

IN THE HIGH COURT OF TANZANIA

DODOMA SUB-REGISTRY

AT DODOMA

MISC. LAND APPLICATION NO. 10 OF 2023

(Originating from the decision of Dodoma High Court in Land Case No. 1 of 2019)

K. M HOLDINGS LTD.....APPLICANT

VERSUS

CRISOSTOM ALFRED KIBOKO.....1ST RESPONDENT

ELIZABETH PAUL MALLYA *(As administratrix of the Late*
PAUL ALEX MALLYA).....2ND RESPONDENT

AUGUSTINO PAULO MALLYA.....3RD RESPONDENT

DEOGRATIUS PAULO MALLYA.....4TH RESPONDENT

THE CITY COUNCIL OF DODOMA.....5TH RESPONDENT

THE ATTORNEY GENERAL.....6TH RESPONDENT

RULING

8th November, 2023

HASSAN, J.

Under section 11 (1) of the Appellate Jurisdiction Act, cap 141 R. E 2019, Rule 45 (a) of the Court of Appeal Rules, 2009 G. N No. 368 of 2009 and section 95 of the Civil Procedure Code, Cap 33 R. E 2019, the applicant knocked the court's door for application to enlarge time upon

which, to lodge notice of appeal and applying for leave to appeal to the Court of Appeal out of time against the judgment and decree of this court in Land Case No. 1 of 2019 delivered on 22nd day of September, 2022.

This application is supported by affidavit of Mr. Elias Michael Machibya, the applicant's learned counsel, which was fervidly countered by the affidavits by the respondents severally sworn.

When the application came for hearing, the applicant was represented by Mr. Onesmo David, learned counsel whereas the 1st, 2nd and 3rd and 4th respondents appeared under legal representation of Mr. Godfrey Wasonga, learned counsel while the 5th and 6th respondents were represented by Mr. Nicodemus and Ms. Kumbukeni Kondo the Learned State Attorneys. Parties herein prayed to proceed by way of written submissions. The Parties complied to the order of preference in filing their written submissions.

Submitting in support of the application, the applicant adopted her affidavit to form part of her submissions and added that, in the year 2019, the applicant instituted a suit against the respondents in the court vide Land Case No. 1 of 2019. The suit was dismissed on the 22nd day of September, 2022 for being *res judicata*. After lodging the notice and applying for leave to appeal and the applicant made follow up in order to

collect the said documents and on the 25th day of January, 2023 the Deputy Registrar supplied the required documents. That, on the 26th day of January, 2023 when they were preparing for records they noted that the date of ruling, drawn order and proceedings was the 22nd September, 2023 but in the notice of appeal lodged and the letter there was a mistake by citing date 19th day of September, 2022 instead of 22nd day of September, 2022. That was due to the fact that, the case was adjourned on the date set for ruling as the presiding judge was absent and thus it was delivered on the 22nd day of September, 2022.

The applicant further submitted that, she was diligently and honestly following up for the delivery date of the above referred ruling and proceeding rather there was a typing error on the clear date for delivery of ruling. And when the applicant realised the error occurred, she took necessary steps in order to make it clear.

The applicant submitted that time started to run against the applicant when he became aware of the existence of the decision of the court on the 22nd day of September, 2022 and not otherwise and the record was supplied on the 25th day of January, 2023. She submitted further that, she was honestly and diligently prosecuting Land Case No. 1 of 2019 until when she became aware that the same was mistakenly wrote the 19th day of September, 2022 instead of 22nd day of September, 2022,

hence entitled to extension of time under the law. She cited **Rutagatina C. L v The Advocates Committee and Glavery Mtindo Ngalapa**, Civil Application No. 2 of 2011 (unreported), **Principal Secretary, Ministry of Defence and National Service v Devram Valambhia** [1992] TLR 185 and **Mobrama Gold Corporation Ltd v Minister for Energy and Minerals & 2 Others** [1998] TLR 425 to cement her submissions.

The applicant finally prayed the court to grant the application with costs.

On their part, the 1st, 2nd, 3rd and 4th respondents contested the application by submitting that, this application is misconceived thus the only remedy is to dismiss it. That, section 11(1) of the Appellate Jurisdiction Act [Cap 141 R. E 2019] provides clearly that the remedies available and or provided by statute is that to be able to be granted extension of time one must apply for extension of time and for giving notice of intention to appeal and not for taking steps to appeal as prayed by the applicant.

