IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

CIVIL APPLICATION NO. 526/11 OF 2017

KABDECO.....APPLICANT

VERSUS

WETCU LIMITED.....RESPONDENT

(An Application for extension of time to apply application for leave to appeal to the Court of Appeal of Tanzania against the Ruling and orders of the High Court of Tanzania at Tabora)

(Songoro, J.)

Dated the 17th day of July, 2013

in

Miscellaneous Land Application No. 33 of 2011

RULING

25th November & 6th December, 2019

SEHEL, J.A.:

By notice of motion made under Rule 10 of the Court of Appeal Rules, 2009 (the Rules), the applicant is seeking for an extension of time within which to file an application for leave to appeal to the Court of Appeal of Tanzania against the Ruling and order of the High of Tanzania at Tabora in Miscellaneous Application No. 33 of 2011 dated the 17th day of July,

2011. That notice of motion is supported by an affidavit sworn by **Mr. Stanslaus Kazinja**, the Technical Director and the sole proprietor of the applicant.

The affidavit in support of the application provides the background facts leading to present application. It is deposed that the present application originates from Land Application No. 27 of 2007 wherein the respondent sued the applicant in the District Land and Housing Tribunal, Tabora (hereinafter referred to as DLHT) over ownership of Plot No. 17A Block J. The suit was decided in favour of the respondent. The applicant was aggrieved. It filed an appeal before the High Court of Tanzania at Tabora in Land Appeal No. 19 of 2008. It happened that on 11th day of May, 2011 the applicant defaulted appearance thus the appeal was dismissed for non-appearance by Nyangarika, J (as he then was).

Thereafter, the applicant made an application in the High Court for restoration of the appeal, Miscellaneous Land Application No. 33 of 2011. That application was dismissed by Songoro, J on 17th day of July, 2013. In an effort to challenge that decision, the applicant reached up to the Court of Appeal of Tanzania seeking for leave to appeal to the Court of Appeal of

Tanzania in Civil Application No. 4 "A" of 20014. On the 12th day of December, 2014, the Court of Appeal of Tanzania struck out the applicant's application. It also nullified the proceedings of the High Court that refused the applicant's leave to appeal to the Court of Appeal of Tanzania. The applicant was directed to start afresh, if it so wished.

It, thus, begun the process afresh by seeking an extension of time for giving notice of intention to appeal which application was granted on the 25th day of April, 2017. Thereafter, on the 28th day of April, 2017 the applicant made an application for extension of time for leave to appeal to the Court of Appeal Miscellaneous Land Application No. 26 of 20017. That application was refused by Mallaba, J (as he then was) on the 20th day of July, 2017 hence the present application was filed on the 15th day of September, 2017.

The respondent did not file an affidavit in reply to dispute the facts deposed by the applicant. However, when the application was called on for hearing before me, Ms. Theresia Fabian, learned advocate appeared to represent the respondent and intimated that the respondent is objecting

the application on legal issue and not facts that is why it did not file affidavit in reply.

Mr. Stanslaus Kazinja, the sole proprietor of the applicant appeared t represent the applicant. After being given a chance to submit on its application, he being a layperson had nothing much to add apart from adopting the notice of motion and his affidavit in support of the application.

In reply Ms. Fabian raised two legal issues. First, she contended that the applicant ought to have cited Rule 45 (a) of the Rules. Having been shown to the amendment effected in Rule 48 of the Rules through G.N. No. 344 of 0219, the learned advocate abandoned that submission. She thus turned to her second objection that the application ought to have been brought against the Ruling of Mallaba, J. that refused his application for leave to appeal to the Court of Appeal and not against the Ruling of Songoro, J. that refused re-admission of the appeal. She added that there is no notice of appeal against the decision of Songoro, J. With that shortfall, she prayed for the application to be struck out.

Mr. Kazinja being not conversant with the legal issue raised by Ms. Fabian, he could not respond to it. He instead opted to leave to the Court and urged for the grant of the extension of time.

From the outset let me narrow down the non-contentious facts. It is not disputed by the respondent that the present application emanated from the land dispute and that the applicant is required by law to seek and obtain leave to appeal to the Court of Appeal of Tanzania as it was a mandatory requirement before the amendment of section 47 (1) of the Land Disputes Courts Act, Cap 216 Revised Editions 2002 (the LDCA). The Amendment was made through the Written Laws (Miscellaneous Amendment) Act No. 3 of 2018 (the Amendment Act) which came into force on the 24th day of September, 2018, that is, five years after the application for restoration of the appeal was refused by the High Court. It is further not disputed that the applicant had been all along in court corridors trying to restore his appeal that was dismissed by the High Court on the 17th day of July, 2013. Its barren efforts led to the filing of the present application.

