IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA DISTRICT REGISTRY

AT BUKOBA

MISC. LAND APPLICATION NO. 86 OF 2021

(Arising from DLHT Application No. 198 of 2009, Misc. Land Case Application No. 31 of 2019-HC of Tanzania Bukoba, Misc. Land Case Application No. 71 of 2016 and HC Land Case Application No. 68 of 2020)

NURU RAMADHANI (Administrator of estate of the late Zainabu Mussa)....APPLICANT

VERSUS

NURU ABDALLAH MBEHOMA.....RESPONDENT

RULING

22/02/2022 & 04/03/2022

NGIGWANA, J.

The applicant is seeking leave to appeal to the Court of Appeal of the United Republic of Tanzania against the decision/ruling of this court (Mgeta, J) handed down on 23rd day of July, 2021 in Land Case Application No. 68 of 2020.

The application was brought by way of chamber summons made under Section 47(2) of the Land Disputes Court Act, Cap. 216 R:E 2019, and accompanied by the affidavit of the Applicant's advocate Mr. Alli Chamani.

The factual setting giving rise to this application as it can be gathered from the available records is to the effect that; the Applicant Nuru Ramadhani (Administrator of the estate of the late Zainabu Musa, through the legal service of Ms. Liberatha Bamporiki Revocatus, learned advocate lodged an

application which was registered as Land Application No. 68 of 2020. The same was made under Section 14 (1) of the Law of Limitation Act, Cap. 89 and Section 78 (1) (a) and Order XLII Rule 1 (1) of the Civil Procedure Code Cap. 33 R: E 2019. The applicant was praying for two orders; **one**, extension of time to file application for review against the order of this court dated 28/09/2015 in Land Appeal No. 39 of 2014 and **two**, application for reviewing the order dated 28/09/2015 made by this court (S. S. Mwangesi, J as he then was) in land Case No. 39 of 2014.

Upon being served with the chamber summons, the respondent Nuru Abdallah Mbehoma filed the counter affidavit together with the notice of preliminary objection raising points of law as follows: -

1. *That the application contravenes the provisions of order XXXIX rule 19 of the Civil Procedure Code Cap. 33 R: E 2019.*
2. *That the application is omnibus hence it cannot be maintainable in law.*
3. *That the application is incompetent for being fitted wrongly contrary to rule 8 (2) of G.N. No. 96 of 2005 of the High Court Registry Rules.*
4. *The application on affidavit is not maintainable in law for being prepared, sworn and signed by the same advocate who represents the applicant.*

The objections were orally argued whereby the court found that the application for extension of time under which the applicant, if granted would file application for review, was made **under the Law of Limitation Act,** and that upon obtaining extension of time, is when the applicant would come

under Civil Procedure Code Cap. 33 R: E 2019 equipped with application for review of the order of this court made way back on 28/09/2015.

The court ruled out that, since no order for extension of time within which to file application for review was obtained, obviously, application for review, was premature. Consequently, the application was found incompetent hence struck out with costs.

Aggrieved with that order, the applicant now after he had filed the notice of appeal, seeks leave of this court to challenge the said order at the Court of Appeal of Tanzania.

On 22/02/2022, when the matter came for hearing, the applicant appeared in person and represented by Mr. Alli Chamani, learned advocate while the respondent appeared in person and unrepresented.

At the outset; Mr. Alli Chamani adopted his affidavit and argued that paragraph 6 of the affidavit contain the reasons why the intervention of Court of Appeal of Tanzania is needed. The learned counsel stated the matters to be referred to the Court of appeal of Tanzania as follows; whether the refusal of mixed-up prayers catered under different laws in one chamber summons is still good law after the introduction of the doctrine of the substantive justice and/or whether it is wrong to combine applications in one chamber summons which its result follows each other.

The learned counsel went on to argue that according to the case of **Jovin Mtagwaba & 5 Others versus Gita Gold Mining Ltd**, Civil Appeal No. 23 of 2014 CAT (unreported), it is irregular and improper to mix up prayers

catered under different laws in one application, but the same Court in the case **Benard Gindo & 25 others versus Tol Gases Limited**, Civil Appeal No. 128 of 2016 CAT (unreported) held that, the introduction of Overriding Objective was not designed or intended to disregard the rules of procedure coached in mandatory terms, and in the case of **Samwel Munsiro & 5 Others versus Geita Gold Mining Ltd**, Civil appeal No. 539/8 of 2019 CAT (unreported) the Court stated that, where an application omits to cite any specific provision of the law or cites a wrong provision, but the jurisdiction of the court to grant the order sought exists, the irregularity or omission can be ignored and the court may order that the correct law be inserted.

