IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 51 OF 2019

(Originating from the decision of this court in Civil Revision No. 33 of 2015, from Civil Revision No. 10 of 2015 at the District Court for Ilala, Original Probate Cause No. 17 of 2006 Kiriakoo Primary Court)

OMARI AMIRI MRISHO .....1st APPLICANT

ANSELINE AMIRI MRISHO .....2ND APPLICANT

NAIMA AMIRI MRISHO .....3RD APPLICANT

MARIAM AMIRI MRISHO .....4TH APPLICANT

REHEMA AMIRI MRISHO .....5TH APPLICANT

RAHELI AMIRI MRISHO .....6TH APPLICANT

JUMA AMIRI MRISHO .....7TH APPLICANT

SAID AMIRI MRISHO .....8TH APPLICANT

ZAINABU AMIRI MRISHO .....9TH APPLICANT

MRISHOI AMIRI MRISHO .....10TH APPLICANT

VERSUS

SOPHIA AMIRI MRISHO .....1ST RESPONDENT
NAHLA DEVELOPMENT LTD.....2nd RESPONDENTS

RULING

MASABO, J.L:-

This ruling is in respect of an application for extension of time within which the Applicants may file a notice of appeal to the Court of Appeal out of time

against the decision of this court in Civil Revision No. 3 of 2015. The application is supported by a joint affidavit sworn by all the applicants which was sternly contested by the Respondent.

What can be deciphered from the affidavit is that the matter has been in court since 2006. It emanated from an intestate demise of one Amiri Mrisho Masaki on 25/2/2005. After his demise, processes for appointment of an administrator of his estate ensured in Probate Cause No. 167 of 2006 at Kariakoo Primary Court whereby on 2/3/2007 three (3) people out of his 23 surviving heirs were appointed as co-administrators. Having being granted the letters of administration, they embarked on execution of their roles but the task was not an easy one and has as of to date remained incomplete owing to endless misunderstanding between the heirs.

In 2014 having failed to reconcile their differences the parties approached the primary court for Kariakoo seeking assistance on disposal of one of the deceased's assets through appointment of a court a broker to conduct the sale. Meanwhile in the course of inspection the District Court for Ilala revised the matter *suo motto* and held that matters pertaining to the sale of the respective property were outside the mandate of the court and directed that it be left to the administrators. At the same time the primary court for Kariakoo proceeded with the appointment of a court broker who ultimately sold the property through public action to the 2nd Respondent. The applicants herein were disgruntled. They applied to the district court for Ilala praying for revision of the decision of the primary court but their application (Civil Revision No. 10 of 2015) was dismissed after being found to be *res*

judicata as the court had already examined the file and made orders while exercising its supervisory powers in the course of inspection.

Still disgruntled the applicants lodged a Civil Revision No.33 of 2015 in this Court which was dismissed by Mkasimongwa, J. The dismissal disgruntled them further. Desirous of appealing to the Court of Appeal they sought certification of point of law in this court but their application was struck out for wrong citation of enabling provision. Meanwhile they subsequently knocked the doors of the Court of Appeal by filling, well within time, a Notice of Appeal in the Court. The Notice was on 20th March 2019 deemed by the Court to have been withdrawn after the Respondent successfully moved the court to invoked the provision of Rule 91(a) of the Court of Appeal Rules to mark the notice deemed as withdrawn owing the Applicants failure to file their Appeal within 60 days. After this order, the Applicants retreated to administrative remedies which nevertheless turned futile. On 20th August 2019 having failed to rip any fruit from the administrative remedies they filed this application.

The application was argued in writing. In his written submission Mr. Mshana narrated the sequence of events above and proceeded to argue that, it is in the interest of justice that this application be granted so as to correct irregularities and procedural improprieties pertaining to the sale of the disputed property which the court having found to be void, restrained from nullifying it. He submitted further that the Applicant herein filed their notice on time and that after the notice was marked as deemed withdrawn they pursued a remedy under Rule 65(1) and (2) of the Court Rules by writing a complaint letter to the Court of Appeal requesting for *suo motto* revision of

the application but the same was rejected on 2nd August 2019 whereby they were advised to pursue legal procedures. Acting on this advice, it was argued, they hurriedly prepared this application and filed it in court on 17th September 2019. In short, it was argued that the Applicants have at material time acted diligently in pursuit of their right.

