IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT ARUSHA

MISCELLANEOUS LAND CASE APPLICATION NO. 29 OF 2018

(Arising from the Judgement and Decree of the High Court of Tanzania at Arusha by Hon. Madam Judge Massengi given on the 24th September, 2014 in the Land Appeal No. 18 of 2012)

BETWEEN

ELIZABETH LOISUJAKI..... APPLICANT

Versus

AGNES LOISUJAKI .....1st RESPONDENT

JUSTINE JOHN LEIYAN.....2ND RESPONDENT

RULING

MWENEMPAZI, J.

The applicant has filed this application seeking extension of time to file Notice of Appeal out of time to the Court of Appeal of Tanzania against the Judgement and Decree of the High Court of Tanzania, Arusha District Registry in Land Appeal

No. 18 of 2012 delivered on the 24th September, 2014. The application is made under section 11(1) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002.

Parties to this application are represented by legal counsels. The applicant is represented by a Law firm of Duncan Joel Oola & Co. Advocates and Nangawe Advocate was representing the respondents. The matter was disposed by way of written submission upon being ordered so by the court. Both counsels representing the parties did their job properly and assisted the court with relevant submission which is very much appreciated.

In brief, the facts of the case are that the applicant was the respondent in the High Court Land Appeal No. 18 of 2012 whereby the said appeal was decided in favour of the Respondents, who were appellants. The applicant was aggrieved by the decision of the High Court, thus filed a Notice of Appeal on the 23rd October, 2014 with the intention to appeal against the said decision at the Court of Appeal. The applicant also applied for leave to appeal in Miscellaneous Civil Application No. 228 of 2014; from the record the application was filed under section 5(1) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002 and Rule 45(a) of the Tanzania Court of Appeal Rules, 2009. Leave to appeal was granted by this court on the 2nd day of April, 2015 as a result of the said application. The applicant then, filed an appeal in the Court of Appeal at Arusha, which appeal was registered as Civil Appeal No. 99 of 2017 with parties as in this application. It was unfortunate to the

applicant(appellant), the appeal did not cross the borders to the hearing on merit. The appeal was ruled to be incompetent and struck out at the hearing of the point of preliminary objection on the reason that leave to appeal was wrongly granted under section 5(1) of the Appellate Jurisdiction Act, Cap. 141 R. E.2002. The court held that: -

> *"the requirement of leave to appeal to this court against the decisions of the High court which originate from the land cases is provided for under section 47(1) of the Land Disputes Courts Act [Cap.216 R.E. 2002] as amended by Act No. 2 of 2010.*

In the decision of the court it was clearly explained that *leave to appeal (*in matters which originate from land cases) *can only be granted by the High Court under s. 47(1) of the Act and that it is that court which is vested with exclusive jurisdiction to do so. It means therefore, that the requisite leave can only be granted under section 47(1) of the Act*

The applicant has filed this application under section 11(1) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002. The provision as such give power to this court to enlarge time within which a party can file a notice of appeal. This is confirmed by the Court of Appeal in a number of cases. One of them is the case **Joseph Mhina Msumari vs Mkurugenzi Mtendaji One Stop Co Ltd,** Civil

Appeal No. 12 of 2008, Court of Appeal of Tanzania, at Zanzibar(unreported) where court held

> *"Under section 11 (1) of the Appellate Jurisdiction Act No. 15 of 1979 the High Court, or the Industrial Court of Zanzibar for that matter, has power to extend the time for giving notice of intention to appeal."*

It was also held in the case of **Keloi Madore vs Mepukori Mbelekeni and Another**, Civil Application No. 13 of 2016, Court of Appeal of Tanzania at Arusha(unreported) that: -

> *"as a matter of general principle, it is entirely in the discretion of the court whether to grant or refuse an application for extension of time. That discretion is, is however, judicial and so, it must be exercised according to the rules of reason and justice, the deciding factor being the showing of "good cause' by the applicant. As to what constitutes "good cause" is dependent upon a variety of factors which may include the length to the delay, the reasons for the delay, the chances of the appeal succeeding if the application is granted and; the degree of prejudice to the respondent if the application is granted."*

The counsel for the applicant has given an account which, is a factual background to the case. In my view, the account of facts, gives also various stages through which the applicant has been traveling in pursuit of her perceived right

which she feels obliged to fight for. In it one can easily see what made her delay to be within time as required by law. He has also given the account of what he believes in law is the right of the applicant in the circumstances of the case. That since the appeal by the appellant has been struck out, she has a right to re-institute the same. On the point he has cited a number of cases. The applicant counsel has also submitted on the power of court to exercise its discretion to enlarge time; and the reasons for the intended appeal. At this point he has enlisted the grounds of the intended appeal.

