

IN THE HIGH COURT OF TANZANIA

(AT DAR ES SALAAM)
MISC CIVIL APPLICATION NUMBER 97 of 2012

KIDAWA IDDI.....APPLICANT

VS

HALFAN ATHUMANI PAZI.....1st RESPONDENT

KHALFAN SAID SELEMANI.....2nd RESPONDENT

RULING

Date of last Order: 12-10-2012

Date of Judgment: 21-11-2012

JUMA, J.:

This Ruling relates to the Notice of Preliminary Objection which Khalfan Said Selemani (the 2nd respondent) issued on 17th September 2012 contending that a Chamber Summons application, which the applicant KIDAWA IDDI filed to apply for leave of the High Court to enable her to apply for leave to appeal to the Court of Appeal, is defective for failing to cite applicable provision of the law.

Background facts show that the applicant KIDAWA IDDI was on 31st May 2006 appointed by the Primary Court at Temeke to administer the estate of her mother Hadija Athumani who had died intestate. The deceased left

behind a house at Plot Number 50 Block 8 situate at Keko Juu area of Temeke Municipality. It appears from the records that on 3rd June, 2007 that house was sold by public auction to the second respondent Khalfan Said Selemani. Later on 15th June 2007 the primary court sought the advice of Baraza Kuu la Waislamu wa Tanzania (BAKWATA) on how to distribute the estate of the deceased to heirs and beneficiaries. On 29th June 2007 the primary court revoked the appointment of Kidawa Iddi and in her stead appointed the 1st respondent Halfan Athumani Pazi. Kidawa Iddi appealed against this revocation through Civil Appeal Number 75 she filed at the District Court of Temeke. On 11th May 2009, Mnzava-PDM restored the administration of Kidawa Iddi.

The dispute was referred by the two respondents to this Court (Twaib, J.) through Miscellaneous Civil Application Number 56 of 2009. The two respondents wanted this Court to recognize Khalfan Said Selemani as the lawful purchaser of the house left by the deceased. In his ruling on 20 June 2012, Twaib, J. of this Court granted the request and confirmed Khalfan Said Selemani as the lawful purchaser of the house.

At the hearing of the preliminary point of objection on 12th October 2012, Mr. Mtatiro the learned Advocate appeared on behalf of the applicant. Learned Ms Elizabeth Mhagama appeared on behalf of the 2nd respondent Khalfan Said Seleman. Halfan Athuman Pazi did not show up at the hearing of the objection.

Ms Mhagama submitted that by citing Rule 10 of the Court of Appeal Rules which governs applications that are made before the Court of Appeal for extension of time; the applicant has not properly moved this court into granting her the application. The learned Advocate insisted that the applicant should have cited Order XLIII Rule 2 of **Civil Procedure Code, Cap 33** which governs applications that are made before the High Court.

In his reply to oppose the preliminary point of objection, Mr. Mtatiro did not address himself to the contention that Rule 10 of the Court of Appeal Rules does not apply for applications for extension of time that are lodged in the High Court because Rule 10 of the Court of Appeal Rules apply when such an application is made before the Court of Appeal. Instead, Mr. Mtatiro submitted that Ms Mhagama has totally failed to appreciate that the matter originated from the Primary

Court and the applicant should first apply for leave of High Court before lodging an appeal to the Court of Appeal.

The main issue arising from the point of objection is whether by citing Rule 10 of the **Court of Appeal Rules, 2009** the applicant has properly moved this Court to grant her an extension of time. The relevant Rule 10 provides:

10. The Court may, upon good cause shown, extend the time limited by these Rules or by any decision of the High Court or tribunal, for the doing of any act authorized or required by these Rules, whether before or after the expiration of that time and whether before or after the doing of the act; and any reference in these Rules to any such time shall be construed as a reference to that time as so extended.

Section 5-(1) (c) of the **Appellate Jurisdiction Act, 1979** confers on the High Court concurrent jurisdiction with the Court of Appeal to grant leave to appeal to the Court of Appeal. The High Court does not by that concurrence assume the entire Constitutional and statutory powers of the Court of Appeal but is restricted to extension of time for making application for leave to appeal and to hear applications for such leave. When, the applicant lodged her application for leave on 1st August 2012, it was Rule 10

of the **Court of Appeal Rules, 2009** which she employed to seek for leave to appeal to the Court of Appeal out of time.

The definition of the word "court" under Rule 10 is clearly restricted to applications for extension of time that are lodged in the Court of Appeal and do not cover applications that are made in the High Court. Rule 3 has defined the word "Court" to mean the Court of Appeal of the United Republic of Tanzania established by the Constitution, and includes any division of that Court and a single Judge exercising any power vested in him sitting alone.

In my opinion since this application for extension of time was lodged in the High Court, the proper provision which the applicant should have cited to seek an extension of time should have been section 14 (1) of the **Law of Limitation Act**. Rule 10 of the Court of Appeal Rules does apply to practice of the High Court when hearing applications for leave to lodge an appeal to the Court of Appeal out of time.

Ms Mhagama is with due respect right to contend that the applicant has not cited proper provision to move this court into extending time. The law is now settled law in

Tanzania that a proceeding which is brought under wrong provision of the law, is incompetent and ought to be struck out. This settled position of law has been restated in a number of decisions of the Court of Appeal of Tanzania. One such case is the case of **Almas Iddie Mwinyi v. National Bank of Commerce and Another- Civil Application No.88 of 1998** where the Court of Appeal of Tanzania held that non-citation of the law under which the court is moved renders an application incompetent.

In the upshot, the preliminary point of objection contending that this application is improperly before this court is sustained and the Miscellaneous Civil Application Number 97 of 2012 is hereby struck out. Each side shall bear its own costs.

DATED at DAR ES SALAAM this 21st November, 2012



**I.H. JUMA
JUDGE**

Ruling is delivered in the presence of the Applicant Kidawa Iddi, Ms Elizabeth Mhagama (Advocate for Khalfan Saidi Selemani).



**I.H. JUMA
JUDGE
21/11/2012**