

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**BUKOBA DISTRICT REGISTRY**

**AT BUKOBA**

**MISC. CIVIL APPLICATION NO. 06 OF 2022**

*(Arising from the Decision of Hon. A.E. Mwipopo, Judge Dated on 11<sup>th</sup> days of November, 2021, in (PC) Civil appeal No. 45 of 2020 arising from Civil Appeal No. 53 of 2019 of Muleba District Court, Originating from Civil Case No. 108 of 2019 of Muleba Urban Primary Court).*

**EVANGELINA K. CHARLES..... APPLICANT**

**VERSUS**

**PROJESTUS RUTINWA BENDABENDA.....RESPONDENT**

**RULING**

*19/07/2022 & 29/07/2022*  
**E. L. NGIGWANA, J.**

This ruling is in respect of the Preliminary Objection (P. O) raised by the respondent one Projestus Rutinwa Bendabenda through the service of advocate Remidius Mbekomize. In due cause of filing a counter Affidavit, is when the respondent accompanied a notice of preliminary. The said objection was couched viz;

*"That, the application is bad in law for being accompanied or brought by Omnibus Application. Hence an incompetent application to be determined by this Honorable court".*

The brief factual background which can be deciphered from the record informs that the respondent successfully sued the Applicant as the administrator of estate of the deceased Erasto Higombeya Andrea for recovery of Tshs. 10,500,000 in primary court. The applicant was not amused

with the decision of the primary court and thus appealed in the Muleba District Court through Civil Appeal No. 53 of 2019 in which again the applicant was unsuccessfully party. Still undaunted, she appealed in this court but in vain.

In her desired effort to further appeal to the Court of Appeal, she found herself out of time hence the current pending Application for extension of time to file an application to appeal as third appeal to the Court of Appeal. Before the same application was determined, it encountered the stumbling block with the preliminary objection which this ruling is the result of.

In her chamber summons, the applicant has now sought the following prayers as quoted:

- (1) Leave to extend time to file an application for leave to appeal to the Court of Appeal.***
- (2) This Honorable Court be pleased to grant leave to appeal to the Court of Appeal of United Republic of Tanzania.***
- (3) Certification that there is point of law involved in the appeal to be determined by the Court of Appeal.***
- (4) Costs of this application.***
- (5) Any other orders (s) and relief(s) this Honourable n Court may deem just to grant.***

At the hearing of this Preliminary objections, Advocate Derick Zephryne who held brief for Advocate Mbekomize, with instruction to proceed with a hearing, submitted that the current Application No. 06 of 2022 was brought under section 11(1) of the Appellate Jurisdiction Act and Section 5(1) of the

same law. That the prayers prayed for are (1) Extension of time within to file an application for leave to Appeal to the Court of Appeal of Tanzania. He went on that another prayer is (2) Leave to appeal to the Court of Appeal and the third prayer is (3) Certification to the Court of Appeal to appeal on point of law. That the application for extension of time is a separate application and the prayer for certification on point of law is a distinct thing thus they cannot be joined together.

He cited the case of **Juma M. Nkondo vrs Tol Gases Limited/Tanzania Oxgen Ltd and Another**, Civil Application No. 382/01 of 2019 where the issue of Omnibus application was discussed that in the context that Application for extension of time and certification of point of law cannot be “lumped” up together. He finally prayed for the application to be struck out.

Replying to the respondent’s learned counsel submission, advocate Kiula contended that since the prayers in the application are closely related, it was right, for convenience purpose to put them together in one application. He insisted that there is no law prohibiting such combination. He cited the case of **MIC Tanzania Limited vrs Minister of Labour and Youth Development and AG**, Civil Application No. 103 of 2004 at Page 9, the court specifically stated that unless there is a specific law barring the combination of Applications, the same must be encouraged to avoid multiplicity of cases.

That the case of **Juma M. Nkondo**(supra) is distinguishable, as it was at the second bite in the Court of Appeal, therefore we cannot invoke the procedure

of the Court of Appeal on Omnibus Application in the High Court where the Court of Appeal Rules are not founded.

He referred me the case of **Mariam Abdallah vrs Adolph Mwakanyuki**, Misc. Application No. 116 of 2021 which ruled that where the court finds that the application is Omnibus, the same should not be struck out, instead should apply Overriding Objection Principle to deal with the first prayer. He finally prayed the P.O to be overruled.

In rejoinder, Advocate Zephrrine reacted that the decided case by the court of appeal is a law. The case of **Juma Nkono**(supra) is so recent, thus in matters of interpretation the current decision must prevail. In the case of **Maria Abdullah** (supra), on the prayers was distinguished, but according to him, since the affidavit was the same. He reiterated his prayer to have the application struck out.

