IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MWARIJA, J.A., GALEBA, J.A. And KENTE, J.A.)

CIVIL APPEAL NO. 43 OF 2020

MASATO MANYAMA.....APPELLANT

VERSUS

LUSHAMBA VILLAGE COUNCIL.....RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Mwanza)

(Gwae, J.)

dated the 22nd day of February, 2016

in

Miscellaneous Land Application No. 113 of 2014

.....

RULING OF THE COURT

14th & 24th February 2023

GALEBA, J.A.:

The land matter giving rise to this appeal, was initiated by the appellant, Masato Manyama on 24th November 2008 in the District Land and Housing Tribunal for Geita (the DLHT), by filing Land Application No. 55 of 2008, against the respondent, Lushamba Village Council. In that case, the appellant was claiming Tanzania Shillings 40,000,000.00 as compensation in respect of a piece of land, which he claimed to be his. The land is measuring approximately 10 acres located in Lushamba Village

in Sengerema District within Mwanza Region. He also claimed for general damages and costs. As for the respondent, the story was different. The Council had built a Public Secondary School on part of that land on the basis that in 1974, during Operation Vijiji, the land was set aside as communal land for the benefit of all village members. So, the respondent disputed the claim, and in addition, she raised a preliminary objection that the appellant did not have *locus standi* in the matter. Based on that objection, the appellant's application was initially dismissed with costs by the DLHT (Mwashambwa, Chairperson) on 30th September 2009.

The appellant was dissatisfied with that decision such that he lodged Civil Appeal No. 39 of 2010 to the High Court to challenge the dismissal of his application. That appeal was successful. The DLHT dismissal order was set aside, because according to the High Court (Sumari, J., as she then was), the preliminary objection upon which the dismissal was based, was not *per se,* a pure point of law, as the disputed issue could only be determined upon adducing evidence. In addition, the court directed that the original record of the DLHT be remitted to it, so that parties could be heard on merit before another chairperson. The original record was accordingly remitted to the DLHT, and upon a full trial before another

chairperson (Kitungulu chairperson), still the DLHT dismissed the appellant's application with costs for want of merit, on 3rd July 2012.

The appellant would not however give in easily, he approached the High Court and filed Land Appeal No. 73 of 2012, but that appeal was dismissed with costs for want of merit on 26th June 2014 by the High Court, (Mutungi J., as she then was). That order, like several others preceding it, aggrieved the appellant. He thus, made up his mind to appeal to this Court.

In order to exercise his right of appeal, the appellant approached the same High Court, and filed Miscellaneous Land Application No. 113 of 2014, seeking leave of the High Court in order to appeal to this Court. The High Court, heard the matter *ex parte* the respondent, that is, in the absence of the respondent, but that notwithstanding, still the appellant lost. The learned Judge found the application devoid of merit; thus, leave to appeal was accordingly, refused.

This appeal, is challenging that refusal of leave to appeal. The appeal is based on three grounds, but before we could get to them at the hearing, we first engaged parties and required them to address us on the competence of this appeal or otherwise.

At the hearing, the appellant appeared in person, whereas the respondent was represented by a team of four learned State Attorneys, who were Ms. Irene Lesulie, learned Principal State Attorney, Mr. Julius Tinga, learned Senior State Attorney, Ms. Deborah Mcharo learned State Attorney and Ms. Sabina Yongo learned State Attorney.

Ms. Lesulie, was the one who addressed us. She argued that this appeal is incompetent because, where leave is applied at the High Court and refused, as it happened in this case, the remedy available for the aggrieved applicant is not to appeal against the refusal, but to lodge a similar application by way of a second bite to this Court. To support her argument, the learned Principal State Attorney cited section 47 (2) of the Land Disputes Courts Act, Chapter 216 of the Revised Edition of the Laws, 2002, now 2019 (the LDCA) as amended by the Written Laws (Miscellaneous Amendments) (No. 3) Act, 2018 (the Amendment Act).

The learned Principal State Attorney also clarified to us, why this Court might have struck out an application for leave on a second bite in Civil Application No. 3/08 of 2016, where the applicant was advised to appeal against the decision of Gwae J. In that respect she contended that the application for the second bite had been made in 2016 before

enactment of subsection (2) of section 47 of the LDCA, which provision was introduced by the Amendment Act, in 2018. At the time (in 2016), she elaborated, the only court with jurisdiction to grant leave to appeal to the Court of Appeal in land matters, was only the High Court. The Court of Appeal did not have such jurisdiction in land matters at that time. If he was still determined to appeal against the decision of Mutungi J, and leave having been refused in the High Court, she insisted, the appellant was not supposed to file an appeal, he was duty bound to apply for leave on a second bite from this Court because from 2018, this Court started to enjoy concurrent jurisdiction with the High Court in entertaining applications for leave to appeal to this Court. In the circumstances, she moved us to strike out the appeal, because it is incompetent.

Nonetheless, the appellant was confident that his appeal before us was a competent proceeding. His basis was that this Court in Civil Application No. 152/08 of 2019, where he was applying for extension of time to file a notice of appeal, we made a statement by the way, at page 119 of the record of appeal that, his application for leave on a second bite in Civil Application No. 3/08 of 2016 was struck out and he was directed to appeal against the order of Gwae J. In brief his point was that, if his

application for a second bite was struck out and he was advised to appeal, why should it then be argued by the respondent that his appeal is incompetent! That argument sounds logical, but before concluding this ruling, we will determine whether the contention is also legally sound.

We have accorded the submissions of parties' due regard and, in our view, the issue before us, is whether this appeal having been lodged on 3rd March 2020, challenging the High Court's refusal order for leave to appeal dated 22nd February 2016, is tenable at law.

To begin with, as the dispute giving rise to this appeal is a land matter, we will start with shedding some light on the law on appeals from orders of the High Court exercising appellate jurisdiction in such matters, as at 26th June 2014 when Mutingi J. dismissed the appellant's appeal. At that time, in 2014 through to 2016 and to be precise up to 24th September 2018, the relevant law for applying for leave in order to challenge orders of the High Court sitting as a land court, was section 47 (1) of the LDCA, which was providing as follows:-

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

In view of the above provision, before enactment of the Amendment Act in 2018, the High Court was the only court from which leave to appeal to the Court of Appeal in land matters, could be obtained. That is to say, in 2016 when Gwae J. turned down the appellant's prayer for leave to appeal, the Court of Appeal did not have jurisdiction to entertain an application for leave to appeal to this Court in matters originating from land disputes. That means, at that time, if the High Court did not grant leave to appeal, as it happened in this matter, the only option available to the aggrieved applicant, was to appeal to the Court of Appeal against the High Court's refusal to grant leave. See **Twaha Michael Gujwile v. Kagera Farmers Cooperative Bank,** Civil Application No. 352/04 of 2021 (unreported), where this Court observed:-

"Thus, under the old position, the applicant who was refused leave to appeal to this Court over any decision of the High Court sitting as a land court, rendered in its exercise of its original, appellate or revisional jurisdiction had no option of a second bite but an appeal- see ***Tumsifu Anasi Maresi v. Luhende***

Jumanne Selemani and Another, *Civil Application No. 184/11 of 2017,* ***Yusufu Juma Risasi v. Anderson Julius Bacha*** *Civil Application No. 176/11 of 2017,* ***Eladius Tesha v. Justine Sekumbo,*** *Civil Application No. 170 of 2021 ... (all unreported decisions of the Court), to mention but a few."*

Thus, when Gwae J. refused to grant leave to him, instead of filing an appeal, the appellant filed an application for a second bite which this Court struck out, in our view, quite lawfully. Apparently, it appears that after his application for the second bite was struck out by this Court, the appellant did not lodge an appeal to challenge the refusal of leave by Gwae J., until 3rd March 2020, when he ultimately filed this appeal.

The foregoing point, that is, the fact that the appellant filed this appeal in the year 2020, well after 25th September 2018, is very crucial. It is significant because our discussion in seeking to resolve the above framed issue, will closely revolve around that factor, and our final decision will be entirely dependent on that very aspect of the case, as our constant.

As indicated above, it is crucial to note that on 25th September 2018 the Amendment Act was gazetted and effectively came into operation. Section 9 of the Amending Act provides as follows:-

"9. The principal Act is amended in section 47 by: -

(a) deleting subsection (1) and substituting for it the following:

(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.

(b) adding immediately after subsection (1) the following:

(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."***

[Emphasis added].

That is to say, by the above referred section 9 of the Amendment Act, the old subsection (1) of section 47 of the LDCA was repealed and replaced with a new subsection, which however, has nothing to do with leave to appeal to the Court of Appeal. The appropriate law on which leave could be applied from that day (25th September 2018) onwards, was and continues to be the new section 47 (2) of the LDCA, (the bold text above), which vests concurrent jurisdiction on the High Court and this Court in applications for leave to appeal to this Court.

To facilitate a simplified appreciation of the exact message we are endeavouring to deliver, is that this appeal would have been competent, had it been lodged before 25th September 2018. Because before then, this Court did not have jurisdiction to entertain applications for leave to appeal, but had powers to entertain appeals from orders refusing leave to appeal. In this case however, the appeal was filed on 3rd March 2020 close to two years after the cut off date, the said 25th September 2018.

In summary, the High Court having denied him leave to appeal, and the appellant having failed to appeal against that refusal before 25th September 2018, the appellant was duty bound to seek leave to appeal from this Court. He was supposed to do so in compliance with section 47 (2) of the LDCA because this was the relevant law all the way from 25th September 2018 to 3rd March 2020 when he filed this appeal, and beyond.

Based on the above reasons, we cannot determine any of the grounds of appeal upon which this appeal is predicated, for the appeal itself is not an appeal in the eyes of the law, because it is an incompetent proceeding. Much as we may sympathize with the appellant for having spent about nine years trying to appeal against the judgment of the High Court which was pronounced in June 2014, still the only available order

that we have powers to make in respect of an incompetent matter, like the present appeal is regrettably, to strike it out. Thus, in fulfilment of that legal procedure, we hereby strike out this appeal with costs.

DATED at **MWANZA**, this 24th day of February, 2023.

A. G. MWARIJA
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

This Ruling delivered on 24th day of February, 2023 in the presence of absence of appellant and Ms. Sabina Yongo, learned State Attorney for the respondent Rpublic, is hereby certified as a true copy of the original.

J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL