IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

MISCELLANEOUS LAND APPLICATION NO. 213 OF 2019

(Arising from the High Court of the United Republic of Tanzania at Mwanza District Registry in Land Appeal No. 71 of 2015 before Hon. Gwae, J. originating from Land Application Case No. 54 of 2012 in the District Land and Housing Tribunal for Tarime District).

JOYCE EGINA *(Administratrix of the Estate of Late VENANCE MASEKE EGINA)* **.....APPLICANT**

VERSUS

PURASDUS JUNUS NDARO..... RESPONDENT

RULING

Date of last Order: 08/05/2020
Date of Judgement: 12/06/2020

F. K. MANYANDA, J.

This Court is being moved under Section 47(2) of the Land Disputes Courts Act, [Cap. 216 R. E. 2019] as amended by the Written Laws (Miscellaneous Amendments) (No.3) Act, of 2018 and Section 5(1)(c) of the Appellate Jurisdiction Act, [Cap. 141 R. E. 2019] to grant orders prayed in the Chamber Summons as follows:-

(i) That, the Hounourable Court be pleased to grant leave to appeal to the Court of Appeal of Tanzania against the whole decision of High Court of the United Republic of Tanzania; and

(ii) Any other order(s) that the Honourable Court deem fit to grant.

The brief facts of this application as gleaned from the chamber summons, affidavit supporting it and the records of the case give the

background of this matter. The Applicant unsuccessfully sued the Respondent in Land Application Case No. 54 of 2012 in the District Land and Housing Tribunal for Tarime District which decided in her disfavor. Being aggrieved the Applicant also filed an appeal in the High Court registered as Civil Appeal No. 71 of 2015 which was decided on 16th November, 2017 also not in her favor. Undaunted, she decided to appeal to the Court of Appeal by lodging a notice of appeal on 5th December, 2017. However when it came to processing for the requisite leave of this court to appeal to the Court of Appeal she found herself out of the prescribed time of 30 days. Therefore she filed Miscellaneous Land Application No. 136 of 2018 for extension of time within which to apply for leave. After been granted with extension of time she filed the instant application on 20th December, 2019.

At the hearing, the Applicant appeared in person while the Respondent was represented by Rose Edward Ndege, learned Advocate. The Respondent raised preliminary objection to the hearing of the application on two points of law that:-

(i) The Application for leave to appeal to the court of Appeal is time barred; and

(ii) The verification clause does not state who is the deponent verifying the affidavit of the applicant.

Hearing of the objection was ordered to be conducted by way of written submissions. Both parties filed their submissions in time.

It is trite law that a preliminary objection once has been established as such, must be heard first because it has a legal effect of disposing the whole matter. According to the **Black's Law Dictionary** (8th Edition) a preliminary objection is defined as follows:

> *"An objection that, if upheld, would render further proceedings before the tribunal impossible or unnecessary"*

Equally, as rightly cited by the counsel for the Respondent Ms. Rose, in the famous case of **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd** [1969] EA 696, His Lordship Law, J. as he then was stated at page 700:

> *"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arise by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit .."*

Also the Court of Appeal of Tanzania instructively aired this position of the law in the case of **Shahida Abdul Hassanali v. Mahed M.G. Karji,** Civil Application No. 42 of 1999 (CAT) inter alia that:-

"The law is well established that a court seized with a preliminary objection is first required to determine that objection before going into the merits or the substance of the case or application before it. In ***Bank of Tanzania Ltd vs. Devran P. Valambia*** *Civil Application No. 15 of 2002 (CAT) (unreported) the Court observed:*

> *"The aim of a preliminary objection is to save the time of the court and of the parties by not going into the merits of the application because there is a point of law that will dispose of the matter summarily.'*

Furthermore, given that one of the points raised in the preliminary objection concerned the court's jurisdiction, it was therefore even more imperative for it not only to be heard but also to be determined fully by the trial court before the continuation of the main suit... With respect, therefore, the failure by the learned Resident Magistrate with extended jurisdiction to deliver the ruling on the preliminary objection... constituted a colossal procedural flaw that went to the root of the trial. It matters not, whether it was inadvertent or not. The trial court was duty bound to dispose of it fully, by pronouncement of the ruling before dealing with the merits of the suit. This it did not do. The result is to render all subsequent proceedings a nullity."

