

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR-ES-SALAAM DISTRICT REGISTRY)

AT DAR-ES-SALAAM

MISCELLANEOUS CIVIL APPLICATION NO. 414 OF 2022

(C/O Civil Appeal No. 248 of 2018, originating from Matrimonial Cause No. 1 of 2018 of the District Court of Kigamboni at Kigamboni)

TIMOTHEO LUNALA APPLICANT

VERSUS

HYASINTA LUNALA RESPONDENT

RULING

Date: 18/04 & 05/06/2023

NKWABI, J.:

This is a ruling in respect of a preliminary objection raised against this application. The applicant is in this Court seeking the following orders:

1. Extension of time to file Notice of Appeal to the Court of Appeal against the ruling of this Court dated 17/09/2021 in Land Case No. 36 of 2018.
2. Extension of time to serve a letter applying for copies of judgment, decree and proceedings for purpose of appeal against the decision in civil appeal No. 248 of 2018 dated 30th July 2020 by Hon. S. M. Kulita, Judge.
3. Costs be provided for,
4. Any other relief(s) this honourable Court may deem fit and just to grant.

The raised preliminary objection has two branches which are that:

1. That the honourable Court lacks jurisdiction to entertain the application.
2. That, the application is bad in law, misguided, blemished, flawed, ill-thought-out, misconceived, and an utter abuse of Court process.

It is prayed by the respondent that the application be dismissed with costs.

The hearing of this application was carried out by way of written submissions. The submission in chief for the respondent were drawn and filed by Richard Godlisten Kimaro, learned counsel for the respondent. The reply submission was drawn and filed by the applicant himself. The counsel for the respondent did not file a rejoinder submission.

On the first branch of the preliminary objection, the counsel for the respondent asserted that the applicant filed a notice of appeal. That being the case this Court ceased to have jurisdiction to entertain matters pertaining to this case except for applications specifically provided for, such as leave to appeal or provision of a certificate on point of law. He cited **Arcado Mtagazwa v. Buyogera Julius Bunyango** [1997] TLR 242 (CAT). The counsel stated that it was held that once a notice of appeal has been lodged to appeal to the Court of Appeal, then the High Court proceedings must be

stayed until the notice is withdrawn or is deemed to be withdrawn. That is not all, the counsel for the respondent made reference to the case of **Tanzania Electric Supply Company Ltd v. Downs Holding SA (Costa Rica) and Downs Tanzania Limited (Tanzania)**, Civil Application No. 142 of 2012 where it was stated that:

"It is settled law in our jurisprudence, which is not disputed by 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. We are equally convinced that it has long been established law that once a notice of appeal has been duly lodged, the High Court ceases to have jurisdiction over the matter: see Aero Helicopter (T) Ltd v. F.N. Jansen [1990] TLR. 142."

It is stressed by the counsel for the respondent that since the application at hand is not among these applications for which the High Court has jurisdiction, such as leave to appeal or provision of a certificate of law, this Court lacks jurisdiction to entertain the application at hand because it possesses no such powers to determine the same because notice of appeal filed by the applicant is still intact and unscathed.

In reply submission, the applicant maintained that the objection does not hold water and it is a mere misuse of Court's precious time delaying justice to be done. He added that the preliminary objection is baseless and misleading. He prayed the preliminary objection be dismissed with costs while the application be heard on merits.

I have painstakingly considered the first branch of the preliminary objection. I have however, failed to find that this Court has no jurisdiction to entertain the application because, the respondent has not cited any authority that specifically rules that this type of an application cannot be entertained by this Court at this stage. The cited case of **Downs** (supra) was on an application for stay of execution, so it is distinguishable to the application at hand. Now, the question whether there is a pending notice of appeal in the Court of Appeal is a matter of evidence which has to be established, it cannot be decided at a preliminary stage. Parties have to bring evidence to establish it or that this Court has to decide on the merits of the application and therefore, not opportune time to determine it in a preliminary stage. I reject this branch of the preliminary objection.

On the 2nd branch of the preliminary objection, the counsel for the respondent argued that this application is an utter abuse of Court process, a slight reference to the affidavit in support of the application would reveal that the applicant herein is yet to be supplied with the copies of the judgment and decree despite writing to the Registrar for that purpose. He cited the proviso to Regulation 90(1) of the Court of Appeal Rules which goes that:

"Save that where an application for a copy of the proceedings in the High Court has been made within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted be excluded such time as may be certified by the Registrar of the High Court as having been required for the preparation and delivery of the copy to the appellant."

It was therefore maintained by the counsel for the respondent that the time which is spent waiting for the copies of the judgment and decree and proceedings is automatically excluded by the Registrar by issuing a certificate of delay. The counsel for the respondent concluded that the application at hand is wanting in bona fide and is frivolous, vexatious and oppressive and

without any legal basis and hence an utter abuse of the Court process and it should thus be dismissed.

I agree with the applicant that this limb of the preliminary objection is misleading not only as to the legal position on the letter but also on the prayer for dismissal of the application as if the application has been heard on merits.

The counsel for the respondent did not argue that the rule of the Court of Appeal Rules provides for exclusion of the time provided for serving the letter to the Respondent as prayed by the applicant. That is the gist of the applicant's 2nd order prayed for from this Court. In the circumstances, the 2nd limb of the preliminary objection, is found just as per the submission of the applicant that, the same is misleading. It is overruled.

In fine, I rule that the preliminary objection is devoid of merits. I dismiss the preliminary objection with costs.

It is so ordered.

DATED at DAR-ES-SALAAM this 5th day of June, 2023.



J. F. NKWABI

JUDGE