

**IN THE HIGH COURT OF TANZANIA**  
**(DAR ES SALAAM DISTRICT REGISTRY)**  
**AT DAR ES SALAAM**  
**MISC. CIVIL APPLICATION NO. 167 OF 2022**  
(Emanating from Land Case No.41 of 2011)

**NEW MSOWERO FARMS LIMITED..... APPLICANT**

**VERSUS**

**CHINA CIVIL ENGINEERING CONSTRUCTION**

**CORPORATION LIMITED.....1<sup>ST</sup> RESPONDENT**

**TANZANIA NATIONAL ROAD AGENCY (TANROAD) ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

Date of Last Order: 12<sup>th</sup> May 2022.

Date of Ruling: 16<sup>th</sup> May 2022.

**E.E. KAKOLAKI, J.**

By way of chamber summons supported by his affidavit, the applicant has moved this court under certificate of urgency to extend him time within which to serve the Respondents with the Letter Requesting for Certified copies of Proceedings, Judgment and Decree in Land Case No. 41 of 2011 dated 27<sup>th</sup> July, 2016 out of time. The application has been preferred under section 11(1) of the Appellate Jurisdiction Act, [Cap. 141 R.E 2019] (the AJA) and section 14 of the Law of Limitation Act, [Cap 89 R.E 2019] (the LLA). The same is strenuously resisted by the 2<sup>nd</sup> Respondents who filed the

Counter Affidavit to that effect and in addition lodged a Notice of preliminary objection on two grounds going thus:

1. That, the Application is untenable in law as the Court has no jurisdiction to entertain it.
2. That the application is untenable in law for being frivolous and vexatious thus abusing Court process.

During hearing both parties who appeared represented were heard viva voce on both raised preliminary objections and the merits of the application. The applicant appeared through Mr. Alex G. Mgongolwa assisted by Ms. Lujjaina Mohamed, both learned advocated while the 2<sup>nd</sup> Respondent represented by Mr. Ayubu Sanga and Mr. Salehe Manoru, learned State Attorneys. As to the 1<sup>st</sup> respondent she failed to file the Counter affidavit despite of extension of time to her to so do, hence hearing proceeded ex-parte against her.

The facts leading to the institution of this application as gleaned from the applicant's affidavit can be briefly narrated as hereunder. The applicant unsuccessfully sued the respondents before this Court in Land Case No. 41 of 2016, in which the decision to that effect was handed down on 27/07/2017, dismissing the suit. Bemused she unsuccessfully appealed to

the Court of Appeal vide Civil Appeal No. 69 of 2019, as the same was struck out on 15/02/2022, for being time barred after being precluded from relying on the certificate of delay as provided under Rule 90(3) of the Court of Appeal Rules, 2009 (the Rules), for failure to serve timely the Respondents with the letter requesting for proceedings, judgment and decree for appeal purposes (the letter). As the striking out of the appeal crumbled down the whole records of appeal and the notice of appeal, undauntedly before this Court, the applicant successfully sought extension of time to file the Notice of appeal to the Court of Appeal vide its ruling in Misc. Civil Application No. 82 of 2022, dated 8<sup>th</sup> April, 2022 as the Notice was filed to the Court of Appeal on 13<sup>th</sup> April, 2022. Following pendency of her appeal before the Court of Appeal at the moment, this application has been preferred by the applicant so as to secure extension of time within which to serve the respondents with the letter herein above referred.

In this ruling, I am intending to start addressing first the raised preliminary points of objection, before going into merits of the application depending on the determination of the preliminary objections. Arguing the first ground on the jurisdiction of this court to entertain the application, Mr. Sanga contended that, once the Notice of appeal is filed in the Appellate Court, the

lower Court ceases to have jurisdiction over the matter save where the law specifically provides otherwise. To fortify his stance the Court was referred to the case of **Tanzania Electric Supply Company Limited Vs. DOWANS Holdings SA (Costa Rica) and Another**, Civil Application No. 142 of 2012 (CAT-unreported). He said, matters in which this Court is clothed with jurisdiction to extend time after filing of the Notice of appeal to the Court of Appeal are limited to applications for leave to appeal and certificate on point of law as provided under section 11 of AJA, as the jurisdiction of court for the second bite applications is governed by Rule 45A(1) of the Rules.