On his party, Mr. Samson Mbamba, counsel for the 1st Respondents started by attacking the application for incompetence. He argued that the instant application has been made after the earlier application was deemed withdrawn by the Court of Appeal owing to the Applicant's failure to file the Appeal within 60 days as per the Court of Appeal Rules. In view of this he submitted that since the withdraw order of the court did not subsequently permit the Applicant to refile, this court cannot entertain the application especially because the withdraw order emanated from the applicant's negligence. In sum he reasoned that, this court being subordinate to the Court of Appeal cannot be used as an avenue for restoring the appeal in the Court of Appeal. In fortifying his argument he cited the case of **Tauka Theodory Ferdinand v Eva Zakayo Mwita Administratrix of the Estate of the late Albanus Mwita and another**, Civil Application No. 300/17 of 2016 Court of Appeal at Dar es Salaam (unreported) where the Court of Appeal approved the decision of Munis J (as she then was) and held that the refilling of the application was an abuse of court process as was meant to circumvent the verdict of the order of the Court of Appeal. He also cited the case of **East African Development Bank v Blueline Enterprises Ltd**, Civil Application No. 101 of 2009, Court of Appeal

(unreported) where the Court of disapproved the refiling of the withdrawn matter.

On the merit of the pplication Mr. Mbamba argued that, even if the refiling was permitted the Application will still fail as the applicants have failed to demonstrate a good cause upon which this court can exercise its discretion in extension of time. He argued that, the earlier notice was withdrawn by the court owing to the Applicants negligence in filing the appeal hence it cannot be considered as a good cause for purposes of extension of time. It was also argued that, in pursuit of administrative remedies the applicants once again demonstrated negligence in pursuit of their legal right. Mr. Mbamba cited the case of **Tanga Cement Company Limited v Jummanne D. Massanga and Other**, Civil Application 6 of 2001, Court of Appeal of Tanzania (unreported) and the case of **National Insurance Corporation (T) Ltd v Shengena Limited**, Civil Application No. 63 of 2011, Court of Appeal of Tanzania (unreported) and submitted that in application for extension of time the overriding consideration is that there must be a sufficient cause and since in this case no sufficient cause has been demonstrated the application must fail.

For the 2nd Respondent Mr. Abdul Azizi, learned counsel briefly submitted that the application should not be granted because the Applicants herein has previously filed the notice but the same was deemed withdrawn owing to their negligence. Further he submitted that since there was a notice already filed and the same was withdrawn with no leave to refile, the hands of this court are tied, it cannot order refiling. He nevertheless cited no authority in support.

In rejoining Mr. Mshana attacked Mr. Mbamba for improperly raising a point of law which ought to have been raised as preliminary objection. He stated that, in so doing Mr. Mbamba has acted in contravention of Rule 4(2) (a) and 107(1) of the Court of Appeal Rules, 2019 and Order VIII Rule 2 of the Civil Procedure Code, Cap 33 RE 2002, hence the point raised should be disregarded. Regarding the merit of the Application he argued that the two authorities cited by Mr. Mbamba are distinguishable from the instant case because, in **Tauka Theodory Ferdinand v Eva Zakayo Mwita** (supra), the applicant had lodged a notice but later applied for extension of time to serve the notice to the opponent party whereupon his application was found with no merit and was dismissed. Thereafter, on his own motion he applied for withdrawal of the notice and lodged an application for extension of time in the high court which was found to be an abuse of court process. Conversely, in the instant application the Applicant did not apply for withdrawal.

