which is the subject of these proceedings, seeking leave to appeal to the Court against the ruling and order of the High Court in Miscellaneous Land Application No. 96 of 2016. As the Swahili sayings go, “siku ya kufa nyani miti yote huteleza” (literally meaning; on the day of death of monkeys, all trees become slippery), his application for leave was also unsuccessful.

In dismissing the applicant’s application for leave to appeal to the Court (Misc. Land Application No. 178 of 2016), the Honourable judge (Opiyo, J.) stated thus:

’”What can be concluded from the above is that, the application before me is an omnibus application for attempting to seek leave to appeal against two distinct matters or cases. In Law this is not attainable. There should be a separate application for leave to appeal against each case unless the two were consolidated. This is because the viability of the appeal to the court of appeal warranting granting leave to do so have to be separately determined.

Thus, based on the same principle in the above referred to cases, an application combining prayer for leave to appeal against more than one decision is defective and incompetent before this court. It therefore struck out with no order as to costs as the issue that disposed the matter was raised by the court suo motu.”

The foregoing finding of the judge forms the crux of the present application in which the applicant is substantially complaining that the parties were not accorded opportunity to submit on the issue whether or not the application was omnibus before the presiding judge raised and determined the same without hearing them. For him, that amounted to a denial of the basic right to be heard. He is, as indicated above,

seeking intervention of this Court by exercising its powers of revision to revise the said decision.

Before us, both parties appeared in persons without legal representations.

Arguing in support of the application, the applicant adopted the written submission he had earlier on filed as part of his submission and had nothing to add. The respondent, similarly, adopted the reply submission he had filed and did not have anything to add. However, for a reason soon to be apparent, we see no reason to delve on the parties' submissions.

After we had heard the parties' arguments in respect of the appeal, we were anxious to satisfy ourselves on the competence of the application before us. That concern arose after we had noted that, instead of lodging an appeal to challenge the High Court decision (Opiyo, J.), the applicant preferred the present application for revision. We had in mind the provisions of section 47(1) of the Land Disputes Courts Act, Cap. 216 R. E. 2002 (the Act). We asked the parties to address us on that aspect.

Unfortunately, both parties had nothing relevant to tell us on account of the issue being legal with which, being laypersons, they could not canvass. They consequently left it for the Court to decide.

As demonstrated above, the application is founded on land dispute. The Act provides for the procedure under section 47(1) for a party who is aggrieved by the decision of the High Court to access the Court. That section, as it were when this application was lodged and before it was amended by The Written Laws (Miscellaneous Amendments) (No. 3) Act, 2018, [Act No.8 of 2018] stated:

> *"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 from the High Court appeal to the Court of Appeal*** *in accordance with the Appellate Jurisdiction Act."* (Emphasis added)

The import of the above provisions of the law is two-limbed. The first limb is in respect of the remedy available to a person aggrieved by any decision of the High Court when exercising its original, revisional and appellate jurisdiction. The remedy is to appeal to the Court. And, the second limb is the

requirement of seeking leave before appealing to the Court. Such leave is given by the High Court.

In respect of the first limb, it is common knowledge that under section 4(2) and (3) of the Appellate Jurisdiction Act, Cap.141 R. E. 2002 (the AJA), this Court is vested with powers of revision. The Court has always been unsympathetic to those who tried to move it to entertain any matter seeking to impugn the decision of the High Court by way of revision where the right of appeal is available. It has consistently pronounced that move to be improper and has insisted that the revisional jurisdiction can be exercised in appropriate circumstances only. Such circumstances were pronounced by the Court in the case of **Moses J. Mwakibete v. The Editor – Uhuru, Shirika la Magazeti ya Chama and National Printing Co. Ltd.** (1995) TLR 134 where it was categorically stated that:

> *i) The revisional powers conferred by Section 4(3) of the Appellate Jurisdiction Act, 1979, are not meant to be used as an alternative to the Appellate jurisdiction of the Court of Appeal; accordingly, unless acting on its own motion, the Court of Appeal cannot be moved to use its revisional powers under Section 4 (3) of the Act in cases where the*

applicant has the right of appeal with or without leave and has not exercised that right.

ii) *The Court of Appeal can be moved to use its revisional jurisdiction under Section 4 (3) of the Appellate Jurisdiction Act, 4 (3) of the Appellate Jurisdiction Act, 1979 only where there is no right of appeal, or where the right of appeal is there but has been blocked by judicial process.*

iii) *Where the right of appeal existed but was not taken, good and sufficient reasons are given for not having lodged an appeal.*

These principles were restated in the cases of **Transport Equipment Ltd. v. D.P. Valambhia** (1995) TLR 161 and **Halais Pro-Chemie v. Wella A.G.** (1996) TLR 269.

In the present case the applicant is aggrieved by the decision of the High Court (Opiyo, J.) denying him leave to appeal to the Court. He had, as indicated above, the right to appeal to the Court against that decision. He was, therefore, bound to abide to the requirements of section 47(1) of the Act by lodging an appeal to the Court. He must first exhaust that remedy provided by law before invoking the revisional jurisdiction of the Court. As he has not yet exhausted that

remedy provided by law he cannot invoke the revisional jurisdiction of the Court.

With respect to the second limb, the provisions of section 47 (1) of the Act is very clear that, it is only the High Court which is vested with powers to give leave to appeal to the Court in a land matter. That section therefore vests the High Court with exclusive jurisdiction to grant leave. That position was insisted in the case of **Nuru omary Ligalwike Vs. Kipwele Ndunguru**, civil Application No. 42 of 2015 (unreported) where the Court stated:

> *"[in **Ligolwike**], the Court held inter alia that leave to appeal can only be granted by the High Court under s. 47 (1) of the Act and that it is that court which is vested with exclusive jurisdiction to do so. It means therefore, that the requisite leave can only be granted under s. 47 (1) of the Act."*

Given the above position of the law, it means a party who is denied leave to appeal by the High Court can not apply for the same in the Court. It curtails recourse to the Court on *second bite* for lack of jurisdiction. The Court has maintained that position in a number of decisions, to mention but a few, are **Felister John Mwenda Vs. Elizabeth Lyimo,** MSH Civil

Application No. 9 of 2013, **Elizabeth Lusojaki Vs. Agness Lusojaki and Anothe**r, Civil Appeal No.99 of 2016, **Tumsifu Anasi Mares Vs. Luhende Jumanne**, Civil Application No. 184/11/2017 and the recent decision in the case of **Idd Miraji Mrisho (Administrator of the estate of Mwanahamis Ramadhani abdallah, deceased) and Another Vs. Godfrey Bagenda,** Civil Application No. 17 of 2015 (all unreported) in which the Court categorically stated that where leave is denied by the High Court the remedy is to appeal to the Court against that decision. In the last case, to be specific, the Court, in very clear words stated:

> *"In case any person is aggrieved by the decision of the High Court in the exercise of its exclusive powers under section 47 (1) of Cap. 216, an appeal to this Court against the order is the appropriate remedy."*

In the light of the clear position of the law, it is apparent that the applicant wrongly preferred the present application to the Court instead of preferring an appeal. He has, if he still wishes, to appeal against the decision of the High Court (Opiyo, J.) in Miscellaneous Land application No.178 of 2016 which denied him leave to appeal to the Court.

In our view this point of law alone, disposes of the matter.

On the basis of the foregoing reasons, this application is incompetent. We accordingly strike it out. We, however, refrain from awarding costs because we raised the issue *suo motu*. Each party shall bear its own costs.

DATED at **ARUSHA** this 11th day of December, 2018.

A. G. MWARIJA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

I certify that this is a true copy of the original

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL