THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

MISCELLANEOUS CIVIL APPLICATION NO. 50 OF 2022

(From Judgement and Decree of the High Court of Tanzania at Mbeya in Civil Appeal No. 26 of 1996. Originating from Civil Case No. 06 of 1995 before the District Court of Mpanda)

VENANCE NYARINGA KAZURI ……..…… APPLICANT

VERSUS

EDWARD MWESIGWA SOSPETER ……..…..… RESPONDENT

RULING

Date of Hearing: 27.04.2023
Date of Ruling : 16.10.2023

MONGELLA, J.

This is a Ruling on preliminary points of objection filed by the respondent challenging the application for being defective. The applicant herein preferred this application under **section 11 (1) of the Appellate Jurisdiction Act** [Cap 141 RE 2019] seeking for the following orders:

One, extension of time to file notice of intention to appeal to the Court of Appeal against the decision of this court in Civil Appeal No. 26 of 1996;

Two, extension of time to lodge a letter requesting for certified copies of records, proceedings, judgment, decree, rulings, drawn orders for preparation of appeal to the Court of Appeal against decision of this court in Civil Appeal No. 26 of 1996 and;

Three, extension of time to lodge application for leave to appeal to the Court of Appeal against the decision of this court in Civil Appeal No. 26 of 1996.

The chamber summons of the applicant was supported by the affidavit of the applicant. In his affidavit, he gave a detailed history of his journey to seek audience before the Court of Appeal for his appeal to be heard. The respondent vehemently disputed the application through his counter affidavit. He also filed a notice of preliminary objection on three grounds:

1. *That, this honourable court has no jurisdiction to determine the second prayer as sought by the applicant in his application.*

2. *That, the application is incompetent and untenable for being omnibus contrary to the law.*

3. *That, the applicant's application is incompetent and unmaintainable since it is abuse court process.*

This court resorted into resolving first the preliminary objections, which were argued orally by the parties' learned counsels. The

applicant was represented by Mr. Hassan Gyunda whereas the respondent by Mr. Ibrahim Athumani.

Arguing the 1st point of objection, Mr. Athumani averred that this court has no jurisdiction to determine the second prayer. He was of view that the applicant had invoked **Section 11(1) of the Appellate Jurisdiction Act**, but the same is an incorrect provision for seeking extension of time to file a letter to apply for necessary copies. He had the stance that the applicant ought to have moved the court under **Rule 90(3) of the Court of Appeal (Amendment) Rules, 2019** as the provision gives the court power to exclude days for which the applicant was seeking for necessary copies of the certified copies, the letter w+hich is to be filed within 30 days.

He was of view that under rules of statutory interpretation particularly, *expressio unius exclusio alterius* which means mentioning of one thing excludes another, this court lacks jurisdiction to grant orders sought in the chamber summons and the error cannot be cured under the overriding objective and thus prayed for the application to be struck out with costs.

As to the 2nd point of objection, Mr. Athumani averred that the application is incompetent for being omnibus because it contains two applications filed under a single application. He averred that the application preferred is formal and thus sanctioned by **Order 43 Rule 2 of the Civil Procedure Code [Cap 33 RE 2019]**. Further that the application has 2 prayers rendering the same omnibus. He was of

view that the applicant ought to have waited for the court to first grant the first prayer. He supported his stance with the case of **Ally Mbegu Msilu vs. Juma Pazi Koba** (Civil Application No. 316 of 2021) [2023] TZCA 106 TANZLII. Mr. Athumani was of the view that **Order 43 Rule 2 of the Civil Procedure Code** prohibits a party from making more than one application in a single application; thus. rendering this court with no jurisdiction to entertain the second prayer.

With regard to the 3rd point of objection, Mr. Athumani averred that this application is an abuse of court process because in 2016, the applicant filed the same application in Misc. Civil Application No. 24 of 2016 which was dismissed by Hon. Levira JAon 19.10.2018 and it is not known what measures the applicant took thereafter. He argued that under **Section 9 of the Civil Procedure Code**, suits cannot be filed twice. That, the application is *res judicata*. He averred that the decision by Hon. Levira, JA still stands and was determined by merit, hence the court's hands are tied up and thus cannot determine the application. He therefore prayed for the application to be dismissed.

In Reply, Mr. Gyunda averred that this application has been preferred under **Section 11 (1) of the Appellate Jurisdiction Act**, which gives this court the power to extend time to file notice and leave to appeal. As to the 2nd prayer, he averred that the appeal must be accompanied by records of appeal under **Rule 90 (1) (b) of the Court of Appeal Rules** whereby records are made after a party has been supplied with relevant copies. He averred that the

prayer was made because they found that they were out of time to write letters to be supplied with records. As to Civil Appeal No. 378 of 2022, the Court of Appeal struck out the appeal as the same was filed out of time, that is, after 60 days.

He contended that **Section 11 (1) of the Appellate Jurisdiction Act** gives the court powers to extend time and there is no any other provision on extension of time. That, **Rule 90 (3) of the Court of Appeal Rules** relied on by Mr. Athumani does not confer powers to the High Court to extend time and the same cannot be applied in the High Court because the Rules refer the "Court" as the Court of Appeal. He averred that normally the two prayers are connected together as it has been the practice of the court to include prayers for extension of time to file letters to be supplied with records.

He added that the application at hand is for extension of time in respect of Civil Appeal No. 26 of 2016, hence there is no way that letters to obtain proceedings will be filed without extension of time. As to the argument by Mr. Athumani that the overriding objective cannot be invoked in these circumstances, he averred that the same can be invoked for expediate dispensation of justice. Hence, he prayed for the same to be invoked and the objection to be overruled.

Replying on the 2nd point of objection, Mr. Gyunda averred that there is no law that prohibits omnibus application except where the prayer emanates from a different case. He fortified his argument

with the cases of **Ally Mbegu** (supra); **Mic Tanzania Ltd. vs. Minister for Labour and Youth Development & Another,** Civil Appeal No. 103/2004, (CAT at Dar es Salaam); and **Uweacho Salum vs. Moshi Salum Ntankwa** (Misc. Civil Application 367 of 2021) [2022] TZHC 144 TANZLII. He contended further that Mr. Athumani failed to state how **Order XLIII Rule 2 of the Civil Procedure Code** prohibits omnibus applications. That, the provision generally provides for chamber summons and affidavit, hence the counsel misdirected himself. That, the prayers are for the same purpose and cannot be separated as they emanate from a series of the same transaction under **Section 11 (1) of the Appellate Jurisdiction Act**.

He further challenged the point of objection on the ground that the same was not on a pure point of law as provided in **Mukisa Biscuit Manufacturing Co. Ltd. Vs. West End Distributors Ltd** [1960] EA 701. He prayed for the same to be overruled.

With regard to the 3rd point, he contended that Mr. Athumani failed to state which law has been infringed to amount to abuse of court process. He contended that the definition of abuse of court process was set under the case of **Sharifu Mohamed @ Athumani and Others vs. Republic** (Criminal Appeal 251 of 2018) [2023] TZCA 183 TANZLII, where the Court held that there must be proof that the acts of the party are intended to obtain unlawful result. He contended that abuse of Court process must be established by evidence.

Mr. Gyunda further averred that after the Ruling determined by Levira JA. was dismissed, the applicant filed a "second bite application" before the Court of Appeal vide Civil Application No. 590/06 of 2018 CAT Dar es Salaam which was granted by Mwambegele JA. Thereafter, Civil Appeal No. 3 of 2020 was filed in the Court of Appeal, but the same was struck out on 29.11.2021 for being incompetent as the memorandum of appeal was filed out of the 60 days after notice was lodged, hence filing of the present application.

As to the matter being a *res Judicata* under **Section 9 of the Civil Procedure Code**, Mr. Gyunda contended that the issue was misplaced as *res judicata* and abuse of court process are diverse issues. He averred that the issue of *res judicata* was neither featured in the preliminary objections nor was its elements proved, he contended that *res judicata* is nowadays not a point of preliminary objection as it attracts evidence contrary to the requirement in ***Mukisa Biscuit*** (supra). He prayed for the points of objection to be overruled and the application determined on merit.

Rejoining, Mr. Athumani insisted that **Section 11(1) of the Appellate Jurisdiction Ac**t cannot be invoked to grant the 2nd prayer on the chamber summons. He thus prayed for the 1st point of the objection to be sustained. He had the view that Mr. Gyunda admitted that he invoked a wrong provision. In the circumstances, he argued that the overriding objective principle cannot be invoked where there are mandatory provisions of the law. He maintained his position that

the correct provision was **Rule 90 (3) of the Court of Appeal Rules** and that he should have invoked **Section 95 of the Civil Procedure Code** on the inherent Powers of the Court.