I have considered the submission made by all the parties. This being an application for extension of time it falls squarely under the discretionary powers of this court. Ordinarily, in similar applications, the court is invited to determine whether the applicants have demonstrated a good cause to warrant the exercise of the discretion of this court. In the instant case, this question is prefaced by another issue which must be determined at the outset. This is none other than the question raised by Mr. Mbamba regarding the competence of this Application. In support of this point Mr. Mbamba has reasoned that his point rests on the fact that the Applicant herein took the necessary step on time by lodging their notice timely but the same was

deemed withdrawn after they failed to lodge their appeal within 60 days. Hence this court is not clothed with jurisdiction to reinstatement of the matter because legally the High Court's mandate over the appeal ceased immediately after it was filed in the Court of Appeal which is superior to this court. Thus, had the Applicants wanted to re-institute they would have done so by lodging this application in the Court of Appeal.

Mr. Mshana has argued that since the point raised is a purely point of it should be disregarded as it has been raised in contravention to Order VIII Rule 2 of the Civil Procedure Code, Cap 33 RE 2002. I entirely agree with this submission as it reflects the position of the law. It is however to be noted the position above being a general rule is subject to exception and that exception is when the point raised concerns jurisdiction. It is a settled rule that, the issue of jurisdiction of the Court can be raised at any stage any stage even before an appellate court (See **M/S Tanzania China Friendship Textile Co. Ltd v. Our Lady of the Usambara Sisters** [2006] TLR70). The essence of this exception, has been held, rests on the fact when the issue of jurisdiction is raised, the party who raised it literary tells the court that: "The existing circumstances do not give you jurisdiction" (See **M/S Fidahussein & Co Ltd vs THA,** Civil Appeal No. 60/99, Court of Appeal of Tanzania at Dar es Salaam. It is therefore of utmost importance that it be determined first. In the case of **Fanuel Mantiri Ng'unda Vs Herman Mantiri Ng'unda & 20 Others**, (CAT) Civil Appeal No. 8 of 1995, this rationale behind this principle was exemplified further. It was stated that:

> "The question of jurisdiction for any court is basic, it goes to the very root of the authority of the court to adjudicate upon cases of different nature..... (T)he questions of jurisdiction is so fundamental that courts must as a matter of practice on the face of it be certain and assured of their jurisdictional position at the commencement of the trial.... It is risky and unsafe for the court to proceed with the trial of a case on the assumption that the court has jurisdiction to adjudicate upon the upon the case

Under the premise, I reject Mr. Mshana's objection and proceed to determine the point as raised.

Section 11(2) of the Appellate Jurisdiction Act, Cap 141 RE 2002 under which this application is preferred vests in this Court discretion to extend time upon which the applicant is to lodge a Notice of Appeal to the Court of Appeal. It states that:

> " the High Court .... may extend the time for **giving notice of intention to appeal from a judgment of the High Court.....** notwithstanding that the time for giving the notice or making the application has already expired

The discretion is exercised parallel to the discretion vested in the Court of Appeal by Rule 10 of the Court of Appeal Rules, 2009. Invariably, an application for extension of time can, at the preference the applicant, be

logged in the High Court or the Court of Appeal. Mr. Mbamba's argument seems to suggest that this application has to be treated differently as the matter had already being instituted in the Court of Appeal. His argument is in line with the principle articulated by the Court of Appeal in the case of **Aero Helicopter (T) Ltd. vs. F. N. Iansen** [1990] T.L.R. 142; **Awiniel Mtui and Three Others vs. Stanley Ephata Kimambo (Attorney for Ephata Mathayo Kimambo**), Civil Application No. 19 of 2014 (unreported) and **Tanzania Electric Supply Company Limited vs. Dowans Holdings S. A. (Costa Rica) and Dowans Tanzania Limited (Tanzania),** Civil Application No. 142 of 2012 (unreported) to the effect that, once a notice of appeal has been duly lodged, the High Court ceases to have jurisdiction over the matter except for applications relating to leave and certification of law. In **Tanzania Electric Supply Company Limited vs. Dowans Holdings S. A. (supra)** the court had this to say regarding the principle.

