

IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

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

CIVIL APPLICATION NO. 135/13 OF 2020

SHABAN MKAKANZE APPLICANT

VERSUS

TERESIA JUDI MKAKANZE RESPONDENT

**(Application for leave to appeal to the Court of Appeal of Tanzania against
decision of the High Court of Tanzania at Iringa)**

(Kente, J.)

**dated the 16th day of April, 2019
in
Land Appeal No. 5 of 2018**

RULING OF THE COURT

27th September & 1st October, 2021

MWARIJA, J.A.:

The applicant, Shaban Mkakanze was the respondent in the District Land and Housing Tribunal, Iringa (the DLHT). He was sued in the DLHT by the respondent, Theresia Judi Mkakanze (the administratrix of the estate of the late Judi Mkakanze) in Application No. 49 of 2016. She claimed for *inter alia*, a declaration that house No. K/DOR/A/53 was the property of the late Judi Mkakanze (the deceased). The applicant denied the claim contending that the suit property was owned by one Kaundime

Mohamedi Ndedela and that the respondent merely grew up there, having stayed in the suit property from her childhood.

Having heard the application, the DLHT found that the suit property was part of the estate of the deceased. It thus ordered the applicant to give vacant possession thereof. He was also ordered to pay the costs of the application.

The applicant was aggrieved by the decision of the DLHT and therefore, appealed to the High Court vide Land Appeal No. 5 of 2018. Having heard the parties on appeal, the High Court (Kente, J., as he then was) reserved his judgment. In the course of writing it however, he found that there was a point of law which ought to have been dealt with; whether or not the appeal was filed within the prescribed time of forty-five days of the date of the decision of DLHT as provided for under s. 41 (2) of the Land Disputes Courts Act, [Cap. 216 R.E. 2019] as amended by Act No. 2 of 2016 (the Act). He therefore, re-opened the hearing and directed that the parties be re-summoned so as to be given the opportunity of being heard. The parties were accordingly heard on the issue.

In his decision, the learned High Court Judge found that the appeal was filed after the period of 45 days of the date of the judgment of the DLHT contrary to s. 41 (2) of the Act. He dismissed the argument made

by the applicant that his appeal was filed within time because after the judgment of the DLHT, he applied for certified copy of the judgment and it was after he had obtained it that he filed the appeal. The learned Judge was of the view that the exclusion of the time which the applicant spent in obtaining a copy of the judgment is not automatic. He observed that, the applicant ought to have obtained leave of the High Court before he instituted his appeal.

The applicant was aggrieved and therefore, lodged a notice of appeal in this Court. He subsequently filed before the High Court, an application for leave to appeal. He was unsuccessful in that application hence this application which is by way of a second bite.

In his application which was brought under *inter alia*, Rule 45 (b) of the Tanzania Court of Appeal Rules, 2009 as amended and supported by his affidavit, the applicant is seeking the following orders:

- "1. *This Hon. Court grant leave to [the] applicant to appeal to the Court of Appeal of Tanzania against the decision made by Kente, J. in Land Appeal No. 5 of 2018 delivered on the 16th day of April, 2019.*
2. *Costs of this application be borne by the respondent.*

3. *any other order the court may deem
fit and just to grant."*

In paragraph 5 of his affidavit, the applicant states that, after the judgment of the DLHT which was delivered on 6/3/2018, he wrote a letter on the same day applying for a copy of the judgment. He states further in paragraph 7 that he was supplied with the sought copy on 13/4/2018 and according to paragraph 8 of the same affidavit, he filed his appeal on 24/4/2018, within 11 days of service upon him, of a certified copy of the judgment.

In her affidavit in reply, the respondent does not dispute the facts stated in the paragraphs of the applicant's affidavit referred to above.

At the hearing of the application, both parties appeared in person, unrepresented. The applicant adopted his notice of motion and his affidavit. He insisted that his appeal to the High Court was filed within time because the limitation period should be computed from the date of service upon him by the DLHT, of the certified copies of the judgment and decree.

In reply, the respondent who also adopted her affidavit in reply; urged us to dismiss the application contending that the appeal was properly dismissed by the High Court because it was filed out of time.

From the notice of motion, the parties' respective affidavits and their submissions, the only issue for our determination is whether the application has merit. To determine whether or not to grant an application of this nature, what is to be considered is existence or otherwise of a point of law worth consideration by the Court. - See for instance, the cases of **Mariamula Letifhussein & 2 others v. Mohamed Hatibu Mbwana**; Civil Application No. 5 of 2014 (unreported) and **Nurbhai N. Rattansi v. Ministry of Water Construction, Energy Land and Environment & Another**. [2005] T.L.R. 220. In the latter case, the Court stated as follows:

"In determining an application for leave to appeal to the Court of Appeal, the Court must ascertain if there is a legal point worth of being considered by the Court of Appeal".

In this application, the applicant contends that his appeal was not time barred as held by the learned High Court Judge. In his judgment at page 18 of the record, the learned Judge held as follows:

"The fact that this appeal was filed out of the prescribed time constitutes a total irregularity. The exclusion of the time allegedly spent to procure a copy of judgment as the appellant appears to suggest is in my respectful view not automatic. The appellant ought to have sought and obtained

the leave of this court prior to the filing of his appeal which is time barred."

The point of law which arises here is whether in computing the period of limitation for filing in the High Court, an appeal originating from DLHT, the period of time requisite for obtaining a copy of the judgment sought to be appealed against, is excludable with leave of the High Court. We find this a point of law to be worth consideration by the Court. We thus hereby grant the applicant leave to appeal.

Considering the particular circumstances of the application, we make no order as to costs.

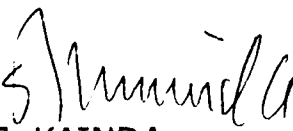
DATED at IRINGA this 30th day of September, 2021.

A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Ruling delivered this 1st day of October, 2021 in the presence of the Applicant in person/unrepresented and the Respondent in person/unrepresented, is hereby certified as a true copy of the original.


S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL