IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

(CORAM: LILA, J.A., KITUSI, J.A. And FIKIRINI, J.A.)

CIVIL APPLICATION NO. 135/12 OF 2017

HEMED SAID AMRI.....APPLICANT

VERSUS

ALLY AMRI SAID.....1ST RESPONDENT
HEMED AMRI SAIDI.....2ND RESPONDENT
RASHID MOHAMED.....3RD RESPONDENT

(Application from the Ruling of the High Court of Tanzania, Tanga District Registry at Tanga)

(Masoud, J.)

dated 15th day of December, 2016

in

Miscellaneous Land Application No. 92 of 2016

.....

RULING OF THE COURT

2nd May & 2nd June, 2023

KITUSI, J.A.:

This is an application for revision under rule 65 (1) of the Court of Appeal Rules, 2009 (the Rules). The applicant lost in Land Application No. 72 of 2006, before the District Land and Housing Tribunal (DLHT) of Tanga District and also before the High Court sitting on appeal in Land

Case Appeal No. 3 of 2008. He was still aggrieved but his quest for justice by accessing this Court has proved to be a complicated journey.

Briefly it is that, the intended appeal to the Court required leave under rule 45 (a) of the Rules. So, the applicant, vide Miscellaneous Land Case Application No. 97 of 2015, applied for that leave. Rule 45 (a) of the Rules requires an application for leave to be lodged within 30 days of the date of the decision intended to be appealed against, but the said Miscellaneous Land Case Application No. 97 of 2015 was filed well beyond the prescribed time of 30 days.

In the course of hearing that application, Mr. Mramba, learned advocate who was acting for the 3rd respondent took several points of preliminary objection formally and one other point of objection he raised informally in his written submissions. The informally raised point of objection alleged that the application was time barred for being filed beyond the 30 days stipulated by the law.

The learned High Court judge sustained that point of objection despite the applicant's counsel submitting that the applicant had applied for and obtained extension of time prior to filing the application for leave. In sustaining the point of objection, the learned judge held:

"My scrutiny of the record could not land my eyes on any leave sought and granted to file the present application out of time. Neither was I shown in the application that there was leave that was sought and granted in support of filing the present application out of time".

The above finding of the High Court is the focus of this application. Hearing before us proceeded in the absence of the second respondent. It was common knowledge that the second respondent passed on since 20th September, 2017 but no steps have been taken by his relatives or any interested person to comply with rule 57 of the Rules which requires a legal representative to be joined in place of a deceased party. This, despite the fact that the first respondent is a brother to the deceased second respondent, therefore aware of his brother's death and also aware of the fact that there is this matter involving him pending in Court.

Rule 57 of the Rules does not provide for a scenario, like the present, where it is the respondent who is dead and no steps have been taken. Part of rule 57 provides: -

"(3) A civil application shall not abate on the death of the applicant or the respondent but the Court shall, on the application of any interested

person, cause the legal representative of the deceased to be made a party in place of the deceased.

(4) Where no application is made by the legal representative under subruie (2) or interested party under subrule (3) within twelve months, the application shall abate.

(5) Any person claiming to be the legal representative of a deceased party or any other interested person, may apply to revive the application; and, if it is proved that he was prevented by good cause from continuing the application, the Court shall revive the application upon such terms as to costs or otherwise as it deems fit".

However, rule 105 of the Rules, which regulates a similar situation in dealing with appeals, has a subrule which accommodates hearing in the absence of a respondent who has died and in respect of whom no steps have been taken to join an interested person or legal representative. Rule 105 of the Rules, provides: -

(1) An appeal shall not abate on the death of the appellant or the respondent but the Court shall, on the application of any interested person,

cause the legal representative of the deceased to be made a party in place of the deceased.

(2) ***Where an application under subrule (1) is not made within twelve (12) months, the appeal shall, if the deceased person is the appellant, abate and if the deceased person is the respondent, proceed in the absence of the respondent.***

(3) Any person claiming to be the legal representative of a deceased party or any other interested person may apply to revive the appeal; and, if it is proved that he was prevented by good cause from continuing the appeal, the Court shall revive the appeal upon such terms as to costs or otherwise as it deems fit.

Considering the blood relationship between the first respondent and the second respondent, it has become obvious to us that the second respondent's family members have deliberately let grass grow under their feet on this matter. We have therefore sought inspiration from rule 105 (2) of the Rules to proceed in the absence of the second respondent. We think it was not the intention of the legislature that in applications a respondent whose relatives take no steps to join in the proceedings after his death, should get away with it without any consequences. Hence our decision to proceed in the absence of the

second respondent. The first and third respondents appeared through Mr. Eric Akaro, learned advocate.

Back to the application before us. The applicant, who enjoys services of Mr. Augustine Kusalika, learned advocate, has demonstrated that at the time of filing Miscellaneous Land Application No. 97 of 2015, he had an order of extension of time vide Miscellaneous Land Application No. 27 of 2013. It is argued that Miscellaneous Land Application No. 97 of 2015 was within time and that the order striking it out was erroneous. On the other hand, although he blamed Mr. Kusalika for not demonstrating to the High Court that he had a prior order for extension of time, Mr. Akaro was not keen in disputing the fact that it, in fact, existed.

We have seen the ruling of Khamis, J (as he then was) dated 28th October, 2015 in Misc. Land Application No. 27 of 2013 granting the applicant extension of time to apply for leave to appeal to the Court. A copy of that ruling was not placed before Masoud, J (as he then was) who considered and eventually struck out Misc. Land Application No. 97 of 2015, therefore the learned judge may have been entitled to the conclusion he arrived at. However, in view of what has transpired before us, we feel we must observe that it is one thing to say the application is

time barred for the applicant's failure to seek and obtain extension of time, and it is quite another when the applicant sought and obtained it, but a copy thereof was not exhibited to the judge. Since litigation is a real search for justice, we cannot allow technicalities to get into the way to frustrate that course. See **Mohamed Ali Mohamed v. Ajuza Shaban Mzee (Administratrix of the estate of the late Fatuma Kibwana)**, Civil Appeal No. 188 of 2016 and; **Union of Tanzania Press Clubs & Another v. The Attorney General of the United Republic of Tanzania**, Civil Appeal No. 89 of 2018 (both unreported).

After the application for leave was struck out, the applicant made efforts to seek remedies by lodging applications before the High Court but the decisions were always against him. First, he filed Misc. Land Application No. 58 of 2016 seeking a review of the decision of the court in Misc. Land Application No. 97 of 2015. This application was dismissed by the court under section 3 (1) of the Law of Limitation Act (LLA) for being time barred. Then he filed Misc. Land Application No. 92 of 2016 seeking extension of time to file a review out of time. This application was struck out for being misconceived, the learned judge holding that a party whose matter is dismissed under section 3 (1) of the LLA cannot go back to the same court to seek extension of time.

Incidentally, it is Misc. Land Application No. 92 of 2016 which we are called upon to revise in this application. Is there anything faulty in the ruling of the High Court in that application? Certainly, there is nothing in that ruling that would justify us revising and quashing it. With respect we agree with the learned judge's reasoning that his hands were tied having earlier dismissed the application under section 3 (1) of the LLA. Mr. Akaro cited the case of **East African Development Bank v. Blueline Enterprises Limited,** Civil Appeal No. 101 of 2009 (unreported) whose holding supports the position taken by the learned judge. With respect, we agree with Mr. Akaro because the principle in **East African Development Bank** (supra) is an old one since the defunct Court of Appeal for East Africa in **Ngoni- Matengo Co-operative Marketing Union Ltd v. Alimohamed Osman** [1959] EA 577. That decision has been followed since then. See also **Johnson Amir Garuma v. Attorney General & 2 Others,** Civil Appeal No. 206 of 2018 (unreported).

Mr. Akaro submitted in respect of Misc. Land Application No. 58 of 2016 and Misc. Land Application No. 92 of 2016, that the applicant's counsel took wrong steps in seeking for remedy and he should not now

blame it on the court. That is correct once again, but it does not justify the end, in our view.

Despite all that, we yearn for justice and we must uphold it. We have earlier demonstrated that the decision in Misc. Land Application No. 97 of 2015 could not be correct because it was reached on a wrong assumption that the applicant had not obtained extension of time. Mr. Kusalika expressed his dismay at the conduct of Mr. Mramba the then learned counsel for the third respondent, suppressing the fact that he was aware of the extension of time having been granted to the applicant earlier. With respect we agree with Mr. Kusalika on this observation. If the parties had addressed the court orally, they would probably have cleared the doubt as to the presence of an order of extension of time, which leads us to conclude that the parties were not fully heard. In addition, as an officer of the court, Mr. Mramba should not have denied the court the relevant information that would have led to a just decision.

For those reasons, the justice of this case requires us to quash the ruling in Misc. Land Application No. 97 of 2015 and set aside any orders arising therefrom. We remit the record to the High Court and order that the parties should address the court on whether Misc. Land Application No. 97 of 2015 was within time or not in view of the alleged existence of

an order of extension of time. The High Court should then proceed to determine that application on merit bearing in mind what will have been presented before it. The rulings and orders in Misc. Land Application No. 58 of 2016 and Misc. Land Application No. 92 of 2016 though legally correct, become moot and ineffectual.

For those reasons, this application is granted.

DATED at **DAR ES SALAAM** this 1st day of June, 2023.

S. A. LILA

JUSTICE OF APPEAL

I. P. KITUSI

JUSTICE OF APPEAL

P. S. FIKIRINI

JUSTICE OF APPEAL

The Ruling delivered this 2nd day of June, 2023 in the presence of Mr. Augustine Kusalika, learned counsel for the Applicant, and also holding brief of Mr. Eric Akaro, learned counsel for the Respondents, is hereby certified as a true copy of the original.

R. W. CHAUNGU

DEPUTY REGISTRAR

COURT OF APPEAL