He went on submitting that, it is mentioned nowhere in the above cited provision of the law that, application for extension of time to serve letter for requesting the copies of proceedings and judgment to the respondents can be made before this court. Since the law does not cloth this Court with such powers to entertain the present application, he proposed, the applicant would have applied the provision of Rule 10 of the Rules and prefer this application before Court of Appeal which is clothed with jurisdiction to extend time limited by the Rules including the one at hand provided under Rule 90 of the Rules. To cement his stance the Court was referred to the case of

**Juto Ally Vs. Lukas Komba and Another**, Civil Application No. 484/17 of 2019 (CAT-unreported) where the application for extension of time to serve the letter requesting for certified proceedings and judgment was preferred before the Court of Appeal and not in the High Court as it is the case in the present matter. It was his submission that since this court lacks jurisdiction to entertain the matter the same should be dismissed and so prayed.

In rebuttal submission Mr. Mgongolwa submitted that this court is seized with jurisdiction to entertain the matter at hand. He was categorical from the outset that this matter is preferred under section 14 of the LLA which is a general provision for extension of matters not covered by AJA and the Rule among other laws, therefore it should not be treated under section 11 of AJA. He went on submitting that, this being a procedural matter does not fall under the general principle that, once a Notice of appeal is lodged with the Court of Appeal the High Court ceases to have jurisdiction over the matter appealed against. The principle is applicable to substantive matter only as it precludes the High Court from re-engaging in matters it has already decided. Mr. Mgongolwa further argued that, section 11 of AJA and Rule 45A(1) of Rules are not applicable in this matter as they do not address the issue of service of letter to the respondents, as the purpose of the application

is to abridge the period between when the documents were ready for collection from the High Court to the period when the applicant intends to file the records of appeal which period according to him is now beyond 60 days required by the law. He insisted, the only available remedy to the applicant is to make sure that, time for service of certified copies of proceedings and judgment is extended and service made to the respondent as per the requirement of Rule 90 of the Rules.

In his further submission Mr. Mgongolwa distinguished the case of **TANESCO** relied on by the 2<sup>nd</sup> respondent saying that, the principle therein meant to address substantive matters and not procedural matters which is the subject of this application. Therefore to him, the case is not applicable under the circumstances of this matter. In regard to the application of **Juto's case** in this matter Mr. Mgongolwa also distinguished it submitting that, in that case extension of time was sought to serve the letter to the respondent on matter which its records were pending in the Court of Appeal before hearing, unlike in the present matter where records are yet to be filed to the Court of Appeal. As the matter before this court is a procedural and not substantive one Mr. Mgongolwa submitted, this Court is clothed with

jurisdiction to entertain it hence prayed for dismissal of the objection while pressing for the cost to be in course.

In a brief rejoinder, Mr. Sanga reiterated his submission in chief and added that, since Mr. Mgongolwa conceded that this application traces its root from the requirement of Rule 90 of Rules then the LLA is not applicable in the circumstances of this matter. He had it that, the submission by Mr. Mgongolwa that, the case of **TANESCO** (supra) applies to substantive matters only is a total misconception as the right is pursued by the person under certain law where that right is so provided said law. He submitted that, in this matter the applicant has a right is to apply for extension of time to serve the letter to the respondent as it was the case for the applicant in **Juto's case**, the right which is exercisable by lodging an application to the Court of Appeal and not this Court. Since the applicant acted to the contrary then this court lacks jurisdiction, thus the application should be dismissed.

I have dispassionately considered the rival arguments by the learned counsels on this ground. What is deciphered from their submission is that, both are at one on the settled position of the law as rightly stated in the case of **TANESCO** (supra) that, once a Notice of Appeal is filed with the Court of Appeal the lower court ceases to have jurisdiction over the matter. And that

when the appeal is struck out for being incompetent the notice and record of appeal crumbles too. See the case of **Henry Zephyrine Kitambwa Vs. The President of the United Republic of Tanzania and 2 Others**, Civil Appeal No. 114 of 2020 (CAT-unreported). It is also not in their dispute that, the present application is rooted from the requirement of Rule 90(3) of the Rules, which precludes the applicant from reliance on the certificate of delay issued by the Registrar of High Court, unless the letter requesting for the certified copy of documents is served to the Respondent, since the applicant feels to still be out of time to effect service of the letter to the respondent even after filing an new Notice of Appeal to the Court of Appeal on 13/04/2022.

