IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MBAROUK, J.A., MKUYE, J.A., And MWAMBEGELE, J.A.)

CIVIL APPLICATION NO. 17 OF 2015

IDD MIRAJI MRISHO
(Administrator of the Estate of
Mwanahamis Ramadhani Abdallah, Deceased) ..... 1ST APPLICANT

ASHA MOHAMED ..... 2ND APPLICANT

VERSUS

GODFREY BAGENDA ..... RESPONDENT

(Application for leave to appeal from the Judgment of the High Court of Tanzania (Land Division) at Dar es Salaam)

(De-Mello, J.)

dated the 22nd day of November, 2012
in
Land Appeal No. 28 of 2009

RULING OF THE COURT

12th & 23rd February, 2018

MWAMBEGELE, J.A.:

By a Notice of Motion taken out under Rule 45 (b) of the Tanzania Court of Appeal Rules, 2009 (henceforth "the Rules"), the applicants apply for leave to appeal against the judgment of the High Court of Tanzania. The Notice of Motion is supported by two

affidavits. The first one is deposed by Idd Miraji Mrisho, the first applicant and the second one by Asha Mohamed, the second applicant. It is resisted by an affidavit in reply deposed by Godfrey Bagenda, the respondent.

When the application was called on for hearing before us on 12.02.2018, the applicants were represented by Mr. Alphonce Katemi, learned advocate and the respondent had the services of Mr. Cleophas Manyangu, learned advocate.

At the very outset, we prompted the learned counsel for the parties to address us on two points; first whether the application was competently before us. We raised such a concern because the applicants had sought enlargement of time within which to file the present application which was granted by the Court on 20.05.2014 and they were ordered to file the application within fourteen days. Secondly, we required the learned advocates to address us on whether, in view of the provisions of section 47 (1) of the Land Disputes Courts Act, Cap. 216 of the Revised Edition, 2002 as

amended from time to time (henceforth "Cap. 216") the Court had jurisdiction to entertain and hear the application.

It was Mr. Katemi for the applicants who addressed us first. With regard to our first concern, Mr. Katemi submitted that after seeking and obtaining the enlargement of time on 20.05.2014, they lodged Civil Application No. 95 of 2014 in compliance with that order. However, they realized later that the Ruling granting them the extension sought had some clerical errors which they successfully asked the Court to rectify. That they were supplied with the rectified copy of the Ruling on 02.02.2015 and lodged the present application on 13.02.2015; well within time. That they withdrew application No. 95 of 2014 on 19.09.2017 to pave way for the hearing of this application. The present application was therefore properly before the Court, he concluded.

On the second point, Mr. Katemi submitted that the applicants were right to come to this Court by way of a second bite as dictated by Rule 45 (1) of the Rules, that application having been refused by

the High Court. The learned counsel did not cite to us any authority on both points.

Mr. Manyangu for the respondent was of the view that the present application was filed out of time, the order for enlargement of time having required the application to be filed within fourteen days. It was his view that time started to run from the date of the Ruling.

Regarding the second point, Mr. Manyangu went along with Mr. Katemi stating that the application is but a second bite properly brought under Rule 45 of the Rules. Like Mr. Katemi, Mr. Manyangu did not cite to us any authority to buttress the points.

Rejoining on the first point, Mr. Katemi submitted that the order of the Court which stated that "the application to be filed within fourteen (14) days" was an open order which, for the purposes of the present application, should be interpreted to mean that the fourteen days should be reckoned from the date when the applicants were furnished with the rectified copy of the Ruling.

We have dispassionately considered the learned arguments of both learned counsel for the parties. Having so done, on the first point of concern, we find it difficult to go along with the arguments brought to the fore by Mr. Katemi. As per record, it is true that the applicants sought and obtained an extension of time from the Court to file an application for leave to appeal to the Court and were given fourteen days within which to file that application. Indeed, the applicants complied with the order by filing Civil Application No. 95 of 2014 which was later withdrawn. The order of the Court having been complied with, Mr. Katemi's averment to the effect that the fourteen days should be reckoned from the date the rectified copy of the Ruling was availed to the applicants becomes very difficult to comprehend. It is unacceptable. We, respectfully, are of the considered view that reading the Ruling in context, by ordering that the application in which the applicants sought extension should be filed within fourteen days, the Court simply meant that that application should be filed within fourteen days of the delivery of that Ruling. The order could not have envisaged the extended time

