

**IN THE HIGH COURT OF TANZANIA**

**(LAND DIVISION)**

**AT IRINGA**

**MISCELLANEOUS LAND APPLICATION NO. 28 OF 2015**

**GAITAN MWAGILE ----- APPLICANT**

**VERSUS**

**JOHN SASA & OTHERS ----- RESPONDENTS**

22/03/2016 & 27/05/2016

**RULING**

**KIHWELQ, J.**

The appellant herein GAITAN MWAGILE has sought to move this honourable court under Section 5(1) (c) of the Appellate Jurisdiction Act Cap 141 RE 2002 and Rule 45(a) and (b) of the Court of Appeal Rules 2009. The application was supported by the affidavit of the applicant.

According to the chamber summons the applicant has applied for the following orders:-

- 1. That this Honourable Court be pleased to grant leave to appeal to the Court of Appeal of Tanzania against the decision given and delivered by the High Court of Tanzania at Iringa in Miscellaneous Land Case Application No. 13 of 2013.*
- 2. That this Honourable Court may grant any other order(s) it deems fit, just and equitable to grant.*

The application is being resisted by the respondents who took up a point of notice of preliminary objection couched thus;

*"That the application is incompetent for being filed out of time and without leave of the court".*

At the hearing before me Mr. Zuberi Ngoda, learned counsel, appeared for the applicant whereas Mr. Imani Nitume, learned counsel appeared for the respondents.

Amplifying in support of the preliminary point of objection Mr. Nitume spiritedly argued that the instant case relates to leave to appeal to the Court of Appeal of Tanzania and according to Mr. Nitume the law is very settled and clear in that Rule 45(1) of the Court of Appeal Rules 2009 prescribes that the application has to be made within fourteen (14) days of the decision subject to appeal. Mr. Nitume went on to submit that in the instant matter the decision subject of the intended appeal was pronounced on 4<sup>th</sup> October, 2012 and the applicant filed this instant application on 25<sup>th</sup> June, 2015 which is more than one year and a half and worse still without any leave of the court.

According to Mr. Nitume this was contrary to the dictates of the law.

Mr. Nitume further raised another point which was not formally put to the notice of the court and the applicant. He strongly argued that the court was not properly moved. According to him the applicant has sought to move the court using Section 5(1) (c) of the Appellate Jurisdiction Act, Cap 141 RE 2002 and Rule 45(a) of the Court of Appeal Rules, 2009 but since

the appeal emanates from a land dispute the proper provisions were Section 47(1) (2) of the Land Disputes Courts Act, Cap 216 RE 2002 and Rule 45(a) of the Court of Appeal Rules, 2009 hence it was superfluous to cite Section 5(1) (c) of the Appellate Jurisdiction Act, Cap 141 RE 2002. He therefore argued that the court is not properly moved as such the application should be struck out.

In response Mr. Ngoda put a valiant fight. He strenuously argued that it is true that the impugned judgment was pronounced on 4<sup>th</sup> October, 2013. However, the applicant made an application on 15<sup>th</sup> October, 2013 that is Miscellaneous Land Application No. 29 of 2013 which was later struck out on 5<sup>th</sup> May, 2015 and the court granted leave to the applicant to file a fresh application. Mr. Ngoda went further to submit that the instant application is within time given the previous attempt by the applicant. He invited this court to the case of **Joseph Ngeleya V Republic**, Criminal Application No. 4 of 2014, Court of Appeal of Tanzania at Mwanza (unreported) and strongly argued that the court has discretion to grant leave where it deems fit to do so. In my view though I find that this case and the submission is misplaced since the issue at hand is not the application for leave but rather

the preliminary objection which hinges on the fact that the application is time barred.

As regards to the impromptu point of preliminary objection which relates to the enabling provision of the law, Mr. Ngoda who though taken by surprise by the preliminary objection lucidly argued that the application was filed in June, 2015 and the position cited by the learned counsel came into being in November, 2015 hence he was of the view that the learned counsel wanted to mislead the court. He therefore emphasized that the matter was properly before the court.

In rejoinder Mr. Nitume briefly argued that the applicant was not granted leave in Miscellaneous Land Application No. 29 of 2013 hence he ought to have filed an application for leave to file the instant application out of time.