> "It is settled law in our jurisprudence/ which is not disputed by counsel for the applicant that the lodging of a notice of appeal in this Court against an appealable decree or order of the High Court commences proceedings in the Court. We are equally convinced that it has long been established law that once a notice of appeal has been duly lodged, the High Court ceases to have jurisdiction over the matter"

There is yet another exception as articulated by the Court of Appeal in **Tanzania Electric Supply Company Limited vs. Dowans Holdings S. A.** (supra) where it was stated as follows:

"From the case of Aero Helicopter (supra), this Court had other occasions on which to express itself explicitly on the issue of the High Court's jurisdiction once a notice of appeal has been lodged. See, for instance:

(i) Komba Mkabara v. Maria Luis Frisch, Civil Application No. 3 of 2000 and

(ii) Matsushita Electric Co. Ltd v Charles George t/a CG Travers, Civil Application No. 71 of 2001 (both unreported.)

In the Matsushita case, the Court lucidly held that:

> "Once a notice of appeal is filed under Rule 76 then this Court is seized of the matter in exclusion of the High Court except for applications specifically provided for, such as leave to appeal, provision of a certificate of law...."

We may as well add applications for extension of time to lodge a notice of appeal out of time." [emphasis added]

Although the circumstances under which the extension of time to file a notice could be entertained after the notice had been lodged in the Court of Appeal, it is clear in my view that it envisions circumstances where the notice was, for example, found incompetent. In my humble view, logic dictates that the ability to reinstate the Notice of appeal by lodging an application for extension of time in this court although permissible is predicated on the manner through which the Notice vacated the Court Appeal and this can be

vividly seen in the case of **Tauka Theodory Ferdinand v Eva Zakayo Mwita** (supra) cited by Mr. Mbamba. In this case the overriding consideration by the Court was the circumstances under which the Notice vacated the Court of Appeal. Its background which I find relevant to narrate, albeit briefly, is that the Applicant having failed to serve the Notice of appeal on the opponent party filed an application for extension of time to serve the respective notice to the Respondent but the same was dismissed whereupon he voluntarily withdrew his Notice from the Court. Thereafter he returned to this Court and lodged an application for extension of time. Having considered the of events antecedent to the application, Munis J (as he then was) held that although there was nothing wrong in the self-induced withdrawal the refiling was problematic because the withdrawn Notice was perfectly valid at the time of its withdrawal and there was a remedy available of referring the matter to the full court. Accordingly, she found the application to be an abuse of court processes. Further she held that:

> "it is in the intention of the legislature to allow a party who fails to a step in the middle of the process to withdraw and restart the process with an intention of patching up the miss, otherwise this would lead to absurdity, uncertainty in the finality of litigation which is against public policy.

On appeal, her decision was upheld and the matter was dismissed.

In trying to convince this court to hold in the applicants' favour, Mr. Mshana forcefully argued that the applicants have acted with diligence and that the instant case is distinguishable from **Tauka Theodory Ferdinand v Eva Zakayo Mwita** (supra). In Mr. Mshana's view, the applicants herein are

comparably more diligent than the Appplicant in **Tauka Theodory Ferdinand v Eva Zakayo Mwita** (supra). For the reasons I will demonstrate below this argument is, in my humble view, seriously fault and devoid of any merit.

It is a common ground in this case that the Notice was deemed withdrawn after the Applicant failed to lodge the appeal timely and after both parties were held accorded an equal opportunity to be heard on whether or not the Notice be sustained. In **Tauka Theodory Ferdinand v Eva Zakayo Mwita** (supra), as narrated earlier, the Applicant, having found that he had not served his notice of Appeal on the opponent party applied for extension of time to serve the Notice on the Respondent. Conversely, in the instant case, the Applicants had not lodged the appeal within 60 days after lodging the notice and had not served the Respondent with a copy of the letter vide which they requested to be supplied with the records of appeal, yet they took no action to remedy the situation. This prompted the Respondent to move the Court of Appeal under Rule 91(a) of the Court of Appeal Rules,2009 for an order that the appeal lodged by the Applicant be deemed to have been withdrawn. Their motion was heard during which the Applicants failed to adduce plausible reasons for sustaining their Notice and the same was consequently deemed to have been withdrawn and was marked as such.