to reckon from the day the rectified Ruling is availed to the applicants. That, in our considered view, is the only logical interpretation which should have been injected to the order "the application should be filed within fourteen (14) days" which Mr. Katemi brands it as an open order. Had Mr. Katemi read the order in context, we are certain, he would not have argued the way he does now. The applicants cannot blow hot and cold at the same time. The reasons given by Mr. Katemi that the first Ruling had clerical errors which they successfully applied to have them rectified and were furnished with a correct copy on 02.02.2015 is supported by the record and would, therefore, have been good grounds in an application for extension of time to justify why they were not able to comply with the order or why the initial compliance of the order was an exercise in futility. We therefore, like Mr. Manyangu, are of the view that the present application was filed out of time and therefore incompetent.

The foregoing disposes of the present matter. However, for completeness, we find it appropriate to canvass the second point of

concern as well. This is about jurisdiction of the Court in matters of this nature; that is, in applications for leave to appeal to the Court in land cases. The learned counsel for the parties are at one that the applicants followed the right path to come to the Court on a second bite in the present application leave having been refused by the High Court. With due respect to both learned counsel, we are not prepared to go along with them. We shall demonstrate why.

It is apparent that the present application stems from a land matter. The applicants lost in both the District Land and Housing Tribunal and the High Court (Land Division). The applicants lost as well in the High Court in an application for leave to appeal to this Court. As correctly perceived by both learned counsel for the parties, a party who has been aggrieved by the decision of the High Court in a land matter cannot come to the Court on appeal without having first sought and obtained leave of the High Court so to do. This is provided for by the provisions of section 47 (1) of Cap. 216. For easy reference, we take the liberty to reproduce the subsection. It reads:

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

We have had an opportunity on several occasions to interpret the tenor and import of the subsection. Such opportunities occurred in **Felista John Mwenda v. Elizabeth Lyimo,** MSH Civil Application No. 9 of 2013 **Nuru Omary Ligalwike v. Kipwele Ndunguru,** Civil Application No. 42 of 2015, **Tumsifu Anasi Maresi v. Luhende Jumanne Selemani & Another**, TBR Civil Application No. 184/11 of 2017 and **Elizabeth Losujaki v. Agness Losujaki & Another**, Civil Appeal No. 99 of 2016 (all unreported) to mention but a few. In all these cases, we were firm to state that an application for leave to appeal to the Court in a land matter is

within the exclusive jurisdiction of the High Court. In **Losujaki** (supra), for instance, referring to **Ligolwike** (supra), we 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."*
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> [Emphasis supplied].

Likewise, in **Maresi** (supra), we quoted the following excerpt from the **Mwenda** case (supra) both of which were applications for leave to appeal to the Court in land matters:

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

application [for leave to appeal to this Court]."

On the stance we exhibited in the above cases, it is apparent that in land matters, the High Court has exclusive jurisdiction to grant or not to grant leave to appeal to the Court of Appeal. That is to say, the Court of Appeal does not have concurrent jurisdiction with the High Court in applications for leave to appeal to the Court in a land matter. An aggrieved person in such a case cannot therefore come to this Court by way of a second bite of the cherry through Rule 45 of the Rules. For the avoidance of doubt, neither can he come through section 5 (1) of the Appellate Jurisdiction Act, Cap. 141 of the Revised Edition, 2002. In case any person is aggrieved by the decision of the High Court in exercise of its exclusive powers under section 47 (1) of Cap. 216, an appeal to this Court against the order is the appropriated remedy.

This means that even if we would have found the application as not incompetent for being filed in time, for the reasons just stated,

we would have as well found it incompetent for want of jurisdiction. It would have been patently wrong to entertain and hear an application which falls within the exclusive empire of the High Court.

For the reasons stated earlier, we find this application incompetent for being filed out of time and strike it out. As we raised the issue *suo motu*, no order as to costs is made.

Order accordingly.

DATED at **DAR ES SALAAM** this 15th day of February, 2018.

M. S. MBAROUK
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

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

A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL