

IN THE HIGH COURT OF TANZANIA

LAND DIVISION

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 404 OF 2017

(Originating from Misc. Land Application No, 123 of 2015 and Land Case
No. 196 of 2008)

SHAMASH RAMZAN DHARAMSI WALJI, as a personal Legal
representative **KARIM ABDULRASUL ADAM.....APPLICANT**

VERSUS

ASILY JOHN MWANKENJA.....RESPONDENT

Date of last Order: 22/6/2018

Date of Ruling: 17/8/2018

R U L I N G

MGONYA, J.

This is an Application for review on the ruling for the Order of this Court in Misc. **Land Application No. 123 of 2015 dated 9/5/2017**; in which the Applicant's suit against the Defendant was struck out.

In this Application, the Applicant is seeking a review of the Ruling and prayer for the following orders that:-

- 1. That the ruling striking out the Application for leave to Appeal is based on the fact that the Affidavit sworn by the Applicant in support of the Application for leave has no indication that the Applicant has already lodged a Notice of Appeal while indeed it is clearly indicated thereon in particular paragraph 6 of the said affidavit;***
- 2. That even if that the case , the period within which to file an Application for leave to Appeal and Notice of Appeal are different;***
- 3. That in so far as the Application for leave to Appeal to the Court of Appeal was originating from Land Case No. 196 of 2008 that Notice of Appeal was already in the record of the main suit.***

The Applicant was represented by Rutabingwa learned Counsel while the Respondent was represented by Tumaini Mfinanga learned Counsel.

In support of the Application, the learned Counsel for the Applicant contended that, the main grounds of this Application were as follows:-

"Misc. Land Application 123 of 2015 was an Application for leave to Appeal to Court of Appeal of Tanzania, which originated from Land Case No. 196 of 2008."

The 1st ground for Application is that, the Ruling striking out the Application for leave to Appeal which was based on the fact that the Affidavit sworn by the Applicant for leave to Appeal have no indication that the Applicant had already lodged a Notice of Appeal; while it was clearly indicated on paragraph 6 of the Affidavit; that the Applicant had simultaneously filed Notice of Appeal and still waiting for relevant documents of which they were still on process.

The second ground of this Application, is that, even if it was the case that the Applicant had not filed a Notice of Appeal, and attached the same to the Application Misc. Application No. 123 of 2015, the period within which to file the Application for leave to Appeal and Notice of Appeal are quite different.

The 3rd ground of this Application was that it was concerned an Application for leave to Appeal to Court of Appeal of Tanzania, originating from Land Case No. 196 of 2008. The said Notice of Appeal was already to the main suit file.

The Counsel further submitted that, under **Order XLII Rule 1 (b) of CPC** provided that under the circumstance, the **Application No. 123 of 2015** was mistakenly struck out on the ground of absence of Notice of Appeal without concerning the fact that the said Notice was already lodged in Court in **Case of Land Case No. 196 of 2008**.

Finally, the Counsel for the Applicant submitted that, under the circumstance, there was an error on the face of record which was yet to be ratified by this Court so as to allow the Applicant to proceed to the Court.

Responding to the Applicant's counsel submissions, the Respondent's Counsel submitted that as per **Rule 46 (1) of Court of Appeal Rules (2009)** filing of a Notice of Appeal to Court of Appeal of Tanzania was a mandatory requirement. The Court was right to strike out the Application for non-compliance with **Rule 46 (1) of Court's Rules**.

The argument by the Applicant Counsel that the Notice was already filed in Land Application No. 123 of 2015, the Respondent submitted that the Court cannot assume the compliance of Rule 46 (1) of Court of Appeal of Tanzania Rules without a specific proof.

The Respondent contended that the Affidavit in Land Application No. 123 of 2015 was not attached with the Notice of Appeal, hence the Court needed to satisfy itself to see the Notice of Appeal in Affidavit. Therefore, the Respondent submitted that for that reason there was no proof as to whether the Notice of Appeal as per Rule 46 (1) of Court of Appeal of Tanzania Rules was exactly filed before this Court.

On the 2nd ground of review the Respondent counsel submitted that the difference of time of filing Application for leave to Appeal and filing a Notice of Appeal were irrelevant under circumstances. The requirement of Notice to Appeal must be proceeded by Notice to Appeal. The Respondent believed that the said Notice of Appeal was in the possession of the Applicant and he had the duty of attaching the same to his Application for leave to Appeal.

Finally it is the Respondents view that, failure of the Applicant of the Applicant to file the Notice of Appeal in his Affidavit to support Application by the court could not award the Application for review because there was no any reference to the court to satisfy itself to the Notice of Appeal to be in the Application. Hence Respondent humbly prayed for dismissal of this Application for lack of merits with costs.

On rejoinder the Applicant counsel concedes that there was no dispute that the requirement as per Rule of Court of Appeal of Tanzania Rules was to file the said Notice of Appeal before filing an Application for leave to Appeal.

The Applicant went to submit that; the main issues was whether the Notice of Appeal was filed on time or not. The Applicant stated that the Notice of Appeal was filed under the main suit; hence the failure to attach in the Application was not occasioned by the Applicant as the copies of the same were located in case file No. 196 of 2008 which was in the record of the suit.

Applicant maintained the fact that the striking of an **Application of 123 of 2015** on ground that the Notice of Appeal was not dully filed was an error to the court on record.

On the issue of difference of time to file Notice of Appeal and the time to file an Application for leave to Appeal of Court of Appeal of Tanzania was quite difference. The Applicant stated that; this ground was raised to elaborate the first ground of Application, in case the Applicant really failed to lodge the Notice of Appeal on time which was not the case.

Applicant submitted further that, the Notice of Appeal according to **Rule 45 (a) of Court of Appeal of Tanzania Rules** provides that Application for leave should be filed within **14 days** from the decision and by virtue of **Rule 83 (2)** of the Court of Appeal of Tanzania Rules the said Notice is to be filed **within 30 days** from the date of decision.

Finally, Applicant submitted that, under such circumstances he prayed that the Application for review be granted.

Having carefully gone through the grounds for review and the both parties' submissions, I have observed that the main issue for determination by this Court is whether there is an error on the face of record for this Court to review its order made on 9/5/2017 in **Misc. Land Application No. 123 of 2015.**

Upon reading the learned Counsel grounds for review, I believe that is no error on the face of record for this Court to review its decision. This is due to the fact that records on the main suit filed revealed that there was no Notice of Appeal filed by the Applicant as alleged.

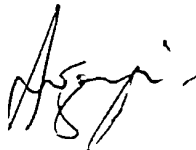
The law is very clear under **Rules 46 (1) of the Court of Appeal Rules 2009** that an Application for leave shall be made after the Notice of Appeal was lodged ; and I quote:-

"46 (1) Where an Application for certificate or for leave is necessary, it shall be made after the Notice of Appeal is lodged."

Therefore it is the legal requirement that the Notice of intended Appeal shall be filed before, and in our case the Applicant failed to prove the same. I have not seen anywhere from the record that the Notice of Appeal was filed.

In view of the above elaboration, **the Application is according dismissed with costs for want of merits.**

It is so ordered.



L. E. MGONYA

JUDGE

17/8/2018

COURT: Ruling delivered in the presence of Respondent in person, Advocate Ida Lugakinyira for Applicant and Ms. Caroline RMA on 17th day of August, 2018 in chamber No. 18.

L. E. MGONYA

JUDGE

17/8/2018