IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MWANZA

AT MWANZA

MISC. CIVIL APPLICATION NO. 157 OF 2023

[*Application from the Order of the Court of Appeal of Tanzania at Mwanza dated 3 July, 2023 in Civil Appeal No. 16 of 2020]*

MWIKWABE N G'WAINA ..... APPLICANT

VERSUS

KEMU MTATIRO ..... RESPONDENT

RULING

13th & 28th March 2024

CHUMA, J:

On 5 July 2023, the lodged Civil Appeal No. 116 of 2020 before the Court of Appeal of Tanzania was withdrawn at the instance of the applicant hence this application predicated under section 14 of the Law of Limitation Act, Cap. 89 R.E 2019 (the LLA). The applicant seeks two orders to wit; an extension of time to file a notice of appeal to the Court of Appeal of Tanzania and an extension of time to serve the respondent with both the notice of intention to appeal to the Court of Appeal of Tanzania and a letter requesting for proceedings, judgement and decree in Land Appeal No. 156 of 2018.

An affidavit sworn by Boniphace Saririo, the applicant's advocate supports the application. The kernel of the application is averred in paragraph 5 of the affidavit that failure to serve a letter to the respondent was occasioned by the fact that the applicant's advocate was out of the office for a long time while attending to his father who was seriously sick.

On the other hand, the respondent did not file a counter affidavit to resist the application. It is not insignificant to state, at the very outset, that failure to file a counter affidavit presupposes that matters of fact alleged in the affidavit are deemed to have been admitted. Yet, the law is settled that the respondent is not precluded from arguing points of law opposing the application.

When the application came for hearing, the Court acceded to the parties' proposition that the application should be disposed of by way of written submissions. The applicant had the services of Mr. Boniphace Sariro, a learned advocate whereas the respondent enjoyed the service of Mr. A.K Nasimire also a learned advocate.

Mr. Boniface's submission was brief that the reasons for the delay in serving the letter are indicated in paragraph 5 on the affidavit that it was not

due to negligence or apathy on the part of the applicant but it was due to matters that were beyond of control. To him that suffices to warrant grant of the application. Stressing the point, the learned advocate referred to the case of **Murtaza Mohamed Raza Virani & Another Vs. Mehboob Hassanali Versi,** Civil Application No. 448/01 of 2020 (unreported), which in essence the Court of Appeal discussed sickness as a ground for the extension of time.

Before responding to the applicant's advocate arguments, Mr. Nasimire for the respondent raised two legal arguments regarding the competence of the application. One, the application is improper for being preferred under the wrong provision of section 14 (1) of the LLA. According to him, the correct provision should have been section 11 (1) of the Appellate Jurisdiction Act, CAP 141 R.E 2019 (the AJA). Two, the application serves no purpose because when Civil Appeal No. 116 of 2020 was marked withdrawn by the Court of Appeal of Tanzania, the notice of appeal also died with the withdrawn order. Mr. Nasamire argued that the applicant ought to have filed an application for an extension of time to file both the notice of appeal and serve the letter to the applicant. That notwithstanding, on the merit of the

application, the learned advocate resisted it that the applicant failed to account for each day of delay.

The applicant's advocate could not make a rejoinder. The matter was scheduled for ruling on 22 March 2024, however, in due course I encountered two issues which, in my opinion, and for the sake of justice, required insights from the parties. Therefore, on 26 March 2024, I invited them to address on improper citation of law, a point which was previously raised by the respondent's advocate in his reply submission, and the existence of omnibus prayers in the applicant's chamber summons.

Regarding the first legal point, Mr. Sariro submitted that the Court is properly moved since section 14 (1) of the LLA is an appropriate provision on applications for an extension of time. He argued further that section 11 of the AJA is only applicable for matters before the Court of Appeal of Tanzania. Regarding omnibus prayers, the learned advocate submitted that the Court is still seized with jurisdiction to entertain the application because the prayers sought are related.

In response, Mr. Nasimile did not support the applicant's advocate line of observation. He replied that section 14 (1) of the LLA does not apply to

the present matter rather the application should have been made under section 11(1) of the AJA which specifically provides for the extension of time to file a notice of appeal. Mr. Nasimile was emphatic that the LLA governs suits, appeals, and applications itemized/covered in the schedule of the Act. That is the spirit section 3(2) (a), (b), and (c) of the LLA, he argued.

Concerning omnibus prayers, Mr. Nasimile reacted that they are only permitted if they are intertwined and governed by the same law. He argued that the situation is different in the present application because the prayers sought are governed by different laws. That is, the application for an extension of time to file a notice of appeal is governed by section 11(1) of the AJA while extension of time to serve notice of appeal is regulated under rule 10 of the Tanzania Court of Appeal Rules, 2009. Strengthening the point, the learned advocate cited the case of **Philemon Vunai Southeu Molel Vs. William Titus Molel & another** Civil Application No 496/02 of 2021.

In his brief rejoinder, Mr. Sariro insisted that wrong citation of the law is no longer a matter of controversy except that the Court should confine on jurisdiction to determine the application and dispensation of justice.

I have thoroughly followed up and weighed the competing submissions made by the learned advocates. Starting with the applicability of section 14 (1) of the LLA and competence of the application, it is common knowledge that the provision vests powers to the Court, upon reasonable or sufficient cause, to extend the time for the institution of an appeal or application. For easy reference, the provision is quoted in verbatim as follows:

> *14.-(1) Notwithstanding the provisions of this Act, the court may, for any reasonable or sufficient cause, extend the period of limitation for the institution of an appeal or an application, other than an application for the execution of a decree, and an application for such extension may be made either before or after the expiry of the period of limitation prescribed for such appeal or application.*
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> *(2) For the purposes of this section "the court" means the court having jurisdiction to entertain the appeal or, as the case may be, the application.*

Taking into account the parameters envisaged by the law, I do not doubt that an extension of time to file a notice of appeal is not one of the applications regulated under that provision. With all due respect to Mr. Sariro, if he had been watchful in ascertaining the plain meaning of section 14 (1) he would have realized that the provision does not give the Court the

jurisdiction to entertain all kinds of applications relating to the extension of time. In other words, invocation of that provision does not come from the vacuum but depends on the nature of the matter intended to be pursued after the extension of time and the court where such matter is going to be attended.

Furthermore, subsection 1 of section 14 should not be read in isolation but must be considered in tandem with subsection 2 of the same section which defines the word "court" to mean the court having jurisdiction to entertain the appeal or, as the case may be, the application. That means the Court will not have the jurisdiction to extend the time for the doing of any act authorized or required by the law unless it has the jurisdiction to entertain the substantive matter after extending time. Since the Court does not have jurisdiction to hear the intended appeal if the application is granted, the same fate follows that it has no powers to extend the time to file a notice of appeal under section 14 (1) of the LLA.

Under the circumstances, as rightly submitted by Mr. Nasimile, the Court is not properly moved. The applicant ought to have predicated his application under section 11 (1) of the AJA to enable the Court to extend the time for giving notice of intention to appeal to the Court of Appeal from a

judgment of the High Court. The assertion made by Mr. Sariro that section 11 (1) of the AJA is only applicable when the matter is before the Court of Appeal, is misconceived. The Court of Appeal has held in several cases including **Maendeleo Kiriba Vs. Tabu Majira Sori & another**, Civil Application No. 269/08 of 2021 (unreported), that section 11 (1) confers on the High Court Jurisdiction to extend the time for giving notice of intention to appeal, making an application for leave to appeal or for a certificate on a point of law. As such, the application suffers from improper citation of the law.

With the second legal point, the issue is whether the application is omnibus. As already introduced earlier, in the chamber summons, the applicant seeks two orders, an extension of time to file a notice of appeal to the Court of Appeal of Tanzania and an extension of time to serve the respondent with both the notice of appeal and a letter requesting for proceedings, judgment and decree. The general principle governing validity and preference of omnibus application was expressed in the case of **MIC Tanzania Ltd Vs. Minister of Labour and Youth Development & another**, Civil Appeal No 103 of 2004 (unreported), the Court of Appeal stated that there is no law which bars the combination of more than one

prayer in one chamber summons however each case must be decided based on its peculiar facts. Later in **Rutagatina C.L. Vs. The Advocates Committee & another**, Civil Application No. 98 of 2010 (unreported), when striking out the application for being omnibus, the Court made the following reasoning:

> ***"Under the relevant provisions of the law an application for extension of time and an application for leave to appeal are made differently. The former is made under Rule 10 while the latter is preferred under Section 5 (1) (c) of the Appellate Jurisdiction Act read together with Rule 45. So, since the applications are provided for under different provisions it is clear that both cannot be "lumped" up together in one application, as is the case here.*** *The time frames within which to prefer the applications are also different. For example, by its nature, an application under Rule 10 has no time frame within which to be filed. Under Rule 45 a time frame of fourteen days is prescribed under both (a) and (b) thereto in the case of an application for leave to appeal in civil matters. In determining both applications the considerations to be taken into account are different. An application under Rule 10 may be granted upon good cause shown. An application for leave is usually granted if there is good reason, normally on a*

point of law or on a point of public importance, that calls for this Court's intervention… ***In both applications the jurisdiction is also different. An application under Rule 10 is at the exclusive domain of this Court. Under Section 5 (1) (c) of the Appellate Jurisdiction Act and Rule 45 of the Rules both the High Court and this Court have jurisdiction to determine applications for leave to appeal****. Furthermore, in terms of Rule 60 (1) of the Rules an application for extension of time is heard by a single Justice whereas under subrule 2 (a) thereto an application for leave is determined by the Court. In the totality of the foregoing, we are satisfied that the Rules do not provide for an omnibus application (emphasis supplied).*

See also: ***Juma M. Nkondo v. TOL Gases Limited/Tanzania Oxygen Limited & another,*** *Civil Application No. 382/01 of 2019 (unreported).*

Guided by the above decisions and having examined the chamber summons as well as the reliefs sought by the applicant, I fully subscribe to the proposition taken by Mr. Nasimile that the instant application is not proper before the Court because of being omnibus. The reason is not far-fetched as the applicant is seeking two distinct/unrelated reliefs whose jurisdiction is different. That is to say, the application for an extension of

time to lodge a notice of appeal as a first-bite application is competently before the Court pursuant to section 11 (1) of the AJA. Quite the opposite, there is no law that vests this Court with jurisdiction to entertain the application of extension of time to serve the respondent with notice of appeal and/or a letter requesting for proceedings. Only the Tanzania Court of Appeal may have jurisdiction over such an application in accordance with the Tanzania Court of Appeal Rules.

In the upshot for all that said and done, the omissions render the instant application incompetent and thus unmaintainable before the Court. I therefore struck out with costs.

It is so ordered.

DATED at **MWANZA** this 28th day of March 2024.

W.M. CHUMA
JUDGE

Ruling delivered in court in the absence of both parties this 28th day of March 2024.

W.M. CHUMA
JUDGE