As regards to the second point of preliminary objection Mr. Nitume valiantly argued that Section 5(1) (c) of Cap 141 RE 2002 is only applicable where the law does not provide the manner upon which an appeal can be preferred. However, in the present case Section 47(1) of Cap 216 RE 2002 is very categorical and clear. He emphasized that the application should be dismissed.

I have carefully followed the arguments of the learned counsel. Although the second point of preliminary objection was not taken formally which is not advisable for the interest of justice and in fairness to the parties see **M/s. Majembe Auction Mart V Charles Kaberuka**, Civil Appeal No. 110 of 2005, Court of Appeal of Tanzania (unreported) but since an error to cite the correct provision is not a technical one but a fundamental matter which goes to the root of the matter see **China Henan International Co-operation Group V Salvand Rwegasira**, Civil Reference No. 22 of 2005 (unreported) I have taken trouble to scrutinize that issue too.

Rule 45(a) of the Tanzania Court of Appeal Rules, 2009 read as follows:-

*"45. In civil matters*

*(a) Where an appeal lies with leave of the High Court, application for leave may be made informally, when the decision against which it is desired to appeal is given or by chamber summons according to the practice of the High Court, within fourteen days of the decision;"*

Whereas the counsel for the respondents has strongly opposed the application on account that it was filed out of the time prescribed by law, the applicant's counsel has valiantly argued that the order of this honourable court dated the 5<sup>th</sup> May, 2015 granted the applicant leave to file a fresh application. It therefore boils down to two issues one whether the applicant filed the application out of time and two whether the applicant was granted leave by the court to file the application out of time prescribed by law. The first issue has been easily answered since the law in particular Rule 45(a) prescribes fourteen (14) days within which to file the application and because the original application which was filed within time

was struck out then time had already lapsed by the time the application was struck out.

This takes me to the second issue whether the court on 5<sup>th</sup> May, 2015 granted the applicant leave to file the application out of time. The last part of the order which presumably is being referred to by the applicant reads;

*"Since before me is an application without a proper affidavit hence the application is incompetent and therefore I strike it out with costs but the applicant is at liberty to file a fresh application if he so wishes".*

In my considered opinion the last words, *"but the applicant is at liberty to file a fresh application if he so wishes"* were mere remarks by way of chance and by no means they amounted to a leave to the applicant to file the application out of time. If the court intended to grant leave it would have done so in express terms and it would have gone further to direct when the same should be filed. By any stretch of imagination the court would not go its way to grant leave based upon an incompetent application which is an empty shell not worth of consideration.



I feel remorse for the applicant but my hands are tied up as my brother Kalegeya J (as he then was) held in the case of **John Cornel V A. Grevo (T) Ltd**, Civil Case No. 70 of 1998 High Court of Tanzania (unreported);


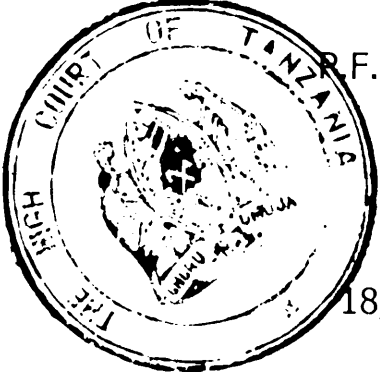
*"However unfortunate it may be for the plaintiff, the law of limitation on actions knows no sympathy or equity. It is a merciless sword that cuts across and deep into all those who get caught in its web".*

By parity of reasoning the above position equally applies in the instant application where the applicant was bound to file the application within the prescribed time or else file an application for leave to lodge an application out of time prescribed by law on account of the reasons which are obvious.


I think, it has amply been demonstrated above that the application has been filed out of time prescribed by law and without leave of the court. This alone suffices to dispose the application without necessarily going to the second point of preliminary objection. The preliminary objection is

therefore upheld and accordingly, the application is hereby dismissed. Each party to bear own costs.

Order accordingly.

  
P.F. KIHWELO  
JUDGE  
18/05/2016  


Ruling to be delivered by the Deputy Registrar on 27<sup>th</sup> May, 2016.

  
P.F. KIHWELO  
JUDGE  
18/05/2016  
