

**IN THE COURT OF APPEAL OF TANZANIA  
AT DAR ES SALAAM**

**(CORAM: MKUYE, J.A., KWARIKO, J.A. And KIHWELO, J.A.)**

**CIVIL REFERENCE NO. 5 OF 2018**

**ALOYCE JAMES. KASAWA**

**(the Administrator of the estate of the late**

**JAMES MWITA KASAWA (deceased) .....APPLICANT**

**VERSUS**

**1. WILLIAM MUFUNGO MWANGWA**

**(the Administrator of the estate of the late  
JULIANA M. MUSIBA (deceased)**

**2. LAWRENCE M. MANYAMA**

**.....RESPONDENTS**

**(Application for Reference from the decision of the single Justice of the Court  
of Appeal of Tanzania at Dar es Salaam)**

**(Mugasha, JA.)**

**dated the 4<sup>th</sup> day of June, 2018**

**in**

**Civil Application No. 173 of 2015**

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**RULING OF THE COURT**

17<sup>th</sup> August & 22<sup>nd</sup> October, 2021

**MKUYE, J.A.:**

This is an application for reference of a Ruling and Order of the single Justice of the Court (Mugasha, JA) dated 4/6/2018 refusing to grant extension of time within which to lodge an application for leave to appeal to this Court against the decision of the High Court in Land Appeal No. 64 of 2009 dated 12/12/2008.

The brief background of the matter leading to this Civil Reference is that the 1<sup>st</sup> respondent had successfully instituted a Land Application in the District Land and Housing Tribunal for Kinondoni District against the applicant and the 2<sup>nd</sup> respondent herein. Aggrieved by that decision, the applicant appealed to the High Court but his appeal was dismissed for lack of merit. Intending to appeal to this Court, the applicant lodged before the High Court Misc. Land Application No. 103 of 2012 seeking leave to appeal to this Court. His application was premised under section 47(1) of the Land Disputes Courts Act [Cap. 216 R.E. 2002; now R.E. 2019] (the LDC Act), section 5(1) (c) of the Appellate Jurisdiction Act [Cap. 141 R.E. 2002; now R.E. 2019] (the AJA) and Rule 45(a) of the Tanzania Court of Appeal Rules, 2009 (the Rules). Upon hearing both sides, the High Court (Wambura, J.) dismissed it on account that no point of law was raised by the applicant to warrant the grant of leave to appeal.

Undeterred, the applicant, having realized that he was out of time to make a similar application to this Court, he lodged Civil Application No. 173 of 2015 seeking extension of time to lodge his application for leave to appeal to this Court on what could be termed as a "second bite".

However, before the hearing of the application could proceed on merit, the Court wished to satisfy itself on the competence of the application in view of the fact that the matter was emanating from a land dispute. Upon hearing the parties, the Court struck out the application on account that section 47(1) of the LDC Act vested exclusive jurisdiction to entertain application for leave to appeal in land matters to the High Court and not to the Court; and that the remedy for the refusal of the application by the High Court on such matters, was to appeal to this Court.

Dissatisfied with the decision of the single Justice, the applicant has preferred this application for reference based on the grounds framed in the form of issues as follows:

- (1) Whether the single Justice of the Court was justified to hold that the refusal of the High Court for leave to appeal, the remedy is to appeal to the Court while before her was an application for extension of time to enable the applicant to seek leave to appeal to the Court.*
- (2) Whether the High Court has exclusive jurisdiction under section 47(1) of the Land Dispute Courts Act Cap. 216 R.E. 2002 in applications for leave to appeal to the Court of Appeal.*

*(3) Whether it was proper for the single Justice to award costs on a matter that was raised by the Court suo motu.*

When the application was called on for hearing, the applicant was represented by Mr. Francis Alfred Mwita Mgare learned advocate; whereas the 1<sup>st</sup> respondent appeared in person, unrepresented. The 2<sup>nd</sup> respondent was not in attendance though the summons show that he refused service and, hence, the hearing of the application proceeded in his absence as per Rule 63(2) of the Rules.

The Court was also notified that the applicant, Aloyce James Kasawa, and the 1<sup>st</sup> respondent, William Mufungo Mwangwa had sought and were each granted leave vide Civil Application No. 362 of 2017 and Civil Application No. 385/01 of 2017 respectively to be joined in this matter as legal representatives of the late James Mwita Kasawa and Juliana M. Musiba, respectively and we formally joined them in this matter.

When Mr. Mgare was given an opportunity to expound on the application, in the first place, he sought to adopt the application for reference together with the written submission filed on 6/8/2018. He, then, prayed to the Court to grant the application.

In the written submission, the applicant's 1<sup>st</sup> point of grievance is that it was wrong for the single Justice to strike out the application for being incompetent while the application before her was for extension of time to enable him seek/ apply for leave to this Court in order to appeal to it after the High Court had refused to grant it under section 47(1) of the LDC Act. It was contended that the single Justice wrongly went to a second stage to consider the issue of leave to this Court as a second bite as if extension of time had been granted and thereby leaving an application which was before her undetermined. He, therefore, argued that the decision of the Court was erroneous based on the decision of **Stanslaus Rugaba Kasusura and Another v. Phares Kabuye** [1982] TLR 338.

In relation to the 2<sup>nd</sup> ground of the application that the applicant ought to have appealed, the applicant has argued that the single Justice mis-interpreted the decision in **Felista John Mwenda v. Elizabeth Lyimo**, Civil Application No. 9 of 2016 and **Tumsifu Anasi Maresi v. Luhende Jumanne Selemani and Another**, TBR Civil Application No. 184/11 of 2017 (both unreported). It was submitted that **one**, section 47 of the LDC Act does not provide for such remedy in case the High Court refuses to grant leave to appeal. **Two**, under Rule 45 (b) of the Rules upon

refusal by the High Court to grant leave then the party is supposed to seek for leave to this Court within 14 days of the refusal. As such, it is the applicant's argument that it was wrong for the single Justice to strike out the application. He, then, invited the Court to reverse the decision of the single Justice and order for the hearing of the applicant's application for extension of time on merit.

Apart from that, the applicant submitted further that the issue of leave under section 47(1) of the LDC Act is optional by the use of the word "may" in that provision. He went further submitting that by the deletion of the title "Land Division" through Act No. 2 of 2010, a party could dispense with the requirement of leave under section 47(1) of the LDC Act and apply for it under section 5(1)(c) of the AJA. As such, he argued that land matters and ordinary civil matters are to be treated equally in relation to leave to appeal to this Court.

The applicant's other complaint is that the single Justice erred to strike out the application with costs because the issue of competence or otherwise of the application was raised *suo motu* by the Court. It was argued that, the practice of this Court whenever such issue is raised *suo*

*motu* is to order each party to bear its own costs. In this regard, it was argued that as the single Justice ordered costs on the matter raised by the Court, we should vacate such order for payment of costs.

On the basis of what was submitted, he implored upon the Court to quash the decision of the single Justice, vacate the order for costs and order that the applicant's application for extension of time be heard on merits.

In response, the 1<sup>st</sup> respondent resisted the application. Being a lay person, he merely argued that there was no reason for hearing the application for extension of time. He urged the Court to determine the application in accordance with the law. There was no response from the 2<sup>nd</sup> respondent for the reasons indicated above.

Having considered the notice of motion as well as the written submission in its support together with the rival submissions, we think, the issue to be determined by this Court is whether the applicant has managed to convince the Court to reverse the decision of the learned single Justice.

Before embarking on the merit of the application, we feel appropriate to restate the legal principles which govern applications for reference as

was clearly articulated in the case of **BG International Limited v. Commissioner General (TRA)**, Civil Reference No. 7 of 2018 (unreported) as follows:

- 1. On reference, the full Court looks at the facts and submissions the basis of which the single Justice made the decision;*
- 2. No new facts or evidence can be given by any party without prior leave of the Court; and*
- 3. The single Justice's discretion is wide, unfettered and flexible, it can only be interfered with if there is misapprehension or improper appreciation of the law or facts applicable to that issue or misinterpretation of the law.*

In the 1<sup>st</sup> ground of complaint, the applicant has assailed the single Justice in that she wrongly considered the issue of leave to this Court as a second bite as if extension of time had already been granted and thereby leaving an application which was before her undetermined.

We have anxiously gone through the record of this reference particularly the impugned Ruling of the single Justice and we have found that the application for extension of time to lodge an application for leave to appeal to this Court was struck out because it was found to be misconceived as the applicant could not seek extension of time to apply for



leave by way of second bite on a land related dispute as it was contrary to section 47 (1) of the LDC Act which vested exclusive jurisdiction on leave in land related matters to the High Court and not this Court. It is noteworthy that, that was the position of the law before it was amended through clause 9 of the Written Laws (Miscellaneous Amendments (No. 3) Act, (No 8 of 2018). Essentially, the amendment vested jurisdiction to entertain applications for leave to appeal in land matters to both the High Court and this Court.

In dealing with this point of complaint, our starting point would be to revisit the application which was before the single Justice. Our perusal of the notice of motion and its supporting affidavit in Civil Application No. 173 of 2015 shows the applicant's application was seeking for extension of time to enable him apply for leave to appeal to this Court on a second bite. This is also clearly evidenced from the grounds of the notice of motion and the affidavit in its support. For instance, in ground (ii) of the notice of motion the applicant said:

*"As evidenced in the affidavit in support of the notice of motion there is a good cause shown for **extension of time within which to file an application for***

***leave to appeal to the Court of Appeal."***

[Emphasis added]

Apart from that, in paragraphs 6 and 8 of the affidavit in support of the notice of motion, the applicant had re-stated his desire of seeking extension of time for applying for leave to appeal to this Court on a second bite when he averred:

*"6. That I have been advised by Mr. Mgare Advocate, which advise I believe to be correct that **upon refusal by the High Court to grant me leave to appeal, the said leave has within fourteen (14) days to be sought and obtained from this Court.***

*8. That, Mgare Advocate has further advised me that there is a need for me to apply for orders sought in the notice of motion, **as the time within which I was supposed to apply for leave to this court expired on 6.8.2015, before I (sic) being supplied with the decision of the High Court.**" [Emphasis added]*

In his submission before the single Justice, when Mr. Mgare was defending that the application was properly before the Court following the issue raised by the Court, he argued among others that *"since the initial*

*leave was refused by the High Court, Rule 45(b) of the Rules entitled the applicant to seek leave before the Court by way of a second bite and this is what prompted the applicant to seek extension of time in this application”.*

So, it is clear that the applicant’s application before the Court was for extension of time to enable him file an application for leave to appeal after the first attempt before the High Court was refused and that is what the learned single Justice wished to satisfy herself on its competence.

However, as alluded to earlier, before the hearing of the application commenced the single Justice required the parties to address her on the competence of the application touching the jurisdiction of the Court on the matter to which extension of time was sought.

At this juncture, we wish to re-emphasize that the issue of jurisdiction in the administration of justice is a creature of statute. It is the bedrock on which the court’s authority and competence to entertain and decide matters rest – (See **Tanzania Revenue Authority v. Tango Transport Company Ltd**, Civil Appeal No. 84 of 2009 (unreported)). Due to its importance, such issue can be canvassed at any stage even on appeal by the parties or *suo motu* by the court since it goes to the substance of a

trial – (See **Michael Leseni Kweka v. John Eliafe**, Civil Appeal No. 51 of 1997 and **Tanzania Revenue Authority v. New Musoma Textiles Ltd**, Civil Appeal No. 93 of 2009 (both unreported)). For that matter, it cannot be exercised on the basis of the whims of the parties. Thus, in the case of **Aloisi Hamsini Mchuwau v. Ahamadi Hassani Liyamata**, Criminal Appeal No.583 of 2018 (unreported), while citing the case of **Fanuel Mantiri Ng'unda v. Herman Mantiri Ng'unda and 20 Others**, (CAT) Civil Appeal No.8 of 1995 (unreported) the Court stated that:

*"The question of jurisdiction for any court is basic, it goes to the very root of the authority of the court to adjudicate upon cases of different nature ... The question of jurisdiction is **so fundamental that courts must as a matter of practice on the face of it be certain and assured of their jurisdictional position at the commencement of the trial.... It is risky and unsafe for the court to proceed with the trial of a case on the assumption that the court has jurisdiction to adjudicate upon the case.**" [Emphasis added.]*

(See also **Tanzania Electric Supply Company Ltd v. Shaffi Ali Nuru (Legal Representative of the late Hassan A. Jambia)**, Civil Appeal No. 2 of 2018 (unreported).

Applying the principle stated above, we think, the single Justice was justified to enquire on the competence of the application for two main reasons. **One**, before a matter is determined on the merits on issues not touching on the jurisdiction of the court below, it must first be ascertained that the proceedings giving rise to such a matter are competently before that court. **Two**, because any decision from proceedings which are a nullity would also lead to a nullity decision. In this case, we are satisfied that the single Justice considered and determined the issue of competence of the application at that stage based on what was submitted before her. For that matter, we find that the contention that she wrongly went to a second stage to consider the issue of leave to this Court as a second bite as if extension of time had already been granted and thereby leaving an application which was before her undetermined to be unfortunate. To the contrary, we endorse that the single Justice was justified to do so because even if for the sake of argument, we assume that the said application was granted, there would have been no competent forum that could have

legally dealt with such application for leave on the second bite. This is so for a simple reason that section 47(1) of LDC Act clearly vested exclusive jurisdiction on leave on land matters to the High Court and not to this Court. In which case, much as Rule 45(b) of the Rules provided for a similar application on a second bite in case of refusal by the High Court, it could not be applicable on leave to appeal in land matters at that time.

This brings us to the 2<sup>nd</sup> ground on the issue whether the High Court had exclusive jurisdiction under section 47(1) of the LDC Act in applications for leave to appeal to the Court of Appeal. Although we have hinted on it above, we deem appropriate to expound on it a bit further.

The issue relating to leave to appeal to this Court which is the subject matter in this reference was before the amendment governed by section 47(1) of the LDCA which provided as follows:

*"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".*

[Emphasis added]

Also, under section 47(3) of the same Act, the procedure for the appeal to this Court is to be governed by the Court of Appeal Rules.

Admittedly, in the matter at hand, as alluded to earlier on, the application that was before the single Justice (Civil Application No. 173 of 2015) was in relation to extension of time to lodge an application for leave to this Court on a second bite as discerned in the notice of motion and the supporting affidavit lodged on 31/8/2015 and what was submitted by the applicant's advocate.

However, our reading of section 47(1) of the LDC Act quoted above, we think, it clearly shows that the application for leave in land matters was sought from the High Court and not to this Court. This position was also fortified by the decisions of this Court which were cited by the single Justice in **Felista John Mwenda (supra)** and **Elizabeth Losujaki (supra)** where it was stated that the Court does not have jurisdiction on applications by way of second bite for leave to appeal against the decisions of the High Court under section 47(1) of LDC Act as it remained to be the exclusive jurisdiction of the High Court. In addition, in the case of **Felista John Mwenda (supra)** the Court was categorical that the Court of Appeal, in terms of the clear provisions of section 47(1) of the LDC Act lacked

jurisdiction to entertain the application as opposed to Mr. Mgare's proposition that the case was distinguishable to the case at hand.

In fact, we asked ourselves, for what purpose was the applicant seeking to be granted extension of time and if it could have taken him somewhere? The answer is in the negative for the simple reason that we have stated above that section 47(1) of LDC Act vested the High Court with exclusive jurisdiction to deal with applications for leave to appeal to this Court against the decisions of the High Court on land matters.