It is argued by the learned counsel for the respondent that the applicant having lost leave in the High Court, it was required to seek extension of time against the Ruling of the High Court that refused leave to appeal so that it could have come to this Court as a second bite as per Rule 45 (b) of the Rules. I, with respect, do not subscribe to the submission of Ms. Fabian. Before the Amendment, the mandate of granting leave to appeal to the Court of Appeal on land matters was within the exclusive jurisdiction of the High Court as it was proscribed by section 47 (1) of the LDCA. That provision of the law reads:

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

There are numerous authorities that interpreted the tenor and import of that section. For instance in the case of **Masato Manyama v. Lushamba Village Council**, Civil Application No. 3/08 of 2016 (unreported) the Court was invited to consider an application for leave to appeal made under section 5 (1) (c) of the Appellate Jurisdiction Act, Cap

141 RE 2002 (the AJA) and Rule 45 (1) (b) of the Rules following its refusal in the High Court. That application was struck out and the Court said:

> *"...in the matter at hand, the applicant has predicated his application under section 5 (1) (c) of AJA and Rule 45 (1) (b) of the Rules. However, we are of the view that, the Court lacks such jurisdiction. We say so because, as we have stated earlier on, section 47 (1) of the LDC Act vests exclusive jurisdiction to the High Court on matters of leave to appeal to the Court of Appeal. On top of that section 5 (1) (c) of the AJA together with Rule 45 (b) of the Rules do not confer jurisdiction to the Court of Appeal to entertain an application for leave to appeal against the decision of the High Court on a matter which is regulated under such other written law such as the one at hand."*

A similar scenario occurred in the case of **Yusufu Juma Risasi v. Anderson Julius Bicha**, Civil Application No. 176/11 of 2017 (TB) (unreported) where the Court held that it had no jurisdiction to entertain an application for leave because of two main reasons. The reasons were stated at page 13 as follows:

"We now turn to address the question whether the Court can grant the applicant leave to appeal to the Court against the decision of Land Division which he seeks under section 5(1) (c) of AJA following its refusal at the High Court (Land Division). Our answer is in the negative because: ***one****, under section 47 (1) of LDCA, the High Court is vested with exclusive jurisdiction on matters of leave to appeal to the Court.* ***Two****, the Court does not have jurisdiction to entertain an application for leave to appeal against the decision of the High Court under section 47 (1) of LDCA and there is no remedy under section 5 (1) (c) of AJA. (See* ***Felista John Mwenda v. Elizabeth Lyimo****, Civil Application No.9 of 2016 and* ***Elizabeth Losujaki v. Agness Losujaki and Another****, Civil Application No. 99 of 2016 (both unreported). Lastly in the case of* ***Tumsifu Anasi Maresi v. Luhende Jumanne****, Civil Application No. 184/11/2017, we clearly stated that the remedy of refused by the High Court for leave to appeal is to appeal to the Court..."*

In view of the above, three things are apparent. **One**, the High Court had exclusive jurisdiction in land matters to grant leave to appeal to the Court of Appeal. **Two**, this Court had no jurisdiction to entertain an

application for leave. **Three**, the remedy of refusal for leave by the High Court is to appeal against that refusal. Consequently, the submission of Ms. Fabian is misconceived and I discard it.

Turning to the application at hand, as I said the applicant is seeking an extension of time to file an application for leave against the decision of the High Court that dismissed its application for restoration of appeal. The issue whether the applicant ought to have filed an appeal instead of leave is not within my jurisdiction. It is within the powers of the Court at the time when the applicant will lodge its application for leave.

In the case of **Victoria Real Estate Development Limited v. Tanzania Investment Bank and 3 Others,** Civil Application No. 225 of 2014 (unreported) a Single Justice of the Court (Mmilla, J.A) when he was dealing with an application for extension of time, declined to tackle the issue whether or not the illegality was well found because he said that issue border closer to going into the merits of the intended application for revision. In reaching to that stance, he relied to the case of **Regional Manager- TANROADS Lindi v. D.B Shapriya and Company Limited**, Civil Application No. 29 of 2012 (Unreported) where it was stated:

"...it is now settled that a Court hearing an application should restrain from considering substantive issues that are to be dealt with by the appellate Court. This is so in order to avoid making decisions on the substantive issue before the appeal itself is heard. Further to prevent a single judge of the Court from hearing an application by sitting or examining issues which are not his/her purviews."

