

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

AT MBEYA

MISCELLANEOUS LAND APPLICATION NO. 33 OF 2022

(Originating from Land Appeal No. 18 of 2021 High Court of Tanzania at Mbeya, original Land Appeal No. 252 of 2019 in the District Land and Housing Tribunal for Mbeya)

REHEMA SAINI NZUNDA APPLICANT

VERSUS

MARTHA ROBERTSON SIMUMBA 1ST RESPONDENT

UBATIZO MWALUKOMO 2ND RESPONDENT

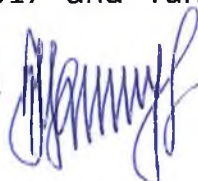
RULING

Date of last order: 20/07/2022

Date of ruling: 29/09/2022

NGUNYALE, J.

The applicant was not satisfied with the decision of this Court in Land Appeal No. 18 of 2021 pronounced on 28th day of February 2022 R. A. Ebrahim, J. (as she then was) whereby her appeal was dismissed with costs for want of merit. On 24th day of April 2022 she marched before the registry of the Court with a chamber summons under section 5 (1) (c) of the Appellate Jurisdiction Act Cap 141 R. E 2019 and Rule 45 (a) of Tanzania Court of Appeal Rules, 2009 as amended by Tanzania Court of Appeal (Amendments) Rules, 2017 and Tanzania Court of Appeal

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(Amendment) Rules, 2019 and Section 47 (2) of the Land Disputes Courts Act Cap 216 R. E 2019 praying for the following orders; -

(a) That the Court be pleased to grant leave for the applicant to appeal to the Court of Appeal of Tanzania against the judgment of the High Court of Tanzania at Mbeya by (R. A. Ebrahim,J) dated 28 February, 2022.

(b) Costs of the application be in course.

The application gained support from an affidavit dully sworn by the applicant Rehema Saini Nzunda in which she deponed that she has arguable issues to be determined by the Court of Appeal. under paragraph 7 of the very affidavit, she listed the following issues; -

(a) Whether or not the mandatory requirements of active involvement of assessors and their opinion were met.

(b) Whether it is right for the High Court to only decide on two grounds of appeal leaving out other five grounds undecided.

(c) Whether it is right for the High Court to decide that the central and crucial issue of the dispute before was dealt with in the trial tribunal.

(d) Whether or not the High Court properly re-evaluated the evidence adduced in the trial tribunal.

(e) Whether it is right for the High Court to decide that the lower trial Tribunal was properly directed itself on the required evidence to prove the particular case.

The application was resisted by the respondent's joint counter affidavit in which they disputed the contents of paragraph 7 of the applicant's affidavit and that the judgment of the High Court is just and reasonable.



The application was heard by written submissions; the parties complied to the scheduling orders of filing the relevant written submissions. The applicant appeared in person and the respondents were enjoying the service of Emily Ernest Mwamboneke learned Advocate.

The applicant submitted in support of the application and he ended with a humble prayer that the Court should grant leave for her to appeal to the Court of Appeal of Tanzania so that errors on point of law to be corrected for the ends of justice.

The respondents could not respond to the submission of the applicant, instead they raised a preliminary objection on point of law that the Court had no jurisdiction to entertain the application because **one**, it offends Rule 45 (a) of the Court of Appeal Rules of 2009 for being hopeless time barred and **two**, the application is incompetent for offending order 46 (1) of the Court of Appeal Rules of 2009.

On the first ground of objection the respondent Counsel submitted that the Court has no jurisdiction to entertain the present application as it offends Rule 45 (a) of the Court of appeal Rules for being time barred. The judgment of the High Court which the applicant seeks leave is appealable with the necessary leave in terms of section 47 (1) of the Land Disputes Courts Act Cap 216 R. E 2019. He went on to state that it



is specifically stated under section 47 (3) of the same Act that the procedure for appeals to the Court of Appeal shall be governed by the Court of Appeal Rules. Section 11 of the Appellant Jurisdiction Act empowers the Chief Justice to make Rules of the Court of Appeal regulating appeals to the Court of Appeal. The above facts take us to Rule 45 (a) of the Court of Appeal Rules as submitted by the respondent's which provides; - In civil matters-

"Where an appeal lies with 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 fourteen days of the decision."

