

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

MISC LAND APPLICATION NO. 231 OF 2021

*(Arising from judgment and Decree of this court delivered in
Land Appeal No. 78 of 2017)*

ROSEMARY KATUNZI APPLICANT

VERSUS

OSCAR MHAGAMA 1ST RESPONDENT

SEKUNDA MHAGAMA 2ND RESPONDENT

Date of last Order: 29/09/2022

Date of Ruling: 31/10/2022

RULING

I. ARUFANI, J

The applicant filed the present application in this court seeking for extension of time within which to apply for leave to appeal to the Court of Appeal of Tanzania, against the judgment and decree of this court, delivered on 19th September, 2019 by my learned sister Maghimbi, J in Land Appeal No. 78 of 2017. The application is made under section 11 (1) of the Appellate Jurisdiction Act, Cap 141 R.E 2019 (AJA), Section 47 (2) of the Land Disputes Courts Act, Cap 216 R.E 2019 (LDCA) and any other enabling provision of the law.

The application is supported by an affidavit of the applicant and it is opposed by joint counter affidavit sworn by the respondents. During

hearing of the application, the applicant was represented by Ms. Nafikile Elly Mwamboma, learned advocate and the respondents were represented by Mr. Methodius Melkior Tarimo, learned advocate. Hearing of the application was conducted by way of written submissions.

Before going to the merit of the application the court has found proper to start with the concern raised by the counsel for the respondent at the end of his submission that, the applicant filed in this court Misc. Application No. 130 of 2021 seeking for extension of time to file in the court a notice of intention to appeal to the Court of Appeal but the application was dismissed by the court for want of merit. The court has found the counsel for the applicant has not disputed the stated position of the matter but she argued the said application is distinct from the instant application and stated the applicant has already lodged another application in the Court of Appeal as a second bite.

The above stated position of the matter shows there is no notice of intention to appeal to the Court of Appeal which has been filed in the court by the applicant. If there is no notice of appeal to the Court of Appeal which has been filed in the court the question is whether a party can be granted extension of time to file in the court an application for leave to appeal to the Court of Appeal while there is no notice of appeal which has been filed in the court. The court has found the procedure for appeal to

the Court of Appeal from decision of this court is provided under section 47 (4) of the LDCA which states that, the procedure for appeal to the Court of Appeal under section 47 of the LDCA shall be governed by the Court of Appeal Rules.

As the applicant is seeking for extension of time to apply for leave to appeal to the Court of Appeal, the court has found proper to start by seeing when the applicant is required to file in the court an application for leave to appeal to the Court of Appeal. The court has found the provision of the law governing when an application for leave to appeal to the Court of Appeal against decision of the High Court in a matter like the one at hand is required to be filed in the court is Rule 45 (a) of the Court of Appeal Rules which states as follows: -

"45 In civil matters: - (a) notwithstanding the provisions of rule 46 (1), where an appeal lies with the leave of the High Court, application for leave may be made informally, when the decision against which it is desired to appeal is given, or by chamber summons according to the practice of the High Court, within thirty days of the decision;"

From the wording of the above quoted provision of the law it is crystal clear that, as the application for leave to appeal to the Court of Appeal was not made orally when the decision was given by the court the applicant's application for leave to appeal to the Court of Appeal was

supposed to be filed in the court within thirty days from the date of the impugned decision. However, filing of the said application for leave to appeal is subject to Rule 46 (1) of the Court of Appeal Rules which states that: -

"Where an application for a certificate or for leave is necessary, it shall be made after the notice of appeal is lodged."

From the wording of the above quoted provision of the law it is the view of this court that, filing of an application for leave to appeal to the Court of Appeal is required to be made after filing in the court the notice of intention to appeal to the Court of Appeal. The stated view of this court is getting support from the decision made by this court in the case of **Josephine Lumuli Kassimu V. Nyange Hamisi Nyange**, Miscellaneous Land Application No. 635 of 2021 where it was stated that, in absence of the notice of intention to appeal the application for leave to appeal has no legs to stand upon and it surely must collapse.

The similar view was taken by the court in the case of **Sadallah Ibrahim Sadallah & Another V. Dodoma Municipal Council**, Miscellaneous Civil Application No. 24 of 2021 where it was stated that, under Rule 46 of the Court of Appeal Rules application for leave to appeal to the Court of Appeal must be made after the applicant has first lodged the notice of intention to appeal in the court. The position of the law

stated in the above cited cases is just a replica of the position of the law stated in an older case of the **DPP V. A. M. Swai**, [1989] TLR 37 where it was stated that: -

"As no notice of intention to appeal was given in the first place, the application for leave to appeal out of time cannot be entertained."

Although the above cited case was a criminal case but to the view of this court the position of the law stated therein is equally applicable in civil matters. That makes the court to find that, the application at hand was filed in the court prematurely. It was supposed to await the applicant to be granted extension of time to file in the court the notice of appeal and after filing the notice of appeal in the court is when she could have sought for extension of time to apply for leave to appeal to the Court of Appeal.

Although it is true that the applicant has lodged an application in the Court of Appeal as a second bite to seek for extension of time to file notice of appeal to the Court of Appeal out of time and it is true as argued by the counsel for the applicant that the said application is distinct from the application at hand but to the view of this court the applicant ought to have waited the outcome of the stated application before filing the instant application in the court. After the applicant being allowed to file in the

court the notice of intention to appeal to the Court of Appeal is when she can be in a position to apply for extension of time to apply for leave to appeal to the Court of Appeal.

In the premises, the court has found the application for extension of time to filed in the court an application for leave to appeal to the Court of Appeal is incompetent for being made prematurely. Having arrived to the stated finding the court has found there is no need of going to the merit of the application filed in this court by the applicant because the above stated finding is enough to dispose of the application. Consequently, the application is hereby struck out for been filed in the court prematurely. The court has considered the basis upon which the application has been determined and find it is appropriate to make no order as to costs in this application. Ordered accordingly.

Dated at Dar es Salaam this 31st day of October, 2022



I. Arufani

JUDGE

31/10/2022

Court:

Ruling delivered today 31st day of October, 2022 in the presence of Ms. Ritha Mahoo, learned advocate for the applicant and in the presence of Mr. Methodius Melkior Tarimo, learned advocate for the respondents. Right of appeal to the Court of Appeal is fully explained.



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JUDGE

31/10/2022