The counsel for the respondent has submitted, I will summarize, that all what has happened causing the delay to be in time is the fault of the advocate for the appellant, he was not diligent enough in the course of exercising his duties to serve his client and the court. That submission by the applicant, in the view of the Counsel of the respondent, could not be taken as an account of delay to amount to a sufficient reason for this court to exercise it discretion to grant this application. The counsel for the respondent has cited a number of decisions to drive his point home and of course object to the submission by the counsel for the applicant. In my considered view, here substantial justice was a bit left aside. I believe the parties are dependent on their advocates in their bid to secure justice. I have gone through the record of the court and found that both counsels were working together in this dispute in the High court serving their respective clients. It won't serve justice to all parties if I will jump in to consider the arguments against the mode of

executing their duties in their careers. Parties are seriously looking for justice to be seen done to them.

At this point it is now necessary to see whether there are sufficient reasons to enlarge time for filing a notice of appeal. The record shows that the applicant has been all along swift to work hard towards making sure that the appeal is heard on merit. As rightly pointed out by the respondent counsel, his counterpart has been missing the point in his endeavor. However, the efforts are clearly seen. The applicant has been struggling to see to it that the appeal is filed and heard on merit. After the appeal had been struck out by the Court of Appeal on the 15th December, 2017, the applicant filed the first application for extension of time to file a fresh Notice of Appeal on 22nd December, 2017. This was just within 8 days from the date on which the appeal was struck out by the Court of Appeal. Even after the first application was struck out by this court on 14th March 2018 the applicant filed the present application on the 19th March, 2018. In this respect, the applicant has manifested the determination to see to it that the appeal stands out and is substantially considered.

On another point the applicant has raised an alarm that the intended appeal has legal points worthy of determination by the Court of Appeal. I see there is a need to give weight to this point. The applicant submits that if this is left unattended, it will cause confusion and uncertainty in the High court itself, the subordinate court

as well as in the society at large. In submitting on the point of illegality and irregularity the applicant has cited the case of **Principal Secretary, Ministry of Defence and National Service v. Devram Vallambia**[1992]T.L.R.185 where it was held that:-

> *"when the point at issue is one alleging illegality of the decision being challenged, the Court has a duty, even if it means extending the time for the purpose, to ascertain the point and, if the alleged illegality be established, to take appropriate measures to put the matter and the record right."*

This position was also reiterated in the case of **Amour Habib Salim vs. Hussein Bafagi,** Civil Application No. 52 of 2009, court of Appeal of Tanzania at Dar es salaam(unreported) where the court after quoting the provisions above it stated as follows: -

> *"In view of the fact that there is an alleged illegality on the procedure followed in respect of a decision arising from an objection proceeding, we find it appropriate to allow the application on this point so that the issue may be considered*

In the application at hand, I have a view, that the parties who are determined to fight for their rights to the end, it will serve them justice if they will see it being done. I therefore find it imperative to grant this application and enlarge time as prayed. There is no order as to cost.

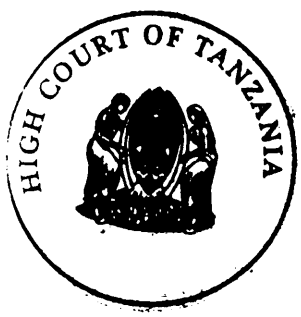
It is ordered accordingly.

SGD: T. M. MWENEMPAZI

JUDGE

7TH SEPTEMBER, 2018

I hereby certify this to be a true copy of the original



J.F. NKWABI

DEPUTY REGISTRAR

ARUSHA 05/10/2018