IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: NDIKA, J.A., WAMBALI, J.A. And SEHEL, J.A.)

CIVIL APPLICATION NO. 322/10 OF 2020

MUSTAFA ATHUMAN NYONI ..... APPELLANT

VERSUS

ISSA ISSA ATHUMAN NYONI
(As a Legal Representative Of the Estate of the late
Issa Athuman Nyoni) ..... **RESPONDENT**

(Application for leave to appeal against the judgment and decree of the High Court of Tanzania at Songea)

(Kwariko, J.)

Dated the 11th day of September, 2014
in
Land Appeal No. 44 of 2013

RULING OF THE COURT

4th & 7th May, 2021

WAMBALI, J.A.:

We wish to preface our Ruling by observing that before the application was heard, in terms of Rule 57 (3) of the Tanzania Court of Appeal Rules, 2009 (the Rules), we granted an informal application by the respondent's counsel to join the legal representative of the respondent. We therefore, ordered that Mr. Issa Issa Athuman Nyoni, an interested person be made a party in the place of the deceased Issa Athuman Nyoni. Essentially, we granted the request after we were satisfied that the then respondent, Mr. Issa Athuman Nyoni

passed away on 9th August, 2020 and Mr. Issa Issa Athuman Nyoni was appointed by the Primary Court of Mfaranyaki in Songea District as the administrator of the deceased's estate on 16th November, 2020. Besides, Mr. Mustafa Athuman Nyoni, the applicant did not object to the request.

In this application, the applicant urges the Court to grant him leave to enable him to challenge the decision of the High Court at Songea Sub-Registry dated 11th September, 2014 in Land Appeal No.44 of 2013. Apparently, the applicant appealed to the High Court after he unsuccessfully persuaded the District Land and Housing Tribunal (DLHT) for Songea in Land Application No.3 of 2012 to declare him a winner against the then respondent over a dispute relating to a piece of land measuring 200 acres on the contention that it was a clan land.

Apparently, after the decision of the High Court was pronounced, he also unsuccessfully in Misc. Land Application No.38 of 2014 applied for leave to appeal to this Court as on 9th April, 2015, Fikirini, J dismissed the application with costs. The dismissal of the applicant's application by the High Court, seriously displeased the applicant, and thus on 27th May, 2020 he lodged the present

application after he was granted extension of time. The application which is supported by the applicant's affidavit is predicated on the following paraphrased grounds for seeking leave to appeal:-

1. *That the court raised some matters such as title of the applicant and that the land was abandoned and decided them without inviting parties.*

2. *That the land in dispute is a clan land for which the respondent was awarded contrary to the law.*

Equally important, the applicant lodged a written submission in support of the application. Essentially, the applicant has approached the Court on a second bite in terms of rule 45 (b) of the Rules. The application is strongly resisted by the respondent as reflected in the affidavit in reply lodged on 2nd June, 2020 and the written submission.

At the hearing of the application, the applicant appeared in person without the services of an advocate. When he was granted an opportunity by the Court to explain the substance of his application, he briefly urged us to consider his notice of motion, affidavit and the

written submission he lodged earlier on to grant the application with costs.

On his part, Mr. Jassey Samwel Mwamgiga, learned advocate who appeared for the respondent, out rightly implored us to strike out the application for being improperly before the Court.

Elaborating, Mr. Mwamgiga submitted that as the applicant's application for leave to appeal to this Court was dismissed by the High Court on 9th September 2015, in terms of section 47(1) of the Land Disputes Courts' Act, Cap 216 R. E. 2002 (now R. E. 2019) (Cap.216), his remedy was to appeal to this Court against that decision. In his further submission, the learned advocate argued that the applicant cannot come to this Court in terms of Rule 45(b) of the Rules, on a second bite because the Court has no jurisdiction to entertain the application. To support his submission, Mr. Mwamgiga referred us to the Court's decisions in **Hamis Msunge v. Hawa Hassani Mtumwa**, Civil Application No.105 of 2014 and **Masato Manyama v. Lushamba Village Council**, Civil Application No.3/08 of 2016 (both unreported).

In the end, relying on those decisions, Mr. Mwamgiga strongly implored us to strike out the application with costs.

In rejoinder, the applicant reiterated his earlier prayer that based on the grounds in the notice of motion, affidavit and the written submission, his application should be granted with costs.

It is apparent as per the record of application that the application for leave to appeal before the High Court was predicated on the then section 47(1) of Cap 216. The said section provided as follows:-

> *"47(1) Any person, who is aggrieved by the decision of the High Court in the exercise of its original, revision 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]

Admittedly, since the applicant's application for leave to appeal was dismissed by the High Court on 9th April, 2015, the remedy which was immediately at his disposal was to initiate the process to appeal to this Court. There is litany of authorities by the Court in support of the settled position of the law. One of those decisions is **Ali Chamani v. Karagwe District Council & Another**, Civil

Application No.411/4 of 2017 (unreported), in which in an akin situation, the Court stated as follows:-

> *"Regarding the exclusivity of the jurisdiction of the High Court it was restated in the case of* ***Felista John Mwenda v. Elizabeth Lyimo,*** *(MSH) Civil Application No. 9 of 2013 (unreported) when the Court stated as hereunder:*
>
> *"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* ***Paulina Thomas v. Prosper Mutayoba & Another, v.*** *Civil Application No. 77/8/2017"*[unreported].

The Court then made reference to the decision in **Juma Ramadhani Mkuna v. Alhaji Hatibu A. Kilango**, Civil Application No.421/17 of 2016 (unreported) and stated thus:-

> *"One, under section 47(1) of the LDCA, 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".*

Apparently, similar observation on the position of the law was stated in **Baghayo Gwandu v. Michael Ginyau**, Civil Application No.568/17 of 2017 (unreported) in which the Court extensively revisited and emphasized the context and application of the provision of section 47 (1) of Cap. 216 as follows:-

> *"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".*

The Court then proceeded and stated that:-

> *"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 Another,*** *Civil Appeal No.99 of 2016,* ***Tumsifu Anasi Mares Vs. Luhende***

Iumanne, *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".*

Generally, in all those decisions, the Court consistently emphasized that a party who is denied leave to appeal under the provisions of section 47(1) of Cap 216 cannot approach the Court on a second bite for lack of jurisdiction and that the remedy was to appeal against the refusal by the High Court.

Applying the above settled position of the law to the instant application, it is plain that the Court has no jurisdiction to entertain it. The application is thus incompetent for lack of jurisdiction. The only remedy which was available to the applicant since 9th September, 2015 when leave was refused by High Court in terms of section 47(1) of Cap. 216, was to appeal to this Court within the prescribed period.

This is so because; by that time section 47(1) clothed the High Court with exclusive jurisdiction in application for leave in land matters.

We are however alive to the current position of the law which was introduced by Act No. 8 of the Written Laws (Miscellaneous Amendments) Act, No. 8 of 2018 which has changed the former position.

Admittedly, under the current set up of the provisions of section 47(1) of Cap. 216, a party whose application for leave to appeal is dismissed by the High Court is entitled to come to the Court on a second bite in accordance with Rule 45(b) of the Rules. The section provides as follows:-

> *47-(1) "A person who is aggrieved by the decision of the High Court in the exercise of its original jurisdiction may appeal to the Court of Appeal in accordance with the provisions of the Appellate Jurisdiction Act.*
>
> *(2) A person who is aggrieved by the decision of the High Court in the exercise of its revisional or appellate jurisdiction may, with leave of the High Court or Court of Appeal, appeal to the Court of Appeal".*

Thus, under the amended version of the reproduced provision of section 47 (2), an aggrieved party to the decision of the High Court in exercise of its appellate or revisional jurisdiction, may appeal to this Court with the leave of the High Court or the Court. In the premises, if an application for leave to appeal is refused by the Court under section 47(2) any aggrieved party may approach the Court on a second bite in terms of Rule 45 (b) of the Rules.

We are, however, mindful of the position of the law that when an amendment of the law affects a procedural step or matter only, it acts retrospectively, unless good reason to the contrary is shown (see the decision of the Court in **The Director of Public Prosecutions v. Jackson Sifael Mtares and Three Others,** Criminal Appeal No. 2 of 2018 (unreported)).

However, in the instant application, we hold the firm view that the situation is distinguishable and the said amendment to section 47 (1) of Cap. 216 cannot apply retrospectively. We hold this view because before the said section was amended, the applicant had initiated the process of seeking leave to appeal to this Court under the same provision. Therefore, since the respective application was dismissed by the High Court, the applicant was bound to appeal to

this Court as rightly stated by the Court in **Yusufu Juma Risasi v. Anderson Julius Bicha**, Civil Application No.176/11 of 2017 (TB) (unreported) before the period of limitation elapsed. Unfortunately, the applicant did not immediately appeal to the Court within the prescribed period against the decision of the High Court. On the contrary, though belatedly, the applicant lodged the instant application under Rule 45 (b) on second bite. We must stress that as the applicant initiated the process of seeking leave to appeal before the High Court and he did not succeed and did not appeal to this Court within the prescribed time, he cannot benefit from the amendment of section 47 (1) and (2) of Cap.216 because by the time the amendment came into operation he had no any matter pending in the Court. Basically, as the applicant delayed to appeal to this Court within the prescribed period, his remedy is to seek extension of time before the High Court in terms of section 11 of the Appellate Jurisdiction Act, Cap 141 R.E. 2019 to lodge a notice of appeal to contest the decision of the High Court.

From the foregoing, relying on the position of law expounded in the above referred decisions of this Court, we hold that the instant application is incompetent. We therefore agree with the learned

counsel for the respondent that the proper course of action we should take is to strike out the application.

Consequently, we strike out the application. However, considering the circumstances of the parties in this application, we order that parties shall bear their respective costs.

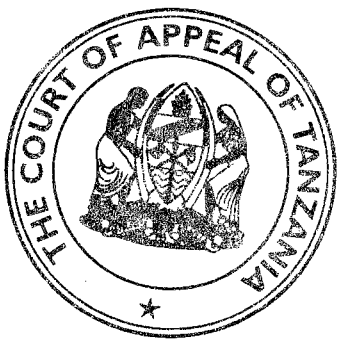
DATED at **IRINGA** the 6th day of May, 2021.

G. A. M. NDIKA
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The ruling delivered this 7th day of May, 2021 in the presence of the appellant linked via video conference at High Court Songea, and Mr. Jassey Mwamgiga, counsel for the respondent is hereby certified as a true copy of the original.



B. A. Mpepo
DEPUTY REGISTRAR
COURT OF APPEAL