Basing on this position of the law I have to deal with the objection raised by the Respondent to its finality before going into the merits of this application. In her submissions Ms. Rose chose to argue the first point of law that the Application for leave to appeal to the court of Appeal is time barred; and abandoned the second point of law about defective verification clause in the affidavit. Supporting the first point, Ms. Rose contended that the instant application was filed late by 52 days. She reckoned time from the date of the ruling of this court in Miscellaneous Land Application No. 136 of 2018 delivered on 28th October, 2019 to 20th December, 2019 when the instant application was filed. That this time is beyond the prescribed 30 days by Rule 45(a) of the Court of Appeal rules, GN No. 368 of 2009 as amended. The application is violative of this Rule for 22 days of delay which have not been accounted for; she invited this court to dismiss the application. To support her position she cited the cases of **Yusuf Same and another Versus. Hadija Yusuf** [1996] TLR 347, **Mustafa Athumani Nyoni vs. Issa Athumani Nyoni,** Civil Application No. 351/17

of 2018 (unreported) a copy of which was supplied to the court. She also cited another case which, not only she failed to supply a copy thereof, but also failed to cite it properly she cited it as follows **Said Peter Katakula vs. Norbert Mahingila Gwebe** (Supra) but she had not cited the same anywhere else. In addition she also cited the case of **Timoth Daniel Kalumile vs. Timoth Patrice Otaigo t/a Nyakanga Filling Station**, Civil Application No. 365/1 of 2017 (unreported) of which copy was supplied. I will not deal with the cases she did not supply copies to the court.

On the other side, the Applicant in her submissions against the preliminary objection concedes that the application was filed out of time but on justifications. One, a copy of the ruling of the High Court was supplied to her late, as it was very crucial in order to make the application she argues she could not file the same until when she was supplied with the same, the delay is not her blame. That as she was given the ruling free of charge thus no receipts issued she cannot tell the date when it was supplied to her. Two, the application is not brought under Rule 45(a) of the Court of Appeal Rules but under Section 47(2) of the Land Disputes Courts Act, [Cap 216 R.E. 2019] read together with Section 5(1)(c) of Appellate Jurisdiction Act, [Cap. 141 R. E. 2019]. Therefore the time should not be reckoned under Rule 45(a) as alleged by the Respondent but under Section 47(2) which she thinks the time extended was enough and the application is not barred.

Those were the submissions by the parties. I have earnestly considered the submissions and find that the issue is whether the

application is time barred. First, it is not disputed that the Applicant did not file in time the application for leave to appeal against the impugned judgment of this Court delivered on 16th November, 2017 by Hon. Gwae, J. Hence she had to apply for extension of time. Secondly, the Applicant delayed in filing her application for leave even after the High court had enlarged the time. Thirdly, she made the instant application for a second time applying for extension of time. In this second time, the controversy is on the reckoning of time. The Respondent reckons the time from the date when the ruling was delivered without excluding the time for obtaining of copy of the ruling, on the hand the Respondent contends that if the time for waiting for the ruling is excluded then the application is in time.

I have gone through the records and found that the ruling of this court in Miscellaneous Land Application No. 136 of 2018 was delivered on 28th October, 2019. The Applicant filed the instant application on 20th December, 2019. This was a period of fifty three (53) days from the date of the ruling. The ruling of this Court by Hon. Ismail, J. did not specify the time which it extended for the Applicant to make her application. My understanding of the law is that a court cannot extend the time beyond or less than that prescribed by the law.

I am not alone on this position, the Court of Appeal said in the case of **Betty Mbapa Versus Dipak Vessa and Joseph Moshi,** Civil Appeal No. 48 of 2010 that:

> *"The High Court in our considered judgment, in granting an order extending the time within which to lodge the notice of appeal was bound by the express provisions of Rule 76 (2) of the Rules. Although the order did not expressly set the time*

limit for doing so, the same was subject to the limit prescribed in sub-rule (2). Neither the High Court nor this Court for that matter, has jurisdiction to set a limit for the lodging of the notice of appeal beyond the prescribed period or in violation of the express provisions of the law."

