

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF KIGOMA

AT KIGOMA

MISC. CIVIL APPLICATION NO. 15 OF 2022

BILALI MOSHI SOUDIAPPLICANT

VERSUS

MARIAM JUMA RESPONDENT

RULING

15/8/2022 & 6/9/2022

L.M. Mlacha,J

The applicant, Bilali Moshi Soudi filed an Application under section 95 of the Civil Procedure code Act, cap 33 R.E 2019 and section 47 (2) of the Land Disputes courts Act Cap 216 R.E 2019 seeking a certificate on point of Law in respect of the decision of this court made in Land Appeal No. 20 of 2022 (Manyanda, J). The Application is accompanied by the affidavit of Gilagiza Issa Omari who is his counsel. With it there is a corresponding chamber summons and affidavit in Kiswahili, the judgement and decree of this court and the exchequer receipt from the systems which has receipt No. EC1014157054701P evidencing payment of court fees Tshs 50,000/=.

Service was effected to the respondent, Mariamu Juma who filed a counter

affidavit and a Notice of Preliminary objection. This is a ruling in respect of the preliminary objection.

The notice of preliminary objection reads:

1. That, the Applicant's Application is unattainable for want of Notice of Appeal as per Rule 46 (1) of the court of Appeal Rules 2009.

Both Mr. Mosses Rwegoshora for the respondent and Mr. Gilagiza Issa Omari had a chance to present oral submissions before me. The submissions were not long. Mr. Rwegoshora had the view that the applicant had failed to attach a copy of the notice of appeal contrary to rule 46 (1) of the Court of Appeal Rules 2009 making the appeal improperly before the court. He said that he was served at a later stage contrary to the law. He advised the court to check if there is a copy of the Notice of Appeal in the court file. He argued the court to follow the law.

Mr. Gilagiza admitted that he could not attach the notice but argued that he lodged the notice on 12/7/2022 well within the statutory period of 30 days. He had a copy of the notice in his hand. He asked the court to use its wisdom and spare the case instead of being moved by technicalities to defect justice.

I had chance to examine rule 46 (1). It reads as under as under:

*"46 (1) where an application for a certificate or for leave is necessary, **it shall be made after the notice of appeal is lodged**"(Emphasis is added)*

Speaking of rule 46 (1), this court had this to say in **Shamash Ramzan Dharamsi Wauji**, (as Personal Legal Representative of) **Karim Abdulrasul Adam v. Asily John Mwankenja**, (Hc Dsm), Misc. Land Application No. 404 of 2017 (Mgonya, J.) page 8: -

*"The law is very clear under **Rules 46 (1) of the Court of Appeal Rules 2009** that an Application for leave shall be made after the Notice of Appeal was lodged . ..Therefore it is the legal requirement that **the Notice of intended Appeal shall be field before....**"*

The law says that the application for leave shall be made after the notice of appeal is lodged. The word used is 'shall' meaning mandatory. The issue now is how can we know that a notice of appeal has been lodged? I think, as correctly suggested by Mr. Rwegoshora, the court will know its existence through the pleadings. That is to say, the notice of appeal must be one of the annextures to the affidavit. It must be annexed and referred to during the submissions. This was not the case here.

Failure to abide with this legal requirement made the application improperly before the court. Wisdom cannot be used to save this application for wisdom must arise from the application of the law not from avoiding it. Neither can section 3A of the Civil Procedure Code Act be called to rescue the situation for the overriding objective principle was not enacted to defeat existing rules.

The application is improperly before the court and cannot be left to stand. It is accordingly struck out with costs. It is ordered so.




L.M. Mlacha

Judge

6/9/2022

Court: Ruling delivered. Right of Appeal Explained.




L.M. Mlacha

Judge

6/9/2022