

IN THE HIGH COURT OF TANZANIA

DODOMA SUB-REGISTRY

AT DODOMA

MISC. LAND APPLICATION NO. 11 OF 2023

*(Arising from the decision of the High court of Dodoma at Dodoma in
Land Appeal No. 43 of 2018 dated 10th September, 2019)*

EDWARD MSENGI.....APPLICANT

VERSUS

COSMAS LWAMBANO.....RESPONDENT

RULING

25th July & 11th September, 2023

HASSAN, J.

The applicant has filed this application for extension of time for him to file Notice of Appeal against the decision of this court in Land Appeal No. 43 of 2018 (Masaju, J).

Before hearing commenced, the respondent raised a preliminary objection on points of law to be determined by the court at the earliest as hereunder:-

1. *That the application is an abuse of due process of the court.*
2. *That, the application is bad for being overtaken by event.*



3. *That, the application is bad in law for being frivolous, vexation and with ill motive.*
4. *That, affidavit accompanying the chamber application is incurably defective.*

When the preliminary objection came for hearing, the applicant appeared in person whereas the respondent was represented by Mr. Erick shauri, learned counsel. The court ordered the preliminary objection to proceed by way of written submissions. The Parties complied to the order of preference in filing their written submissions.

The respondent submitted on the 1st point that the number of cases appearing on the heading of the chamber application thus; "(Arising from the Judgment of the High Court of Tanzania at Dodoma before Hon. Masaju, J dated 10th September, 2019 in Land Case Appeal No. 43 of 2018 originated from the decision of the District Land and Housing Tribunal of Manyoni at Manyoni in Land Application No. 15 of 206) while in his prayer in the Chamber Application he stated "That, this Honourable court be pleased to order extension of time to file Notice of Appeal against the decision of this honourable High Court of Tanzania at Dodoma delivered on 10/00/2019 in Land Case Appeal No. 48 of 2019 out of time"

proceed with. That, the said application is abuse of due process of the court hence should be dismissed with costs.

The respondent submitted on the 2nd preliminary objection that, the applicant had filed in the court a Notice of Appeal before this court on the 17th day of October, 2019 and it was marked Land Appeal No. 44 of 2019. That, after filing the said Notice of Appeal the applicant abandoned the said notice to date when he is applying for extension of time to file an appeal to the Court of Appeal, something which is not proper before the eyes of the law and before this honourable court. He submitted further that since the said notice was left unattended the same is deemed to have been withdrawn by the applicant hence this application cannot stand, he cited **Mrs. Kamiz Abdallah MD Kermal v. Registrar of Buildings and Miss Hawa Bayona 1988 TLR 199 (CA)**.

On the 3rd preliminary objection, the respondent submitted that the applicant's application is impeaching court's record by what is deponed in paragraph 3 of the applicant's affidavit that the trial judges advised the parties herein to resolve the matter amicably. The respondent cited **Halfani Sudi v. Abieza Chichili [1998] TLR 527** to support his submissions.

On the 4th preliminary objection, the respondent submitted that the affidavit is incurably defective since in the chamber summons the deponent Edward Msengi, that is the applicant, affirmed while in the accompanying affidavit he was sworn. Thus, it is left unknown as to whether the deponent/applicant is a Christian or Moslem. The respondent finally prayed the application to be dismissed with costs.

On his part, the applicant contested the preliminary objection by submitting on the 1st preliminary objection that, there is a typing error on the month the judgment was delivered which cannot amount to miscarriage of justice. That, the annexures to the chamber application are the record is clear. That, the error is curable under section 95 of the CPC, Cap 33 R. E 2019.

The applicant submitted against the 2nd preliminary objection that, the alleged Notice of Appeal is within the respondent's record and not on his part.

On the 3rd preliminary objection the applicant submitted that, the same is pure point of law which need proof by hearing of the application and it should not be termed as ill motive.

The applicant submitted against the 4th preliminary objection that, his jurat of attestation in the in the chamber application is not defective as argued by the respondent.

The applicant finalised his submissions by arguing that the respondent's preliminary objections are purely based on facts which need proof and not law. He cited **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd (1969)1EA. 696** to cement his submissions. He also prayed the court not to be bound with technicalities under the provision of Article 13(6) (a) of the Constitution of the United Republic of Tanzania as amended from time to time.