That, in order to appeal to the court of appeal there are two steps, first, one must first file notice of appeal and request for copy of judgment, decree and proceedings. Secondly, once notice of appeal is filed and served to the respondent then an application for leave to appeal to the

Court of Appeal is necessary according to section 5 of the Appellate Jurisdiction Act, Cap 141 R. E 2019. That, the applicant ought to seek for extension of time to file notice of appeal after being granted then apply for leave to appeal to the Court of Appeal.

The Respondents submitted further that they have gone through the applicant's affidavit and seen no sufficient reason for extension of time. That, in paragraph 5 of the affidavit the applicant is referring the notice of appeal dated the 17th day of October, 2022 which does exist since the notice annexed to this application (Exhibit MPA 2) is dated the 13th day of October, 2022 and not the 17th day of October, 2022.

The respondents prayed this application to be dismissed with costs for want of merit.

I have gone through the submissions by the learned advocates representing the parties in this application. In this application the applicant is praying for extension of time for her to file notice of appeal to the Court of Appeal out of time. The reasons for the delay being that she had filed the first notice of appeal right in time after the decision of this court was delivered but she came to realise an error on the notice specifically the date the ruling was delivered hence she applied for withdrawal of the notice in the court. Now coming to the provision of law

guiding applications for withdrawal of the notice of appeal, that is, Rule 89 of the Court of Appeal Rules, which provides;

"89.-(1) An application to withdraw a notice of intention to appeal may be made any time before instituting the appeal and a copy of the notice shall be served upon all parties on whom the notice was served.

(2) Subject to the provisions of subrule (1), any other person on whom a notice of appeal was served or ought to have been served may at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice of appeal or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time.

(3) Where the Court strikes out a notice of appeal under sub rule (2) after an appeal has been lodged, the appeal shall be deemed to have been struck out and the Registrar shall mark it accordingly."

The above cited provision sets a mandatory requirement on the part applying for withdrawal of the notice of appeal to serve all the parties

on whom the notice of appeal was served. The purpose for serving the party is provided by the above Rule 89 (2) that is the served party may apply to the court for the notice of appeal to be struck out.

In the instant case, the applicant alleges to have applied for withdrawal of the notice of appeal she filed (annexure MPA-4). But looking at the same, the 6th respondent was not served contrary to Rule 89(2) of the Court of Appeal Rules. Thus, the omission deprived the 6th respondent of their right and relief as so set out by the above provision of law and emphasized by the decision of the court in **Martin D. Kumalija & Others vs Iron & Steel Ltd**, Civil Application No. 70 of 2018 (unreported);


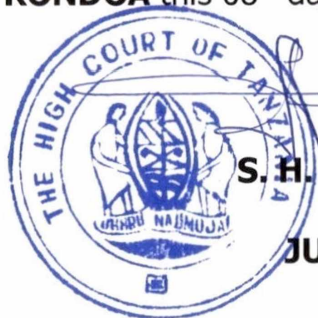
"The above provision is self-explanatory. It gives recourse to the relief of striking out a notice of appeal to a respondent or any other person on whom a notice of appeal has been served on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time."

Also see for **Elias Marwa v. Inspector General of Police and Another**, Civil Application No. 11 of 2012 (unreported) and **Grace Frank Ngowi v. Dr. Fank Israel Ngowi** [1984] TLR 120.



Also, the applicant has neither supplied the court with the outcome of her application for withdrawal of the notice on whether it was successfully withdrawn or not, nor has she attached a copy of notice confirming withdrawal, issued by the registrar of the Court Appeal, if any. Thus, this court left blind if the notice of appeal was actually withdraw or not.

That being the case, the application at hand cannot stand for it was brought prematurely due to the omission as deliberated. Therefore, the same is hereby struck out with costs, for being filed prematurely. Ordered accordingly.

DATED at **KONDOA** this 08th day of November, 2023.



S. H. Hassan
JUDGE

Ruling read over in the presence of parties linked together through Video Conferencing from Kondoa to IJC- Dodoma.



S. H. Hassan
JUDGE