Basing on positions given by the Court of appeal in the above cases, Mr. Chamani argued that the two points to be **referred to the Court of Appeal are contentious taking into account that application No. 68 of 2020 was struck out by the court (Mgeta, J) after being guided by the decision of the Court of Appeal in the case of Jovin Mtagwaba (supra).**

In reply, but having adopted his counter affidavit, the respondent argued that, no contentious legal points/issues that have demonstrated by the applicant to warrant the Court of appeal intervention, hence urged the court to dismiss the application for want of merit.

In his brief rejoinder, Mr. Chamani reiterated that, there are contentious legal issues worthy of being considered by the Court of Appeal of Tanzania.

Having heard submissions for and against the application, the issue before me for determination is whether the applicant has demonstrated contentious legal issues or an arguable case warranting the grant of this application.

This application was brought under Section 47 (2) of the Land Disputes Courts Act, Cap. 216 R: E 2019 which states that;

"*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*".

From the herein above provision of the law, it is apparent that appeal to the Court of Appeal is not automatic; it is within the discretion of the court to grant or refuse leave. However, such discretion must always be exercised judiciously.

It is settled law that, in order to grant leave, the court must satisfy itself that the applicant has demonstrated serious and contentions issues of law or fact fit for consideration of appeal. In **Ramadhani Mnyanga versus Abdala Salehe** [1996] TLR it was held that;

"*For leave to be granted, the applicant must demonstrate that there are serious and contentions issues of law or fact fit for consideration of appeal*"

Furthermore, in the case of **British Broadcasting Corporation versus Erick Sikujua Ng'amaryo,** Civil Application No.133 of 2004 which at page 7 the Court of Appeal quoted the holding in the case of **Harban Haji Mosi and Another versus Omar Hilal and another**, Civil reference No.19 of 1997 (Unreported) where it was held that:

"Leave is granted where the proposed appeal stands reasonable chances of success or where but not necessarily, the proceedings as a whole reveal such disturbing features as require the guidance of the Court of Appeal. The purpose of the provision is, therefore, to spare the Court the specter of unmeriting matters and to enable it to give adequate attention to cases of true public importance"

Generally, from the above authorities, we can learn that there are conditions to be met for the grant of leave to appeal to the Court of Appeal, amongst them being that; **One,** the appeal would have reasonable prospect of success. **Two,** there are compelling reasons why the appeal should be heard, including conflicting judgments on the matter under consideration. **Three,** the decision sought to be appealed did not dispose of all the issues in the case. **Four,** the proceedings as a whole reveal disturbing features requiring the Court of Appeal intervention and provision of guidance. **Five,** there is point of law or point of public importance detected from the appealed decision, and **six**, there are arguable issues fit for the consideration of the Court of Appeal.

In the present application, as stated earlier, the applicant under paragraph six of the founding affidavit averred that there are two points of law that attract the attention of the Court of Appeal of Tanzania. The points were coached as follows;

1. *Whether the refusal of mixed-up prayers catered under different laws in one chamber summons is still good law after the introduction of the doctrine of the substantive justice.*

2. *Whether it is wrong to combine applications in one chamber summons which its result follows each other.*

The Court of Appeal of Tanzania in the case of **MIC Tanzania Limited versus Minister for Labour and Youth Development,** Civil Application No. 103 of 2004 CAT (unreported) while addressing the issue as to **whether it is wrong to combine more than one application in one chamber summons which are interrelated or which its results follow each other** had this to say;

"*The combination of the applications is not bad in law otherwise the parties would find themselves wasting money and time or avoidable applications which would have been conveniently combined. Unless there is a specific law barring the combination of more than one prayer in one chamber summons, the court should encourage this procedure rather than thwart it for fanciful reasons*"

My brother Hon. Masoud, J in the case **Zitto Zuberi Kabwe & 2 Others versus Attorney General,** Misc. Civil Cause No. 31 of 2018 HC-DSM (unreported) while guided by the case of MIC Tanzania Ltd (Supra) had this to say;

"*Combining prayers in one application is not bad although there are considerations that must be made in deciding whether or not the combination is proper. Such considerations are* ***one****, whether there is a specific law barring of more than one prayer.* ***Two****, whether the prayers are those which can properly be combined in one application. And three, dictates of the peculiar circumstances of a case*".

In the application at hand, it is clear that the 2nd point which the applicant is intending to be referred to the Court of Appeal as a contentious legal issue worthy of consideration by the Court of Appeal is not a contentious legal issue at all. Therefore, referring such a point to the Court of Appeal will definitely amount to abuse of court process because abuse of court process also involves situations where the process of the court has not been resorted to fairly, properly, and honestly, but maliciously with the purpose of delaying justice, causing disturbance to the other party to the case and wasting the court's precious time and resources.

