

**IN THE COURT OF APPEAL OF TANZANIA  
AT DODOMA**

**(CORAM: MUGASHA, J.A., NDIKA, J.A., And LEVIRA, J.A.)**

**CIVIL APPLICATION NO. 477/03 OF 2018**

**CHARLES S. KIMAMBO ..... APPLICANT**

**VERSUS**

**CLEMENT LEONARD KUSUDYA (As an Administrator  
of the Estate of LEONARD KUSUDYA, Deceased) ..... FIRST RESPONDENT  
NATIONAL BANK OF COMMERCE ..... SECOND RESPONDENT**

**(Application for leave to appeal from the Decision of the High Court of  
Tanzania at Dodoma)  
(Mansoor, J.)**

**dated the 23<sup>rd</sup> day of June, 2017**

**in**

**Misc. Civil Application No. 44 of 2016**

.....

**RULING OF THE COURT**

17<sup>th</sup> & 19<sup>th</sup> June, 2020

**NDIKA, J.A.:**

This ruling resolves the application by Charles Kimambo (“the applicant”) for leave to appeal to the Court against the decision of the High Court of Tanzania at Dodoma in Miscellaneous Civil Application No. 44 of 2016 dated 23<sup>rd</sup> June, 2017. The application is made under section 5 (1) (c) of the Appellate Jurisdiction Act, Cap. 141 RE 2002 and Rules 45 (b) and 48 (1) of the Tanzania Court of Appeal Rules, 2009. In support of the

application, the applicant swore an affidavit. Resisting, Mr. Elias Michael Machibya, learned counsel for the respondent, filed an affidavit in reply.

The background and the context in which this matter has arisen is as follows. On 27<sup>th</sup> December, 1993 the applicant purchased in a public auction landed property described as Plot No. N80, Block 'B' Mpwapwa from the second respondent at the price of TZS. 2,100,000.00. The property is comprised in Certificate of Title No. 672-DLR L.O. No. 48185 of 5<sup>th</sup> May, 1994, then registered in the applicant's name.

In 1996, the property became the subject of Civil Case No. 20 of 1996 in the District Court of Dodoma at Dodoma jointly instituted by the applicant and the second respondent against the first respondent for various reliefs including a declaration that the sale of the property to the applicant was legal and vacant possession. The applicant claims that the suit ended with a consent judgment that was entered between the respondents without involving him. This averment, however, is hotly contested by the first respondent.

According to the applicant, the first respondent remained recalcitrant, refusing to yield up vacant possession of the property. Subsequently, the first respondent applied to the District Court of Dodoma at Dodoma for

direction on how he should refund the purchase price of TZS. 2,100,000.00. The ruling on that application was not issued immediately as the presiding Resident Magistrate, then Hon. Dyansobera, was transferred to another station. The applicant became oblivious of the matter until 2012 when he learnt of a ruling dated 28<sup>th</sup> September, 2000 as having been delivered twelve years earlier. In the said ruling, the learned Magistrate rejected the applicant's contention that he was not a party to the consent judgment. Accordingly, he was directed to accept the refund of the purchase price.

Being aggrieved, the applicant instituted Civil Revision No. 5 of 2012 in the High Court of Tanzania at Dodoma seeking revision of the proceedings in Civil Case No. 20 of 1996. The first respondent resisted the application and so, he raised a preliminary objection mainly based on the point that the matter was time-barred. In its ruling dated 19<sup>th</sup> November, 2015, the High Court (Mohamed, J.) dismissed the preliminary objection as it found that due to an allegation of fraud against the first respondent, the period of limitation had to be reckoned from September, 2012 when the applicant became aware of the fraud. The Court rejected the first respondent's contention that the date of reckoning was 19<sup>th</sup> March, 1999 when the District Court of Dodoma issued the now impugned consent

judgment. It turned out, however, that the High Court (Mohamed, J.) subsequently struck out the revision with costs vide his decision of 28<sup>th</sup> June, 2016 on the ground that it was predicated on wrongly cited enabling provisions of the law.

So as to refresh his quest for revision, the applicant approached the High Court vide Miscellaneous Civil Application No. 44 of 2016 seeking extension of time. The High Court was unimpressed and so, it dismissed the matter on 23<sup>rd</sup> June, 2017 as it reasoned that:

*"I have heard the counsel's submissions and I appreciate their arguments. **I agree that the applicant failed to account for the delay from 1999 until 2012 when he filed the Application No. 5 of 2012 and also he failed to account for the delay from the time Misc. Civil Application No. 5 was struck out to the time he filed the present application.** I also agree that section 21 (1) of the Law of Limitation Act does not allow exclusion of time when a person is pursuing other remedies outside the court's remedies and **the time cannot be condoned as that delay of 12 years from 1999 to 2012 is inordinate** and the counsel for the applicant failed to account for each day of delay."*[Emphasis added]

Being aggrieved by the aforesaid refusal of extension of time, the applicant lodged a notice of appeal and applied to the High Court Dodoma vide Miscellaneous Civil Application No. 32 of 2017 for leave to appeal. The High Court (Kalombola, J.) dismissed the said application on 16<sup>th</sup> July, 2018, hence this application as a second bite, so to speak. The matter is predicated on the ground that:

*"The Honourable Judge misdirected herself, while entertaining the application for extension of time to lodge the Application for Revision, to deal with and decide on an issue relating to **as to when time to lodge an Application for Revision in the matter before her began to run, an issue that was already decided by the same court in Civil Revision No. 5 of 2012, as such court was functus officio in relation thereto.**"*

Before us, Ms. Amina Waziri Hamisi, learned counsel, appeared holding brief for Mr. Cheapson L. Kidumage, learned counsel, for the applicant whereas Mr. Elias M. Machibya and Ms. Magret Mbasha, both learned counsel, represented the first respondent. The second respondent, who was served with the notice of the hearing on 1<sup>st</sup> June, 2020, defaulted appearance. We agreed with Ms. Hamisi and Mr. Machibya to proceed with the hearing in the absence of the second respondent and ordered so in terms of Rule 63 (2) of the Rules.