Rejoining on the 2nd point of objection, he maintained his stance that this court has no jurisdiction. He distinguished the case of **Uweacho Salum** (supra) on the ground that in the said case, the court had jurisdiction. As to the different prayers in the chamber summons, he was of view that while the prayers are on the same transaction, they each ought to have been determined differently. Concerning the third point, he maintained that this application was an abuse of court process as the applicant has re-filed the same application. He maintained his prayer for this court to sustain his objections with costs.

After considering the rival submissions of the learned counsels for both parties, I am of considered view that the 1st and 2nd points of objection are related to each other in the sense that they both address the competence of this appeal in connection to the jurisdiction of this court in extending time for the applicant to apply for certified copies of the court record and to entertain what the respondent terms an omnibus application.

In my considered view, for an application to be omnibus it has to contain prayers that cannot go together. That is, whether the prayers are so distinct and unconnected to the subject matter of the case at hand; or that the prayers are connected to the subject

matter of case but cannot be granted at the same time as one has to be issued first for the second to follow. For instance, an application for extension of time to file an application for stay of execution and an application for stay of execution; an application of extension of time to file leave to appeal and application for leave to appeal and; application for certificate on point of law and an application for extension of time to file an application for certificate of point of law. See: **Ali Chamani vs. Karagwe District Council & Another** (Civil Application 411 of 2017) [2018] TZCA 177 TANZLII; **Ally Mbegu Msilu vs. Juma Pazi Koba** (supra) and; **Hamis Mdida & Another vs. The Registered Trustees of Islamic Foundation** (Civil Application No. 330/11 of 2022) [2023] TZCA 17721 TANZLII.

The applicant herein has moved this court under **section 11 (1) of the Appellate Jurisdiction Ac**t which states:

> **"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"

As evident, the provision covers the 1st and 3rd prayers in this application which are; extension of time for giving notice of intention to appeal and extension of time to file application for leave to appeal. The second prayer in the chamber summons has not been covered under the provision.

The question is now, whether the presence of the three prayers in the applicant's chamber summons make the application omnibus and untenable. Mr. Athumani has averred that omnibus applications are barred under **Order XLII Rule 2 of the Civil Procedure Code**. As argued by Mr. Gyunda, this provision is silent on the subject. The same only generally provides that all applications under the said law ought to be made by chamber summons and affidavit.

There is thus no specific statutory provision barring omnibus applications. In **MIC Tanzania Limited vs. Minister for Labour and Youth Development** (supra), the Court of Appeal addressed a situation where the appellant had preferred an application seeking for time to apply for- leave to apply for orders of certiorari; leave to file order of certiorari and stay of execution. In resolving the application, the Court stated:

> "It is also our settled view that the holding of Katiti, J. was predicated more upon fears than practicality and that is why he went on to determine the main application on merit. If the position he took is sustained on only those grounds, it would lead to undesirable

> consequences. There will be a multiplicity of unnecessary applications. The parties will find themselves wasting more money and time on avoidable applications which would have been conveniently combined. The Courts' time will be equally wasted in dealing with such applications. Therefore, unless there is a specific law barring the combination of more than one prayer in one Chamber Summons, the Courts should encourage this procedure rather than thwart it for fanciful reasons. We wish to emphasize, all the same, that each case must be decided on the basis of its own peculiar facts."

In similar circumstances the Court of Appeal took adverse approach labeling such applications "omnibus." The common reason has been that the Court of Appeal Rules do not provide for **"applications"** being made, but for an **"application"** being made. This stance was taken in **Rutagatina C. L. vs. Advocates Committee & Another** (Civil Appeal 46 of 2012) [2013] TZCA 495 TANZLII, in which it was stated:

> "A close look at the general scheme of the Court Rules, particularly Rules 44 - 66 appearing under PARTS III, IIIA and IIIB, will show that all of them have one common feature. Each one of those rules, as and where is relevant, refers to an application. None of them talks of applications. It follows that under the Rules it was never envisaged that an intended applicant would file applications. It is no wonder that Rule 49 prescribes the manner in which a formal application can be presented to the Court. Thus, it occurs to us

> that there is no room in the Rules for a party to file two applications in one, as happened here."