In rejoinder the respondent submitted that he had already attached the alleged Notice of Appeal on his counter affidavit thus he did not attach it to the written submission since the law does not allow to attach annexures to written submissions. He submitted further that it is the principle of law that once there is an application for Notice of Appeal which was left unattended you cannot file another application for seeking extension of time while there is a pending Notice. The respondent cited **Attorney General v. Tanzania Ports Authority and Alex Msama Mwita**, Civil Application No. 467/17 of 2017 (unreported). The respondent prayed the court to strike out the application with costs. He

added that the applicant cannot ride two horses at the same time as decided in **The Registered Trustees of Kanisa La Pentekoste Mbeya v. Lamson Sikazwe & 4 Others**, Civil Appeal No. 210 of 2020 (unreported).

The respondent finalised his submissions by arguing that the application violated all the stated grounds, he prayed the court to struck out the application with costs.

That is what was submitted by the parties in the court in support of and against.

Now, having heard the rival submission by the parties and going through the record keenly to ascertain what was transpired by the parties in the fullest.

Thus, starting with the 2nd point of preliminary objection, the respondent has alleged that, there is a pending Notice of Appeal filed in the registry of the Court of Appeal by the appellant on the 17th of October, 2019. The same is attached as annexure to the respondent's counter affidavit at paragraph 5. Thus, looking on the face of disputed notice of appeal, it is apparent that the same bears the same names of the parties, it shows the date of filing, that is 17th October, 2019 accompanied by stamp of the Court of Appeal Dodoma Sub-registry and signature of

deputy registrar who endorsed the filing. And the same was number as an intended appeal no. 44 of 2019, and it was further served to the respondent. Thus, at this juncture, there is no doubt that the appellant had properly filed a Notice of Appeal in the court of Appeal, and therefore, the applicant's defence that he has no knowledge of it is baseless.

At this point, I am alive of Rule 83 of the Court of Appeal Rules which gives a mandatory requirement of any party who wishes to appeal to the Court of Appeal to file a Notice of Appeal within 30 days of the decision to be appealed against. Also, Rule 91 gives guidance on the position that, where a notice of appeal was filed and party failed to file an appeal in time, thus;

"91. Where a party who has lodged a notice of appeal fails to institute an appeal within the appointed time

(a) he shall be deemed to have withdrawn his notice of appeal and shall, unless the Court orders otherwise, be liable to pay the costs of any persons on whom the notice of appeal was served arising from that failure to institute the appeal."

An interpretation of this rule was given by the Court of Appeal in **Williamson Diamonds Limited vs Salvatory Syridion & Another, Civil Application 15 of 2015 (unreported)** thus;

"It seems to us, that the purpose of Rule 91 (a) is to flush out such notices of appeal as have outlived their usefulness. That power is vested in the Court. We are further of the view that in exercising such powers, the Court may do so suo motu (after giving notice to the parties) or it may be moved by any party who may or ought to have been served with a copy of the notice of appeal under Rule 84 (1) of the Rules." **[Emphasis added]**

In my view, the above interpretation of the law is clear that, for the notice of appeal to have been withdrawn, either the parties who have been served with a copy of it to move the court for withdrawal, or the court to withdraw the same *suo motu* after giving a notice to the parties to that effect.

Now, coming to the instant case, none of that steps have been complied with, thus, as it stands, there is still a pending Notice of Appeal in the court of appeal registry filed by the applicant. And thus, the

applicant cannot at this juncture apply for extension of time for him to file another Notice of Appeal to the Court of Appeal while the previous notice of appeal is still surviving and well cared in the court of appeal registry.

Having said so, I will reserve my energy in determining the remaining points of preliminary objection since the 2nd point of preliminary objection analysed here-above suffices to dispose the entire application. To that end, the preliminary objection on the points of law is hereby sustained. Thus, the application is struck out with costs.

It is ordered.

DATED at DODOMA this 20th day of October, 2023



S. H. HASSAN
JUDGE

Right of appeal explained to the parties.



S. H. HASSAN
JUDGE