In other words, even if for the sake of argument, we assume that extension of time was granted, the applicant would have eventually bounced back as section 47(1) of LDC Act which was a specific law on land matters did not allow such kind of applications to be entertained by the Court. This position was stated in the case of **Paulina Thomas v. John Mutayoba and Another**, Civil Application No 77/8 of 2017 (unreported) in which the Court sustained a preliminary objection in an application for extension of time to enable the applicant to apply for leave to appeal to this Court on a second bite. In sustaining the preliminary objection, the



Court considered the provisions of section 47(1) of the LDC Act and stated as follows:

*"As it is, the provision does not vest such powers to the Court of Appeal. This means that, in this case, even if extension of time is granted to file an application for leave to appeal to this Court, the Court cannot entertain it because it does not have such powers."*

The applicant, also, took an issue that the single Justice determined an issue that was not before her, but we think that such issue cannot stand because of what we have already stated earlier that the issue of jurisdiction is very crucial. Luckily enough, the single Justice amply explained at page 4 of the Ruling when she stated:

*"At the outset, I feel inclined to state clearly that, the jurisdiction of courts is a creature of statute and not what the litigants like or dislike. **This is the foremost question which the Court must always ask itself before embarking to entertain and determine any matter before it**". [Emphasis added].*

We subscribe to what the single Justice stated. We think, the single Justice rightly sought to clear herself before commencement of the hearing of the application on merit. And, in effect it assisted the parties not to continue going astray.

We have also considered Mr Mgare's argument that matters of leave under section 47(1) of LDC Act and section 5 (1) (c) of the AJA on both civil and land matters should be treated equally. We note that the single Justice basically agreed with him on matters of leave under the said provisions of the law and that in both civil and land matters they should be treated equally. The learned single Justice also stressed that it is the High Court which had exclusive jurisdiction on issues of leave to appeal to this Court on land matters and not this Court.

On our part, we subscribe to the single Justice's stance. We do not have qualms on according equal treatment on both civil and land matters on the issue relating to leave to appeal in terms section 47(1) of LDC Act and section 5 (1) (c) of the AJA, and we think, that was the reason the amendment through Act No. 8 of 2018. We equally, endorse the learned single Justice's stance particularly at that time that when it came to

seeking leave to appeal to this Court in matters of land, the High Court had exclusive jurisdiction over it and not this Court. In this regard, we find that the single Justice cannot be faulted for the move she had taken.

The 3<sup>rd</sup> applicant's complaint is that the single Justice wrongly awarded costs to the respondents on the issue which was raised *suo motu* by the Court. Admittedly, the matter which led to the striking out of the application was raised by the single Justice. None of the parties had anticipated it. As submitted by the learned counsel for the applicant, it has been a long-established practice of this Court that where the issue which leads to disposal of the matter is raised *suo motu* by the Court, then costs are not awarded – (Also see **Tumsifu Anasi Maresi** (supra)). In this matter, since the single Justice inadvertently awarded costs on a matter that was raised by the Court and no reasons were assigned for such departure, we would reverse the order for costs, as we hereby do.

In the event, based on what we have endeavored to canvass, we find the application for reference devoid of merit and we therefore uphold the decision sought to be reversed except for an award of costs which is set

aside. Otherwise, the application for reference is hereby dismissed with costs.

Order accordingly.

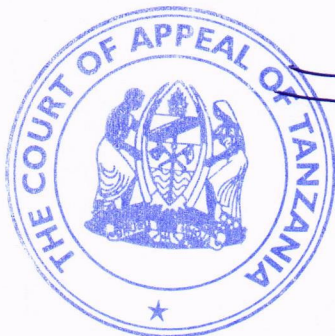
**DATED** at **DAR ES SALAAM** this 20<sup>th</sup> day of October, 2021.

R. K. MKUYE  
**JUSTICE OF APPEAL**

M. A. KWARIKO  
**JUSTICE OF APPEAL**

P. F. KIHWELO  
**JUSTICE OF APPEAL**

The ruling delivered this 22<sup>nd</sup> day of October, 2021 in the presence of Mr. Francis Mgare, learned counsel for the applicant and in the presence of 1<sup>st</sup> respondent who appeared in person and in the absence of the 2<sup>nd</sup> respondent is hereby, certified as a true copy of the original.



  
E. G. MRANGU  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**