A common feature appearing in reasoning in cases such as this is that the court sieved the prayers as to whether they were related to each other such that they can be filed together or whether they are unrelated and thus ought to have been preferred differently. This is however, not the case in the application at hand. Both, the 1st and 3rd prayers sought in this application emanate from the same provision and are closely related to each other. It thus will be pointless to have the applicant prefer the two separately as it will amount to unnecessary multiplicity of suits which is discouraged. See: **MIC Tanzania Limited vs. Minister for Labour and Youth Development** (supra).

Mr. Athumani contended that the 2nd prayer in the applicant's chamber summons is governed under **Rule 90 (3) of the Court of Appeal Rules**. On the other hand, Mr. Gyunda averred that the said provision is inapplicable since the same can only be sought in the Court of Appeal. I will herein reproduce **Rule 90 (1) – (3)** for ease of reference:

> **90.-(1)** Subject to the provisions of Rule 128, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged with -
> (a) a memorandum of appeal in quintuplicate;
> (b) the record of appeal in quintuplicate;

(c) security for the costs of the appeal,

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 that copy to the appellant.

(2) The certificate of delay under rules 45, 45A and 90(1) shall be substantially in the Form K as specified in the First Schedule to these Rules and shall applied mutatis mutandis.

(3) An appellant shall not be entitled to rely on the exception to sub-rule (1) unless his application for the copy was in writing and a copy of it was served on the Respondent.

In a way, both counsels agree that **Rule 90 (3) of the Court of Appeal Rules** provides for exclusion of time in period of computation when a party applies for necessary copies before a period of 30 days expires. The contention is on whether the applicant appropriately made the said prayer for extension to file a letter for necessary copies and whether the same is tenable.

The applicant has not invoked **Rule 90 (3) of the Court of Appeal Rules** to move this court. The reason stated by Mr. Gyunda is that, it is because this provision can only be invoked by the Court of Appeal. **Section 11(1) of the Appellate Jurisdiction Act**, which has been invoked by the applicant does not provide for extension of

time to file an application for extension of time to apply for necessary certified copies. What I gather from Mr. Athumani's contention is that the applicant ought to have applied for the 2nd prayer in his chamber summons in the Court of Appeal; but the provision he suggested to have been invoked does not provide for such relief.

However, in addition, applications are made before the Court of Appeal where notice of appeal has already been lodged. In the matter at hand, it is clear that the applicant has not yet filed the notice of appeal in the Court of Appeal as he is before this court, among other things, seeking for extension of time to file the notice of appeal. As such, applications are made before this Court. Since the applicant moved this court through a wrong provision of the law in the second prayer, I am of the view that the overriding objective principle can be invoked to rescue the situation, especially taking into account that there is no specific provision of the law guiding for application of such a prayer.

As to the third point of objection, that this application is an abuse of the court process as the same is *res judicata*, I disagree with his contention. The facts in the applicant's affidavit disclose that after Hon. Levira JA dismissed Civil Application No. 24 of 2016, the applicant sought other reliefs in multiple applications and was eventually granted extension of time to file an application for leave to appeal vide Civil Application No. 599/06 of 2018 before the Court

of Appeal. He was also duly granted leave by this court to appeal to the Court of Appeal on 30.06.2020.

However, the said decisions are not attached in the applicant's affidavit. The visible decision in the applicant's affidavit is the drawn order of this court issued in Misc. Civil Application No. 24 of 2016, which was an application for leave to file notice of appeal at the Court of Appeal and was dismissed on 19.10.2018. The actual Ruling was attached in the respondent's counter affidavit in which the court dismissed the same on the ground that there was no sufficient reason to extend time.

At this juncture, it appears there are no accurate details on whether this application is *res judicata* or not. The same is therefore a matter that would require this court to observe the evidence available to ascertain the same. That is thus contrary to qualifications of a preliminary objection as featured in **Mukisa Biscuits** (supra) whereby the Court stated:

> "A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."

In consideration of the observations I have made hereinabove, I overrule all points of preliminary objection by the respondent's

counsel and order the matter to proceed on merits. Costs shall follow events.

Dated and delivered at Mbeya on this 16th day of October 2023.

X

L. M. MONGELLA
JUDGE
Signed by: L. M. MONGELLA