Ms. Hamisi urged us to grant leave mainly on the ground that the High Court misdirected itself in refusing the extension prayed for on the ground that the applicant had not accounted for the time between 19<sup>th</sup> March, 1999 when the District Court of Dodoma issued the now impugned consent judgment and 2012 when the applicant lodged Civil Revision No. 5 of 2012. It was her contention that the High Court ought to have not considered the said period because the same court in Civil Revision No. 5 of 2012 had exempted that period, having taken the view that time started running in September 2012 when the applicant became aware of an alleged fraud.

For the first respondent, Mr. Machibya valiantly resisted the application. He submitted that the question of *functus officio* was brought in wrongly because in refusing extension of time Mansoor, J. was not bound by the decision of Mohamed, J. by which he initially dismissed the first respondent's preliminary objection that Civil Revision No. 5 of 2012 was time-barred. The application for extension of time, he added, was doomed to fail on a further ground that the applicant failed to account for each day of delay between the time Civil Revision No. 5 of 2012 was struck out to the time when he applied for extension of time. Accordingly, he urged us to

dismiss the application on the ground it raises no point of law worthy the Court's consideration.

We have examined the application and taken account of the contending submissions of the parties. The sticking point for our consideration is whether the application discloses a strong reason for granting leave to appeal.

It is settled that leave to appeal is not granted automatically. In **British Broadcasting Corporation v. Eric Sikujua Ng'maryo**, Civil Application No. 138 of 2004 (unreported), it was held that:

*"As a matter of general principle, leave to appeal will be granted where the grounds of appeal raise issues of general importance or a novel point of law or where the grounds show a prima facie or arguable appeal."*

Earlier in **Harban Haji Moshi and Another v. Omari Hilal Seif and Another** [2001] TLR 409, the Court had emphasized, at page 414 and 415, thus:

*"Leave is grantable where the proposed appeal stands reasonable chances of success or where, but not necessarily, the proceeding as a whole reveals*

*such disturbing features as to require the guidance of the Court of Appeal. The purpose of the provision is, therefore, to spare the court the spectre of unmeriting matters and to enable it to give adequate attention to cases of true public importance.”*

Guided by the above settled position of the law, we examined the decision of the High Court intended to be challenged in view of the competing submissions of the learned counsel. To begin with, we are in agreement with Mr. Machibya that the question of *functus officio* was, brought in wrongly in this application because in refusing extension of time Mansoor, J. was not bound by the decision of Mohamed, J. by which he dismissed the first respondent’s preliminary objection against the competence of Civil Revision No. 5 of 2012 – see **Kamundi v. Republic** [1973] EA 540 cited by the Court in **John Mgaya and Four Others v. Edmund Mjengwa and Six Others**, Criminal Appeal No. 8A of 1997 (unreported) on what the doctrine of *functus officio* entails.

Nonetheless, we find it arguable, without deciding, that since the High Court (Mohamed, J.) had already decided that the initial revision (Civil Revision No. 5 of 2012) was lodged in time on the ground that the time between 19<sup>th</sup> March, 1999 when the District Court of Dodoma issued the



now impugned consent judgment and 2012 when the applicant lodged that revision, Mansoor, J. should have taken that consideration into account in favour of the applicant. In this sense, we think it is arguable that the finding by Mansoor, J. that "*the applicant failed to account for the delay from 1999 until 2012*" when he filed the initial application for revision is, with respect, a misapprehension of facts. We are decidedly of the view that this issue raises a point of sufficient importance for the consideration of the Court.

It may be true, as contended by Mr. Machibya, that the applicant also failed to account for each day of delay between the time Civil Revision No. 5 of 2012 was struck out to the time when he lodged the application for extension of time. However, we do not think that at this stage this is a decisive consideration. It will be properly examined by the Court on appeal. More so because the material placed before us does not include, for obvious reasons, the chamber summons and the supporting affidavit for us to decide on the point one way or the other. At any rate, we think, as submitted by Ms. Hamisi, the High Court's primary consideration in its decision was the fact as that the delay of twelve years from 1999 to 2012 was so inordinate that it could not be condoned.

The above said, we find merit in the application. Accordingly, we grant leave to the applicant to appeal to the Court against the decision of the High Court at Dodoma in Miscellaneous Civil Appeal No. 44 of 2016 in terms of section 5 (1) (c) of the AJA. Costs shall be in the intended appeal.

**DATED** at **DODOMA** this 18<sup>th</sup> day of June, 2020.

S. E. A. MUGASHA  
**JUSTICE OF APPEAL**

G. A. M. NDIKA  
**JUSTICE OF APPEAL**

M. C. LEVIRA  
**JUSTICE OF APPEAL**

This Ruling delivered on 19<sup>th</sup> day of June, 2020 in the presence of Ms. Amina Hamisi, learned counsel for the applicant and Mr. Elias M. Machibya and Ms. Magret Mbasha, learned counsels for the 1<sup>st</sup> Respondent and in the absence of the 2<sup>nd</sup> Respondent, is hereby certified as a true copy of the original.

  
G. H. HERBERT  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**