I have painstakingly considered the authoritative arguments advanced in both sides and also the available record. Generally, in practice, it is wrong to lump two or more different applications together for consideration by the Court. In law, it is also wrong to support two different applications by a single affidavit. As it was correctly argued by Mr. Zephrrine. This guidance is sought from **Order XLIII rule 2** of the Civil Prodnre Code Cap. 33 R:E 2019 which requires every application to be brought by a chamber summons supported by affidavit. **See Rutagatina C. L vs Advocate Committee and Another**, Civil Application No.98/2010.CAT at DSM,**Also see** the recent case of Court of Appeal as rightly relied up by the Respondent's counsel of

**Juma A. Nkondo versus TOL Gases Limited/Tanzania Oxygen Limited and Another**, Civil Application No.382/01 of 2019, CAT at DSM.

Therefore, an application for extension of time could be applied separately and could be accompanied with its separate affidavit. It is a distinct application from that of leave to appeal and reasons for extension of time and leave are quite distinct.

However, I am alive that there are circumstances where omnibus application is encouraged so as avoid multiplicity of proceedings such as where the prayers are closely related, made under one law and combining them in one application is practicable and does not abuse the court process. **See MIC Tanzania Limited vs Ministry for Labour and Youth Development and another**, (supra) as rightly relied on by the applicant's learned counsel. Nonetheless, concerning the application in our case, it is my settled view that extension of time should first be sought before application for leave. In my view, combining the two becomes as an abuse of court process.

Apart from applying for leave in the chamber summons the applicant also applied for the court to issue a certificate that there is a point of law involved. Again I agree with Mr. Zephurine that these are two distinct prayers and differ in context upon which they are granted. Leave is granted where the applicant seeks the second appeal whereas the certificate on point of law is for the applicant who seeks to go for the third appeal like the situation in our present case. The current matter originates from Primary Court and the applicant intends to go for the third appeal upon which, the fit prayer to apply for, is a certificate on point of law and not leave. This is not only omnibus application but is the misconceived and incompetent application.

Moreover, there is another funny and astonishing flaw which is apparent on the applicant chamber summons; the first prayer sought is extension of time to file application for leave but the third prayer, the applicant seeks only certification on point of law without first applying for leave while she was also out of time to file an application for certification on point of law. That being the case the second prayer on certification is also untenable.

In recap, in cases where the Applicant fails to file an application for leave to appeal to the Court of Appeal within the statutory period of time, it is advisable that an application for extension of time to file an application for such leave should be preferred first. Once it is granted, then the application for leave should follow. If it is refused the matter will end there unless an appeal is preferred to the Court of Appeal against such a refusal.

The respondent's counsel had submitted that the application being omnibus should be struck out. The applicant's counsel resisted and prayed the court to abide on overriding objective principle and disregard the prayers which are uncalled for and act on the competent ones. He requested me to follow the position took by this court in **Mariam Abdallah vs Adolph Mwakanyuki** (supra)

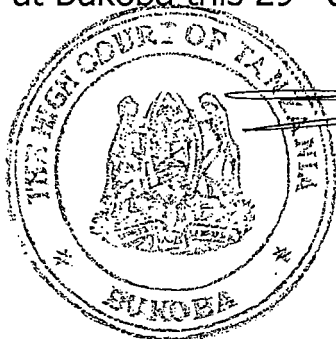
I am sincerely hesitant to borrow the said position in **Mariam Abdallah's case** (supra) and apply in this case at hand because there is no competent prayer which can survive or remain alive instead the trio prayers are all incompetent and therefore are all disregarded. The reasons are not far to fetch. **One**, for the first prayer, what is sought is leave to extend time to file an application for leave to appeal to the Court of Appeal, the same is

misconceived as this matter originates from Primary court. What ought to be prayed for, is the extension of time to file an application for certification on point of law and not leave hence this court cannot fall in that trap to grant incompetent prayer. **Two**, the second and third prayers which seek for the leave and certification respectively are rendered superfluous as they can be granted to the applicant who was out of time after he or she has been granted extension of time. It is my firm view that the above discussed illegalities cannot be cured by Overriding Objective Principle.

In the event the preliminary objection has merit thus, the application is hereby struck out with costs.

It is so ordered.

Dated at Bukoba this 29<sup>th</sup> day July, 2022.

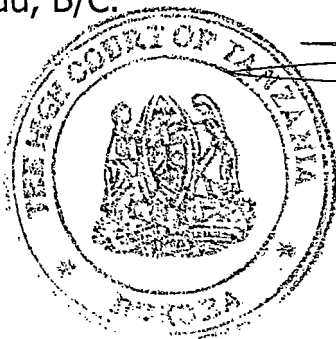


E.L. NGIGWANA

JUDGE

29/07/2022

Ruling delivered this 29<sup>th</sup> day of July, 2022 in the presence of the appellant and her advocate Mr. Samwel Kiula, Ms. Salome Kagoa learned advocate for the Respondent, Hon. E. M. Kamaleki, Judge's Law Assistant and Ms. Tumaini Hamidu, B/C.



E. L. NGIGWANA

JUDGE

29/07/2022