What are the parties locking horns on is the issue as to whether this court is seized with jurisdiction to entertain the present application. Mr. Mgongolwa claims it has such powers to entertain it under the provisions of section 14 of LLA for being a procedural and not a substantive matter restricted by **TANESCO's case**, while Mr. Sanga is of the contrary view that, the LLA is not applicable to this matter predicated on compliance of the requirement of section 90(3) of Rules. With due respect to Mr. Mgongolwa, I distance myself from his stance for two reasons. **One**, the powers of this Court to entertain



applications for extension of time with regard to any matter pending or intended to be placed before the Court of Appeal is governed by section 11 of AJA whose marginal notes specifically provides for "*Extension by the High Court*". As per section 11(1) of AJA the jurisdiction of this Court to entertain applications for extension of time is limited to applications for extension of time for either giving of Notice of intention to appeal from a judgment of the High Court or of the subordinate court concerned or for leave to appeal or for a certificate on point of law and not otherwise. It is in these sanctioned applications if rejected by this court, the applicant is remedied by going for 'second bite' before the Court of Appeal within fourteen (14) days as provided under Rule 45A(1) of the Rules. For the purposes of clarity I reproduce the provisions of section 11(1) of AJA and Rule 45A(1) of the Rules. Section 11(1) of AJA reads:

*11.-(1) Subject to subsection (2), the High Court or, where an appeal lies from a subordinate court exercising extended powers, the subordinate court concerned, **may extend the time for giving notice of intention to appeal from a judgment of the High Court or of the subordinate court concerned, for making an application for leave to appeal or for a certificate that the case is a fit case for***

***appeal***, notwithstanding that the time for giving the notice or making the application has already expired. (Emphasis added)

And Rule 45A(1) of the Rules provides:

*45A.-(1) Where an application for extension of time to:-*

*(a) lodge a notice of appeal;*

*(b) apply for leave to appeal; or*

*(c) apply for a certificate on a point of law,*

*is refused by the High Court, the applicant may within fourteen days of such decision apply to the Court for extension of time.*

As rightly submitted by Mr. Sanga, the power to entertain the application under consideration is not delegate to this court by the above cited provisions of the law in which I hold, if it was so intended the law would have stated it explicitly. **Second**, application of the Law of Limitation Act is excluded to all matters directed to the Court of Appeal. This settled position of the law is conspicuously seen from the reading of section 43(b) of LLA which provides thus:

*43. This Act shall not apply to-*

*(a)N/A;*

*(b) applications and appeals to the Court of Appeal;*

The above position of the law is confirmed by the Court of Appeal in the case of **Hezron M. Nyachiya Vs. Tanzania Union of Industrial and Commercial Workers**, Civil Appeal No. 79 of 2001 (CAT-unreported) where the Court observed that:

*"...the Law of Limitation Act does not apply in respect of proceedings instituted in this Court as provided for under Section 43(b) of the said Act..."*

The law is very clear that, it is the Notice of appeal which commences the proceedings before the Court of Appeal. That position of the law was stated in the case of TANESCO (supra) where the Court of Appeal observed thus:

*"It is settled law in our jurisprudence, which is not disputed by the counsel for the applicant, that the lodging of a notice of appeal in this Court against an appealable decree or order of the High Court, commences proceedings in the Court."*

In this matter since the applicant has already lodged the Notice of appeal to the Court of Appeal hence commenced proceedings before it and since the application has been preferred under the LLA which its application to the Court of Appeal is restricted, I hold this court lacks jurisdiction to entertain the application at hand. This ground suffices to dispose of the application

and for that matter I refrain from further entertaining the second ground as well as the application on merit.

That said and done, I sustain the preliminary objection raised and proceed to strike out the application for being incompetent before the court.

Each party to bear its own costs.

It is so ordered.

DATED at Dar es salaam this 16<sup>th</sup> day of May, 2022.



E. E. KAKOLAKI

**JUDGE**

16/05/2022.

The ruling has been delivered at Dar es Salaam today on 16<sup>th</sup> day of May, 2022 in the presence of Ms. Lujjainah Mohamed, advocate for the Applicant, Mr. Thomas Brash, Advocate for the 1<sup>st</sup> Respondent, Mr. Ayub Sanga, State Attorney for the 2<sup>nd</sup> Respondent and Ms. Asha Livanga, Court clerk.

Right of Appeal explained.



E. E. KAKOLAKI

**JUDGE**

16/05/2022