It was the submission of the respondents that the records speak by themselves that the decision of the High Court which against which it was intended to appeal was delivered on 25th day of February 2022. The application for leave to appeal was filed on 20th April 2022, this was over 56 days after the decision against which it was desired to appeal. The application is time barred and this Court has no jurisdiction to entertain it because it was filed on 20th April 2022 far beyond 14 days prescribed under Rule 45 (a) of the Court of Appeal Rules. He prayed the Court to dismiss the application for being time barred referring to the case of **Emmanuel Nyambi versus Ramadhani Salim**, Civil Appeal No. 84 of 2014 (unreported).

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On the second ground of objection the respondents Counsel submitted that it is a settled law that the High Court had concurrently jurisdiction with the Court of Appeal under provision of section 5 (1) (c) of Appellate Jurisdiction Act and in fact Rule 46 (1) fortifies the event of filing Notice of Appeal ahead of the application for all application that are brought before the High Court, the above rule provides that "where an application for certificate or for leave is necessary, it shall be made after the notice of appeal is lodged". From that reading it is very clear that the provision is coached in mandatory manner, and therefore noncompliance of it makes the application being premature and incompetent, and this application has never complied with rule 46 (1) hence incompetent and should be struck out with costs. To bolster the point, he cited the case of **Awinniel Mtui and 3 others versus Stanley Ephata Kimambo (Attorney for Ephata Mathayo Kimambo)** Civil Application No. 19 of 2014 (unreported).

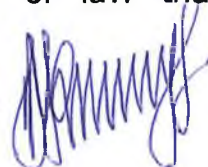
On the first limb of the objection the applicant submitted that Rule 45 (a) of the Court of Appeal Rules does not provide that an application for leave should be brought within fourteen days but within thirty days. The application should be handled with caution because she was represented in the whole journey prosecuting the case from District Land and

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Housing Tribunal. After the decision of the High Court on 28th day of February 2022 she was advised by her advocate that still there is a room for appeal to the Court of Appeal and so he dully instructed him to do the entire requisite for appeal. It was her further submission that her advocate did not provided cooperation at all, she therefore decided to look for legal advise somewhere else. Now she is well informed that before the application for leave can be heard before this Court, she was to file notice of appeal and serve to the opponent in accordance with the law, and when she is out of time with sufficient reasons she is to apply for extension of time.

It was her further submission that the negligence caused by an advocate cannot stand as a excuse for a party to rely on in any prayer before the court as ruled in the case of **Citibank Tanzania Ltd and Emma Mwanda & Another**, Miscellaneous Labour Application No. 489 of 2020. She prayed the Court not to dismiss the matter as prayed by the respondent's but be struck out so that she can follow a proper forum until the application is heard.

Having summarised the submission of both parties, there is a need to consider the points of law which were raised by the respondents' counsel. Regarding the first point of law that this court has no




jurisdiction to entertain this application as it offends Rule 45(a) of the Court of Appeal Rules of 2009. The rule provides;

'where an appeal lies with 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'.

The rules are very clear that an application for leave to appeal to the Court of Appeal must be filed within 30 days from the date when the decision is delivered. In this application the respondent counsel cited the provision of the law which has been amended from 14 days to thirty days.

All in all, the applicant application has been filed out of time. The judgement was ready from 25/2/2022 although it was delivered on 28/2/2022. The applicant filed his application on 20/4/2022. Thirty days has already been lapsed. The applicant was supposed to file an application for extension of time to file leave to file an appeal out of time, before he filed this application for leave to appeal to the court of appeal.

Therefore, I concede with what submitted by the respondent and the applicant that this application is time barred.

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The issue of notice of appeal, that the application is incompetent for offending Rule 46 (1) of the Court of Appeal Rules of 2009. Which provides;

'Where an application for certificate or for leave is necessary, it shall be made after the notice of appeal is lodged'.

Noncompliance of the above provision it makes the application premature and incompetent. As it was held in the case of **Awiniel Mtui and 3 others**(supra) which was cited by the respondent counsel.

Having determined the above raised legal issues in my opinion the application is filed out of time and there is no notice of appeal attached therewith. Hence an application for extension of time to file leave to appeal to the court of appeal has to be filed first, in accordance with s.11(1) of The Appellate Jurisdiction Act [Cap 141 R. E 2019]. There is no need to determine an application for leave to appeal to the court of appeal on merit.

The application is hereby struck out with costs for being incompetent for being premature.

Dated at Mbeya this 29th day of September 2022.



D. P. Ngunyale
Judge