

**IN THE HIGH COURT OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**MISC. LAND APPLICATION NO.186 OF 2021**

*(Arising from the decision of the High Court Land Division in Land Appeal*

*No. 265 of 2019 by Hon. Maghimbi, J dated 24<sup>th</sup> March, 2021)*

**OMARY SHAMTE NGWEYA ..... APPLICANT**

**VERSUS**

**RAHMA ALLY MJIE ..... RESPONDENT**

**RULING**

*Date of last order: 27.08.2021*

*Date of Ruling: 31.08.2021*

**A.Z.MGEYEKWA, J**

This is an application, whereas the application is brought under Sections 47 (1) of the Land Disputes Courts Act, Cap. 216 [R.E 2019]. The applicant seek leave to appeal to the Court of Appeal of Tanzania to impugn the decision of this Court in Land Appeal No. 265 of 2019 delivered on 24<sup>th</sup> March, 2021. The application is supported by an affidavit deposed by Omary Shamte Ngweya, the applicant. The respondent opposed the application. In a counter-affidavit sworn by Rahma Ally Mjie,

the respondent and also raised three points of Preliminary Objection as follows:-

1. *The application is time barred.*
2. *That this application is brought under a wrong provision of the law.*
3. *The application is bad in law for being accompanied by a defective Notice of Appeal.*

When the matter was called for hearing before this court on 12<sup>th</sup> August, 2021, the applicant appeared in person whereas the respondent enjoyed the legal service of Mr. David Ntonge, learned counsel. By the court ordered and consent by the parties, the preliminary objection application to be argued by way of written submissions whereas, the respondent's Advocate filed his submission in chief on 18<sup>th</sup> August, 2021. The applicant filed a replay on 25<sup>th</sup> August, 2021. The respondent's Advocate waived his right to file a rejoinder.

The respondent in his written submission challenged that the application is out of time. The learned counsel for the respondent argued that the application was required to be lodged in court within 30 days from the date when the intended decision was delivered. He added that the decision of this Court was delivered on 24<sup>th</sup> March, 2021 and the instant application was lodged on 23<sup>rd</sup> April, 2021. T Mr. Ntonge went on to submit

that computing the days from when the judgment was delivered, it is obvious that the application is filed after the expiration of 30 days and the applicant has not obtained extension of time to file the application.

Arguing for the second limb of the objection, Mr. Ntonge valiantly argued that the application is brought under a wrong provision of law. He argued that the application has been brought under section 47 (1) of the Land Disputes Act, 2019. The learned counsel submitted that the cited Act is unknown in the law of our country. He added that the present Act is Land Disputes Courts Act, 2002. Mr. Ntonge went on to state that citation of the wrong provisions of the law is fatal and renders the application defective. He urged this court to strike out the application with costs.

On the third limb of objection. The learned counsel for the respondent claimed that the application is bad in law for being accompanied by a defective Notice of Appeal. He submitted that according to Rule 83 (2) of the Court of Appeal Rules of 2009 the law requires a notice to be lodged within 30 days of the date of the decision against which it is desired to appeal. He went on to state that the applicant's notice of appeal was filed on 23<sup>rd</sup> April, 2021. He added that the same was supposed to be filed on 22<sup>nd</sup> April, 2021. He urged this court to find that the application is defective and ought to be struck out with costs.

On the strength of the above submission, Mr. Ntonge, learned counsel for the respondent beckoned upon this court to strike out the application with costs.

Responding, on the first limb of the objection, the applicant submitted that the application is filed before this court within time. He stated that the application was filed online on 21<sup>st</sup> April, 2021. He stated that the procedure is for the aggrieved party to file an application online before submitting a hard copy of the application. He added that after admission of the same then the process of filing a hard copy follows. The learned counsel went on to state that the application was admitted manually on 23<sup>rd</sup> April, 2021. In his view, the application was filed within time.

Concerning the second limb of objection, the applicant submitted that it is indisputable that human error cannot be used to defeat justice. He stated that the law requires that the court is bound by principles of justice and not on technicalities. To support his position he cited Article 107A (2) (e) of the Constitution of the United Republic of Tanzania of 1977. Insisting, the applicant argues the judiciary in delivering justice be not bound with legal technicalities. He urged this court to be pleased to disregard this point of objection since the same is based on technicalities.

As to the third limb of the objection, the applicant argued that this is an application for leave, thus, the issue of notice of appeal is not a subject

for discussion since the same is required to be determined by the Court of Appeal of Tanzania. Insisting he claimed that this is not a proper venue to raise a claim over a notice of appeal. He urged this court to disregard this point of objection.

On the strength of the above submission, the learned counsel for the applicant based his submission in the interest of justice of the parties he urged this court to proceed to determine the application.

I have given careful deliberation to the arguments for and against the preliminary objection herein advanced by both learned counsels. Having done so, it should be now opportune to determine the preliminary objection raised by the respondent's Advocate and the main issue for determination is ***whether the preliminary objection is meritorious.***

To begin with, from the factual setting, it is beyond question that having heard the respondent's Advocate submission that the appeal is time-barred, I had to go through the court records to find out whether the appellant lodged the instant appeal within time. The time limit in filing the instant appeal is prescribed under section 41 (2) of the Land Disputes Courts Act, Cap. 216 [R.E 2019]. I wish to reproduce it hereunder for ease of reference:-

***" (2) An appeal under subsection (1) may be lodged within forty-five days after the date of the decision or order: Provided***

*that, the High Court may, for the good cause, extend the time for filing an appeal either before or after the expiration of such period of forty-five days." [Emphasis added].*

Applying the above provision of law, the prescribed period in filing an appeal or revisions and similar proceeding from or in respect of any proceeding in a District Land and Housing Tribunal in the exercise of its original jurisdiction is 45 days. Counting the days, the last date of filing the appeal was 22<sup>nd</sup> April, 2021.

The learned counsel for the appellant's line of argument is basically that the appeal was filed on 21<sup>st</sup> April, 2021 via electronic filing. The procedure in filing documents through electronic filing is governed by the Judicature and Application of Laws (Electronic Filing) Rules, 2018 specifically Rule 21 and 22. Rule 22 (a) provides that:-

*"Where a document is filled with, served on delivered or otherwise conveyed to the Registrar or Magistrate in charge using the electronic filing service and is subsequently accepted by the Registrar or Magistrate in charge, it shall be deemed to be filed served, deliver or conveyed."*

The above provision of the law provides the procedure to file documents online. There is no dispute that the appellant filed the memorandum of appeal through e-filing on 23<sup>rd</sup> July, 2020. The issue

on which the two learned counsel have, locked horns, is whether or not the appellant filing the memorandum of appeal via e-filing was within time. The respondent's Advocate is in the view that the appeal was filed out of time basing on the manual filing.

It is noteworthy that the electronic filing Rules have not completely substituted the manual filing of documents. The electronic filing Rules are guiding procedures in registering a document online. Therefore, the same cannot diminish the fact that a document is deemed filed upon payment of court fees. Reading the application, the payment slip dated 23<sup>rd</sup> April, 2021. He claimed that he filed the same online on 21<sup>st</sup> April, 2021 but there is no proof.

The appellant's Advocate tried to convince this court that the appellant lodged his appeal within time basing on the date when he filed his application online. As rightly pointed out by the learned counsel for the respondent the application was filed out of time.

On the second limb of objection, it is indisputable fact that the application is brought under a non-existence piece of legislation and wrong provision of law as well. The fact that this provision is inapplicable and the applicant has invoked it in his application means that a wrong provision has been cited in an unfitting situation. This is

what the respondent contends, rightly in my view, that the Court has been improperly moved.

Consequences of a wrong citation are a subject that has been widely covered in our jurisprudence, and there is a litany of court pronouncements that abhor the use of the wrong citation, and the ramification of all that. These include the cases of **Alice Mselle v The Consolidated Holding Corporation**, Civil Application No. 11 of 2002 CAT (unreported); **MIS Ilabila Industries Ltd. & 2 Others v Tanzania Investment Bank & Another**, Civil Application No. 159 of 2004 CAT (unreported). In **Aloyce Mselle**, the Court of Appeal of Tanzania held that: -

*"There is an unbroken chain of authorities of this Court to the effect that the wrong citation of a provision of law under which an application is made renders the application incompetent ..."*

See also the cases of **NBC v Sadrudin Meghji**, Civil Application No. 20 of 1997; **Rukwa Autoparts Ltd v Jestina G. Mwakyoma**, Civil Application No. 45 of 2000; and **Citibank (T) Ltd v TTCL & Others**, Civil Application No. 65 of 2003 (all unreported). In **China Henan International Cooperation Group v Salvand K.A. Rwegasira** [2006] TLR 220, the superior Bench had the following observation: -

*"...From these decisions, the unanimous position is that applications that suffer from the malady of the wrong citation are*



*incompetent and are liable to striking out. The application at hand is no better. It is incompetent and untenable. Accordingly, the same is hereby struck out."*

For reasons canvassed above, I find the application before this court was brought under a wrong provision of the law and filed out of the prescribed time. Therefore, I proceed to struck out the Land Application No.186. Each party to shoulder his own costs.

Order accordingly.

Dated at Dar es Salaam this date 31<sup>st</sup> August, 2021.



  
A.Z.MGEYEKWA

**JUDGE**

31.08.2021

Ruling delivered on 31<sup>st</sup> August, 2021 via audio teleconference in the presence of both parties.



  
A.Z.MGEYEKWA

**JUDGE**

31.08.2021