As regard the 1st point which the applicant is also intending to be referred to the Court of Appeal; **whether the refusal of mixed-up prayers catered under different laws in one chamber summons is still good law after the introduction of the doctrine of the substantive justice,** it is a general principle of law that an application which is composed of two or more unrelated applications may be labeled omnibus and consequently struck out for being incompetent. See **Amos David Kassanda versus Commissioner for Lands and Another**, Misc. Land Application No. 457 of 2020 HC-DSM, **Rutagatina C.L. versus the Advocate Committee & Clavery Mtindo Ngalapa**, Civil Application No. 98 of 2010 CAT and Mohamed **Salimin versus Jumanne Omari Mapesa**, Civil Application No. 103 of 2014 (CAT) (all unreported).

In the matter at hand, there is no doubt that Application No. 68 of 2020 which was found incompetent by this court (Mgeta, J.) **was peculiar in the sense that the prayers sought though appeared interrelated but they are under different provisions of the law and their manner of**

filing is different. Application for extension of time is made under Section 14 (1) of the Law of Limitation Act, Cap. 89 R: E 2019 and/or any other specific law (if any) for instance Section 41 (2) of the Land Disputes Courts Act Cap 216 R: E 2019, and is filed by of a chamber summons supported by an affidavit. See Order XLIII Rule 2 of the Civil Procedure Code Cap. 33 R: E 2019, **while application for review is made by way of memorandum of review supported by grounds of review as per Order XLII Rule (1) and (3) of the Civil Procedure Code Cap. 33 R: E 2019.**

It is trite law that an affidavit is evidence on oath while the grounds of review require further proof to show the propriety of the said application. It suffices to say, it need not an Angel to descend from Heaven so as to understand that application for extension of time is a distinct application under a different law all together to the application for review, the latter depending on the outcome of the former. And, for the reasons stated herein above, and the fact that the grounds of review cannot be raised in an affidavit and vice versa, application for review must be preceded by application for extension of time. They can never be conveniently combined in a single chamber application.

In the case of **Ally Abbas Hamis versus Naima Hassan Ally Kanji,** Misc. Land Application No. 140 of 2017 HCLD (unreported), the High Court while guided by the decision of the Court of Appeal in **Mohamed Salimin** (Supra) held "*Lumping of several prayers in a single application which those prayers are also different and the consideration to be taken into account are different, the conclusion is not hard to find, but to conclude that the*

application is omnibus and from the same reason, I have no option than to struck out with costs the omnibus application"

As regards the Principle of Overriding Objective, it is undisputed that the principle was introduced in 2018 vide the Written Laws (Miscellaneous Amendments) (No.3) Act, No.8 of 2018, to facilitate the just, expeditious, proportionate and affordable resolution of disputes without due regard to technicities as opposed to substantive justice, but the principle does not help a party to circumvent the mandatory rules of the court. See the case **Martin Kumalija & 117 others versus Iron and Steel Ltd,** Civil Application No.70/18 of 2018 CAT (Unreported). The same Court in the recent case of **Juma Busiya versus Zonal Manager, South Tanzania Postal Corporation,** Civil Case No.273 of 2020 (Unreported) had this to say;

"The principle of overriding objective is not the ancient Greek goddess of universal remedy called panacea, such that its objective is to fix every kind of defects and omissions by parties in courts"

From the herein above Court of Appeal authorities, it is settled that omissions or defects which go to the root of the case cannot be ignored or cured by the principle of overriding objective. In other words, the guidance on the applicability of the overriding objective principle has already been set in place by the Court of appeal. The prayer to refer the same matter to the Court of appeal is wastage of time and focus, and it may amount to abuse of court process. In this application, the applicant had the legal service of a senior and experienced advocate. However, taking into account the nature of this application, my view is that, the applicant was not properly advised by the

learned counsel, otherwise, the applicant would not have lodged this application because the matter was struck out, therefore, the applicant would have filed an application for extension of time, if granted, followed by application for review.

In the totality; it suffice to say that, I have carefully gone through the proceedings of this court in Land Application No.68 of 2020 as a whole to see whether the same reveal disturbing features requiring the Court of Appeal intervention and provision of guidance but found no disturbing features. The issues mentioned here in above do not at all constitute arguable grounds worth consideration by the Court of Appeal of Tanzania. In short, nothing contentious neither legal nor factual exhibited that is worthy of consideration by the Court of Appeal. Consequently, the application is hereby dismissed with costs. It is so ordered.

E. L. NGIGWANA

JUDGE

04/03/2022

Ruling delivered this 4th day of March, 2022 in the presence of both parties in person, Mr. E M. Kamaleki, Judges' Law Assistant and Ms. Tumaini Hamidu, B/C.

E. L. NGIGWANA

JUDGE

04/03/2022