If the situations obtaining in these two cases were to be measured on a scale it would take no time to establish that the Applicant in the former case was comparably responsible in that having realized the anomaly he attempted to find a solution which nevertheless ended without fruition while on the other hand the applicants in the instant case the Applicants were merely relaxed

waiting for things to crumble on their own. This in my humble view does not make their case batter.

Having carefully considered the circumstances of this application, I fully subscribed to the view expressed by Munis J and upheld by the Court of Appeal in Tauka that:

> "it is not the intention of the legislature to allow a party who fails to a step in the middle of the process to withdraw and restart the process with an intention of patching up the miss, otherwise this would lead to absurdity, uncertainty in the finality of litigation which is against public policy

The sequence of the events leading to the application speak for the themselves. There is no glimmer of doubt in mind that the instant application serves no other purpose than looking for an avenue through which the Applicants can patch up the miss.

Besides, as stated in **Tauka Theodory Ferdinand v Eva Zakayo Mwita** (supra) there was a remedy under the Rules but the Applicant opted not to invoke them. As paragraph 37 of the affidavit and Annexure "AM 7" would reveal, instead of pursuing legal remedies the Applicant opted for administrative procedures writing complaints/ letters to the Chief Justice. Mr. Mshana has argued that, in writing the letters they were exercising a remedy provided for under Rule 65 by moving the Court to revise the matter *suo motto*. With respect I will reject this argument outright as the procedures to be followed by the parties under this Rule are explicitly stated. Writing letters to the Chief Justice is not among them. What the applicants were doing was pursuit of administrative/extra- judicial remedy. The following

excerpt from the letter wrote to them by the Chief Registrar in response to their letters as contained in Annexure "AM 7" to the affidavit is self-explanatory. In this letter the Applicants were advised as follows:

> "Kwa msingi huo mnashauriwa kuchukua hatua stahiki za kimahakama kwa kuzingatia taratibu za kisheria zilizopo badala ya kutumia njia ya malalamiko kumuomba Mheshimiwa Jaji Mkuu kuingilia kati kiutawala suala linalohitahi uamuzi wa kimahakama.

In total, the applicants spent about five months (from 25th March 2019 to 20th August 2019 when they finally filled this application) in pursuit of this administrative remedy. As correctly argued by Mr. Mbamba, under the law, pursuit of administrative remedy does not constitute a good cause for purposes of extension of time. In fact, I find this to be a manifestation of gross negligence and forum shopping on the party of the Applicants. It is also on record that throughout this time the applicants had legal representation of a highly qualified and senior advocate who is well acquainted with the legal procedures. Certainly, they ought to have known that the flight they were boarding was incapable of landing them at the desired destination. In totality of all this the application cannot escape the label of abuse of court processes.

I understand that, the Applicants have pleaded illegality as one of the grounds for the application and I alive to the principle that the point of illegality in itself suffices as a ground for extension of time. However, considering what I have endeavored to demonstrate above, I will refrain

from considering this factor. In so doing, I am inspired by the *dictum* of His Lordship Mwambegele JA in **Tauka Theodory Ferdinand v Eva Zakayo Mwita** (supra). After upholding the that decision that the application before him was an abuse of court process he stated as follows:

> "even if I would have found the illegality complained of to be significant and apparent on the face of record, I would in the circumstances of the present case, have hesitated to grant the extensions sought. I would have so hesitated because to qualify as a good cause in my view, must be pleaded in order to start a process of appeal. In the case at hand, the process of appeal was started and failed. It would be absurd to consider illegality at this stage after the process of appeal had been started. ..... otherwise the point of illegality would turn into a blank check to be used at any stage of the process of appeal. If that were allowed, it would defeat the overarching object that litigation must come to an end.

Based on the above, I dismiss the application with costs.

DATED at DAR ES SALAAM this 13th day of May 2020

J.L. MASABO

JUDGE