In the instant matter, the issue now is what the time was extended by His Lordship Ismail, J. in his ruling. The answer to this is found under the law which the application was made. The Respondent argues that the applicable law is Rule 45(a) of the Court of Appeal Rules while the Applicant contends that the applicable law is Section 47(2) of the Land Disputes Courts Act read together with Section 5(1)(c) of the Appellate Jurisdiction Act. Understandingly, Section 5(1)(c) of the Appellate Jurisdiction Act lists down decisions from which appeals lie to the Court of Appeal with leave of the High Court as a pre condition. In other words, it imposes leave as a precondition for an aggrieved person to appeal to the Court of Appeal from those listed decisions and orders, it reads:

"5.-(1) In civil proceedings, except where any other written law for the time being in force provides otherwise, an appeal shall lie to the Court of Appeai-

a. NA

b. NA

c. With the leave of the High Court or the Court of Appeal, against every other decree, order, judgment, decision or finding of the High Court.

Section 47(2) of the Land Disputes Courts Act, like Section 5(1)(c) above, imposes leave as a precondition for an aggrieved person to appeal to the Court of Appeal in matters concerning land; it reads:

> *"47(1) NA*
> *(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."*

On the other hand Rule 45(a) of the Court of Appeal Rules provides for the procedure and the time within which an application for leave to appeal to the court of Appeal is made; it reads:

> *45. In civil matters:-*
> *a) notwithstanding the provisions of rule 46(l),where an appeal lies with the 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 thirty days of the decision; or*

Miscellaneous Land Application No. 136 of 2018 which My Brother Hon. Ismail, J. dealt with was made under Section 11(1) of the Appellate Jurisdiction Act and Rule 10 of the Court of Appeal Rules which provide for powers to extend time within which to apply for leave to appeal to the court of Appeal. However the said provisions do not provide the time limit within which to apply for leave to appeal to the Court of Appeal can be extended. Hence the authority in **Betty Mbapa case** (supra) comes into play, that is, extension of the time will be extended subject to the limit prescribed by the law. From the provisions cited above, the provision

setting the time limit within which to apply for leave to appeal to the Court of Appeal is Rule 45(a) which prescribes the time limit of thirty (30) days from the date of the decision intended to be appealed against. In the premise, the time limit which my Brother Hon. Ismail, J. prescribed in his ruling could not be beyond or less than thirty (30) days.

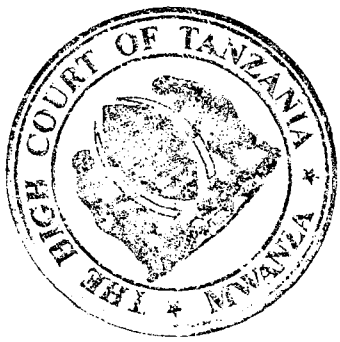
The last question is, in this matter from which date the time is supposed to be reckoned. From their submissions, the Respondent reckons the time from the date when the ruling was delivered without excluding the time for obtaining of copy of the ruling, on the hand the Applicant contends that the time for waiting for the copy of the ruling be excluded thus, the application is in time, but she fails to establish when she obtained the same. In these circumstances the Applicant ought to have obtained a supporting affidavit from the registry officer of this Court in order to establish the date on which she collected the copy of the ruling. The Court of Appeal in the case of **M/S Tanzania Coffee Board vs. M/S Rombo Millers Limited,** Civil Application No. 35 of 2015 (unreported) where the Applicant relied on information from a registry officer, held that a person relying on evidence from a Registry Officer of misplacement of documents must obtain from him an affidavit in his support. Otherwise there is nowhere to base the reckoning of time except the date on which the ruling was delivered. In the case of **Cosmas Construction Co. Ltd vs Arrow Garments Ltd** [1992] TLR 127 which was decided by the Court of Appeal of Tanzania an application, by the applicant's company, for extension of time to institute an appeal was heard by the High Court in the absence of the applicant. In his application for extension of time the applicant said

that he was not given notice of judgment but did not disclose when he got to know of the existence of the judgment. In a considered judgment by His Lordship, Makame, Justice of Appeal (as he then was) instructively held *inter alia* that:

> *"Without disclosing when the applicant got to know of the existence of the judgment it is not possible to gauge the extent of the delay. No sufficient cause for the delay has been established."*

Since the Applicant failed to give any evidence from the registry to establish the date on which she collected the copy of the ruling, the time is reckoned from the date on which it was delivered. It follows that the Applicant was late in filing the instant application for twenty three 23 (days).

In conclusion and for reasons given above, I hereby struck out this application for leave to appeal to the court of Appeal for been time barred with costs. It is so ordered.



F.K. MANYANDA
JUDGE
12/06/2020