

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO.696 OF 2021

(Arising from the Judgment and decree of the High Court – Land Division, in Land Appeal No. 195 of 2020 before Hon. Maghimbi, J. Originating from the District Land and Housing Tribunal for Ilala at Ilala in Land Application No. 140 of 2008)

YUSSUF RAJAB – SODAH MWINYI –ALLI (Administrator of the Estate of the late HATIBU HUSSEIN) APPLICANT

VERSUS

JOYCE MWASAKAFYUKA (Administrator of the Estate of the late WEID MWASAKAFYUKA) RESPONDENT

RULING

Date of Order: 13.09.2022

Date of the Ruling: 26.09.2022

A.Z. MGEYEKWA, J

In this application, the Court is called upon to grant leave to appeal to the Court of Appeal of Tanzania. The application is brought under section 47 (1) of the Land Disputes Courts Act, Cap. 216 and Rule 45 (a) of the Tanzania Court of Appeal Rules, 2009. The application is supported by an affidavit deponed by Yussuf Rajab –Sodah Mwinyi- Alli, the applicant.

The applicant has set out the grounds on which an extension of time is sought. The respondent has stoutly opposed the application by filing a counter-affidavit deposed by Joyce Mwasakafyuka, the respondent.

When the matter was called for hearing before this court on 9th August, 2022, the applicant had the legal service of Ms. Yona Lucas, learned and the respondent was present in person. By the court order and consent of the parties, the application was argued by way of written submissions whereas, the applicant's advocate filed his submission in chief on 22nd August, 2020 and the respondent filed her reply on 6th September, 2022. The applicant's Advocate waived his right to file a rejoinder.

Mr. Yona, learned counsel for the applicant was the first one to kick the ball rolling. He began to narrate the genesis of this application which I am not going to reproduce in this application. Reiterating what was deposed in the supporting affidavit, the learned counsel urged this court to adopt the applicant's application and form part of his submission. Mr. Yona stated that the applicant wants to file a leave to go to the Court Appeal of Tanzania against the decision of this Court in Land Appeal No.195 of 2020. The counsel listed two grounds and the same are stated under paragraphs 16 (a) to (d) of the applicant's affidavit. The two grounds or proposed arguable grounds are as follows:-

1. Whether it is correct in law for this Court to determine *locus standi* of the applicant without affording the applicant right to be heard and
2. Whether it was proper for this Court to deliver its decision on the date not communicated to the parties.

To support his submission, Mr. Yona referred this Court to the Judgment of this Court in Land Appeal No. 195 of 2020, particularly on page 2 at paragraph 5. The learned counsel for the applicant valiantly contended that it is the principle and part of our law, the constitutional right that no one should be condemned unheard. Fortifying his submission, he cited the case of **Ausdril Tanzania Ltd v Mussa Joseph Kumili & Another**, Civil Appeal No. 78 of 2014.

Submitting on the ground whether this Court was right to deliver its decision on a different date from the one communicated to the parties, Mr. Yona was brief and focused. He stated that the record shows that the date of Judgment was on 9th July, 2021 but the Judgment was delivered on 2nd August, 2021. To support his submission he referred this Court to paragraphs 11 & 12 of the applicant's affidavit. The counsel for the applicant further argued that there was no any notice to the parties on the date of delivering the Judgment. Mr. Yona was certain that the applicant has success stated arguable points of law worth determination by the Court of Appeal of Tanzania.

On the strength of the above submission, the learned counsel for the applicant beckoned upon this court to grant leave to the applicant to file an appeal to the Court of Appeal of Tanzania.

Responding, the respondent urged this court to adopt the respondent's counter-affidavit and form part of his submission. The respondent in her submission raised a preliminary objection that the applicant has filed the instant application out of time. She referred this court to section 45 (a) of the Tanzania Court of Appeal Rules, 2009. The respondent argued that the impugned Judgment was delivered on 30th August, 2021 and the applicant filed the instant application on 6th December, 2021.

She continued to submit that the timeline to file an application for leave is 14 days but the applicant filed the instant application after 31 days. The respondent stated that the previous application was withdrawn and this Court granted the applicant 21 days to refile a fresh application, however, she insisted that the same does not override the fact that the application is incompetent for being time-barred. Supporting his position, she cited the case of **Dalmas Jonyo v Samson Owino**, Misc. Land Application No. 24 of 2021.

Submitting on the application, the respondent stated that the points raised by the applicant whether the Court was right to deliver its decision on a different date from the date availed to the parties, she admitted that the

Judgment was scheduled on 9th July, 2021 but parties were notified that the Judgment will be delivered on 30th July, 2021 and the said Judgment was delivered in the presence of the respondent.

In conclusion, the respondent urged this Court to dismiss the application with costs for being incompetent.

Having heard the learned counsel for the applicant and respondent submissions in support and against the application and upon thorough perusal of the record of the application, I wanted to satisfy myself on the propriety or otherwise of the application before this court. The respondent in her written submission has raised a point of law that the application is time-barred. The applicant's counsel had a right to file his rejoinder but he waived his right. However, before delivering the Ruling, I decided to give Mr. Yona a chance to reply orally about whether or not the application is time-barred.

I have found it is important to address the point of law raised by the respondent since this court has a duty to take judicial notice of matters relevant to the case even when the matter is not raised in the memorandum of appeal. The Court of Appeal of Tanzania in the case of **Adelina Koku Anifa & another v Byarugaba Alex**, Civil Appeal No. 46 of 2019 (unreported) that:-

"...the court cannot justifiably close its eyes on such glaring illegality because it is his duty to ensure proper application of the laws by the subordinate courts and/or tribunals."

The facts of the instant application correspond very well with the authority above and in case the point of law could not have been raised by the learned counsel for the respondent then this court could have raised or the same could have been raised in a later stage. The applicant was required to file his application in accordance with the law of limitation of time.

The record reveals that the impugned Judgment in Land Appeal No. 195 of 2020 was delivered on 30th July, 2021 and the applicant filed a Misc. Land Application No. 446 of 2021 before this Court and the same was withdrawn with leave to refile on 15th November, 2021. The days to lodge leave to appeal to the Court of Appeal is 30 days. Section 45 (a) of the Tanzania Court of Appeal Rules, 2009 as amended in 2017. For ease of reference, I reproduce hereunder:-

" 45 (a) Notwithstanding the provisions of rule 46 (1), where an appeal with leave of the High Court, application for leave may be made informally when the decision against which is desired to appeal is given, or the provisions of Rule 46 (1), where an appeal lies with the leave of the High Court, within thirty days of the decision..."

The record shows that the impugned Judgment was delivered 30th July, 2021, and the applicant filed his application for leave to appeal within time before Hon. Mwenegoha, J. Thereafter the applicant prayed to withdraw his application, and this Court on 15th November, 2021 marked his application withdrawn and granted him 21 days to refile his application. Counting the 21 days, the applicant was within time. However, since it was an order to withdraw, the applicant could not refile the said application that is why he prayed for leave to refile. Therefore, in my opinion, the applicant was required to file the instant application subject to the limitation of time. I am saying this because the applicant filed the instant application before this Court on 6th December 2021 while the impugned decision was delivered on 30th July, 2021. Consequently, he was out of time. The record is silent on whether the applicant filed an application for an extension of time to file leave to the Court of Appeal.

In the upshot, I strike out the Misc. Land Application No. 696 of 2021, the applicant can file a proper application if he wishes so. Each party to shoulder his own costs.

Order accordingly.

Dated at Dar es Salaam this date 26th September, 2022.




A.Z.MGEYEKWA
JUDGE
26.09.2022

Ruling delivered on 26th September, 2022 whereas both parties were present.




A.Z.MGEYEKWA

JUDGE

26.09.2022