See also the case of **Grand Regency Hotel Limited v. Pazi Ally and 5 Others**, Civil Application No. 100/01 of 2017 (unreported).

Admittedly, in the application at hand, my jurisdiction is narrowed into looking as to whether there is good cause or not. Dwelling further into scrutinizing the propriety or not of the intended application for leave will be tantamount to the usurpation of the Court's power. In that regard, as it was done in **Victoria Real Estate Development Limited v. Tanzania Investment Bank and 3 Others** and **Grand Regency Hotel Limited v. Pazi Ally and 5 Others** (supra), I will confine myself into the merits and demerits of an application for extension of time.

An application for extension of time is governed by Rule 10 of the Rules that states:

> *"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 such time shall be construed as a reference to that time as so extended."* (Emphasis is added)

It is evident from the above provision of the law that the applicant has to advance good cause for the Court to exercise its discretionary power in granting the extension of time. What constitutes *"good cause"* cannot be laid down by any hard and fast rules. The term *"good cause"* is a relative one and is dependent upon the circumstances of each individual case. It is upon the party seeking extension of time to provide the relevant material in order to move the court to exercise its discretion. See **Regional Manager Tanroads Kagera v. Ruaha Concrete Company Limited**, Civil Application No. 96 of 2007; **Oswald Masatu Mwizarubi v. Tanzania Fish Processing Ltd**, Civil Application No. 13 of 2010; and **Victoria Real Estate Development Limited v. Tanzania Investment Bank and 3 Others**, Civil Application No. 225 of 2014 (All unreported).

The applicant in the instant application has explained in its affidavit that it was at all times pursuing its right before the court of law and as such time lapsed. It deposed that it filed the notice of appeal in time and sought leave to appeal but that leave was refused by the High Court thus it went up to the Court of Appeal. This Court struck out its application for leave and nullified the proceedings of the High Court which refused the application for leave and the Court directed the applicant to start afresh, if it so wished. For that reason, the applicant is now before me seeing for an extension.

In the case of **Fortunatus Masha v. William Shija and another** [1997] TLR 154, a single Judge of this Court termed the time spent in court by the applicant in pursuing incompetent application as technical delay which cannot be used again to penalized the applicant after the defective application having been struck out. He said at page 155 as follows:

> *"..... I am satisfied that a distinction should be made between cases involving real or actual delays and those like the present one which only involve what can be called technical delays in the sense that the original appeal was lodged in time but the*

present situation arose only because the original appeal for one reason or another has been found to be incompetent and a fresh appeal has to be instituted. In the circumstances, the negligence if any refers to the filing of an incompetent appeal not the delay in filing it. The filing of an incompetent appeal having been duly penalized by striking it out, the same cannot be used yet again to determine the timeousness of applying for filing the fresh appeal."

The above position was followed in the case of **Eliakim Swai and Another v. Thobias Karawa Shoo**, Civil Application No. 2 of 2016 (unreported) where at page 11 it was stated:

"It is not disputed that Civil Application No.1 of 2015 was filed in time. Thus, as for the period of delay between the filing of Civil Application No.1 of 2015 and 27.02.2016 when it was struck out for non-citation of section 4 (3) of the Appellate Jurisdiction Act which is the enabling provision for revision, that period can conveniently be termed as a "technical delay" on which the applicants are not to blame within the meaning of the decision of this court in ***Fortunatus Masha v. William Shija And Another*** *[1997] TLR 154 at 155."*

On the foregoing position of the law, I find and hold that the applicant has explained away the delay in filing the application for leave to appeal to the Court of appeal.

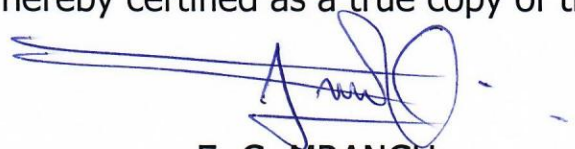
In the end, the application is hereby granted. That application shall be filed within fourteen days from the pronouncement of this ruling. Costs shall abide to the outcome of the intended leave.

Ordered accordingly.

DATED at **TABORA** this 5th day of December, 2019.

B. M. A. SEHEL
JUSTICE OF APPEAL

The Ruling delivered on this 6th day of December, 2019 in the presence of Mr. Stanslaus Kazinja, Managing Director of the Company on behalf of the applicant, Miss Theresia Fabian, learned counsel appeared for the respondent, is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL