IN THE HIGH COURT THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 433 OF 2022

(Arising from Land Case No. 118 of 2021)

JUMA ABDALLAH ABDALHMAN.....APPLICANT

VERSUS

WAJIDALI JIWA HIRJI.....RESPONDENT

Date of last order: 17/10/2022

Date of ruling: 30/11/2022

RULING

I. ARUFANI, J.

The applicant lodged in this court the instant application seeking for extension of time to file in the court the notice of appeal to the Court of Appeal out of time. The application is made under section 11 (1) of the Appellate Jurisdiction Act, Cap 141 R.E 2019 and is supported by the affidavit of the applicant. The application was opposed by the counter affidavit affirmed by the respondent which was replied by the applicant. When the application came for hearing the applicant was represented by Mr. Theofil Kimaro, learned advocate who was assisted by Ms. Eva Manga learned

advocate and on the other hand the respondent was represented by Mr. Kalolo Bundala, learned advocate.

Mr. Teofil Kimaro told the court that, Rule 10 of the Tanzanian Court of Appeal Rules of 2019 states the court can grant extension of time if good cause is shown. He submitted that it is also imperative for the applicant to account for each day of the delay to move the court to grant the extension of time is seeking for. To fortify his submission, he referred the court to the case of **Samwel Sichoni V. Bulebe Hamisi**, Civil Application No. 8 of 2015 CAT at Mbeya (unreported) where the Court of Appeal stated that, in exercising its judicial discretionary power to determine whether extension of time should be granted or not, the court is required to take into account such factors as the length of the delay, reason for the delay, likelihood of success of the intended appeal and the prejudice to be suffered by the applicant if extension of time will not be granted.

While being guided by the position of the law stated hereinabove the counsel for the applicant argued that, the court pronounced its judgment orally and stated the defendant should continue to stay in one of the apartments of the suit premises until when he would have re-couped the money, he spent in the suit property which was USD 200,000 and until when

the service charge would have completely been paid in full. He said after the judgment been delivered, they found it was fair and after three days they sought to be supplied with the copy of judgment.

He stated the copy of judgment was supplied to them on 25th July, 2022 and after reading the same they found the court has ordered the applicant to pay the respondent USD 200,000, to give the respondent one apartment and the respondent was ordered to pay the applicant USD 25,706 being outstanding charges. He said the applicant found that is a double punishment because the agreement was for the applicant to pay the respondent USD 200,000 and failure of that to give the respondent one apartment. He argued that, the applicant believed it was not the intention of the court to punish him twice.

He argued that, the applicant delayed to file in the court the notice of appeal to the Court of Appeal because when the judgment was read to them, the applicant found he had no reason to appeal against the judgment of the court. However, after being supplied with the copy of the judgment of the court and saw the order given in the judgment, he found there is a need to appeal against the order of the court.

He stated under normal circumstances the applicant was required to file his notice of appeal in the court on 16th July, 2022 but the applicant was supplied with the copy of judgment on 25 July, 2022. He stated after getting the copy of the judgment on 27th July, 2022 he started process of preparing the instant application which was filed in the court on 29th July, 2022. He argued that, although the respondent stated in his counter affidavit that he was not served with the copy of the letter seeking for the copy of the judgment but the copy of the said letter was served to the respondent on 13th July, 2022.

He stated that, the respondent deposed in his counter affidavit that, even if the applicant had no reason to appeal, he was required to file his notice of appeal in the court and later on make a decision if he would have a reason to appeal or not. The counsel for the applicant submitted that the stated action would have been an abuse of the court process. He stated the law does not allow frivolous matters to be filed in the court and there is a punishment for doing so. He stated that is provided under Rule 91 of the Court of Appeal Rules.

He submitted that it is because of the above stated reason the applicant is urging the court to grant him extension of time is seeking for.

He stated that, the applicant was delayed for only four days and stated if the application will not be granted, the applicant will suffer irreparable loss. He prayed the court to grant the applicant extension of time to lodge his appeal in the court out of time for the interest of justice to triumph.

In reply the counsel for the respondent opposed the application and prayed to adopt the respondent's counter affidavit. In addition to that he opposed the application basing on two grounds. He stated in relation to his first ground that, the affidavit in support of the application is defective because the deponent states he is a Muslim but on the attestation clause he has sworn the affidavit instead of affirming it. He stated a Muslim cannot swear an affidavit but is required to affirm it. He argued that, the stated irregularity contravenes section 4 of the Oaths and Statutory Declaration Act [CAP 34 R.E 2019] (the Act). He argued the stated irregularity renders the affidavit supporting the chamber summons defective and renders the whole application incompetent.

In his second ground he stated the present application was made in ignorance of the law. He stated under Rule 94 (1) of the Court of Appeal Rules a party who has been served with notice of appeal is not required to file another notice of appeal in the court if he wants to challenge the

impugned decision. He stated he is required to file in the court his notice of cross appeal after being served with the record of appeal and memorandum of appeal. He argued that, as the respondent has not filed the record and memorandum of appeal in the Court of Appeal the applicant is required to wait until when he will be served with the record and memorandum of appeal is when he can file his notice of cross appeal in the court.

He argued that, even if the respondent will not file his memorandum of appeal in the court but the applicant was required to wait until when the time for filing memorandum of appeal in the court by a person who has filed in the court a notice of appeal to expire. He stated the time to file a cross appeal in the court starts to run from when the date of filing memorandum of appeal expires. He submitted that, the notice of appeal filed in the court by the respondent has not been struck out and is still pending in the court.

He prayed the court to struck out the application for being irregular or dismiss the same for want of good cause as provided under rules 91 and 94 of the Rules. He submitted that, the stated reasons are sufficient enough to dispose of the application and stated he had no intention of going to the merit of the submission made to the court by the counsel for the applicant.

In his rejoinder the counsel for the applicant stated section 4 of the Oaths and Statutory Declarations Act does not prohibit or make an application fatal because of the kind of the error noted by the counsel for the respondent. He stated it is only giving opportunity to a person who is not a Christian to make his solemn affirmation. He stated in relation to rule 91 (1) of the Rules that, if the applicant will not file his notice of appeal in the court, he will lose the opportunity of filing his appeal in the court in future if the respondent will not pursue his appeal.

Having carefully considered the parties' rival submissions the court has found before going to the merit of the application, it is pertinent to start with the two points of law raised by the counsel for the respondent against the application. The court has found the stated points of law are challenging competency of the application before the court. The court has found impliedly the counsel for the respondent is arguing there is no need of going to the merits of the application because the two points of law he has raised and argued in his submission are sufficient enough to dispose of the application.

Starting with the first point the counsel for the respondent argued that, as the applicant sworn an affidavit instead of affirming the same then the

affidavit is contravening section 4 of the Oaths and Statutory Declarations Act, Cap 34 R.E 2019. The court has found the referred provision of the law provides for who may be required to make oath or affirmation. Principally, it states that, any person who may be required to be examined or give evidence before a court and is professing any faith other than Christian faith, he may be required to make solemn affirmation and those professing Christian faith may be required to make oath.

To the view of this court and with due respect to the counsel for the respondent, section 4 of the Oaths and Statutory Declarations Act referred to the court by the counsel for the respondent does not apply to affidavit. That is because if you read the title of the cited law, you will find it is dealing with the administration of oaths and affirmations in judicial proceedings and for statutory declarations and not how the affidavits should be made. Although affidavits and statutory declarations are written statements solemnly made on oaths as true facts on the knowledge, information and belief of the deponent but they are not the same thing. The distinction of the two legal aspects was made by the court in the case of **Margovind Savani V. Juthalal Velji Ltd** (1969) HCD no. 278 where the court stated as follows: -

"It was definitely a mistake to draw and swear an affidavit as a statutory declaration. I do not think that the Oaths (Judicial Proceedings) and Statutory Declarations Act is meant to apply to affidavits despite the fact that there is no Tanzanian Ordinance or Act governing the procedure of drawing and swearing affidavits. Both affidavits and statutory declarations are written statements solemnly made on oath as true facts on the knowledge, information and belief of the deponent or declaring. In affidavits the deponent must distinguish facts that are true to his knowledge from those that he thinks or believes are true to his information and belief and in the latter group of facts he must also disclose the sources of his information as well as his grounds of belief. This however, is not an essential requirement of a statutory declaration".

Without prejudice to what has been stated hereinabove the court has found it is proper to to go further and see whether a Muslim to swear an affidavit instead of affirming the same is a fatal defect which can render an affidavit incurably defective. The court has found it is true that the applicant stated at the beginning of his affidavit that he is a Muslim but the jurat of attestation of his affidavit shows he swore the affidavit instead of affirming the same. The court has found there are numerous decisions whereby this court and the Court of Appeal have traversed the stated defect and come to the settled view that the same is not a fatal defect.

One of the cases where the Court of Appeal dealt with the issue relating to the defect of 'swearing' an affidavit instead of 'affirming' the same is the case of **Mekefason Mandali & 8 Others V. The Registered Trustees of the Archdiocese of Dar es Salaam,** Civil Application No. 397/17 of 2019, CAT at DSM (unreported) where the Court of Appeal referred the case of **Zanzibar Shipping Corporation & Another V. Mohamed Hassan & Another,** Civil Application No. 8 of 2014 (unreported) and stated that, the defect is not fatal because a person who 'swear' and the one who 'affirm' are in effect making promise to speak the truth.

The Court of Appeal went on referring other cases of the **Director of Public Prosecution V. Dodoli Kapufi & Another,** Criminal Application No. 11 of 2008 and **Asha Haruna V. R,** Criminal Appeal No. 75 of 2005, CAT (unreported) where it was stated inter alia that, the words 'sworn' and 'affirmed' means that the witness be a Christian or Moslem will testify truthfully. The Court of Appeal stated further in the latter case that, swearing or affirming a witness is more a question of semantics because at the end of the day, the goal is to cause the witness to solemnly promised to tell the truth and the truth only. The Court of Appeal held in the above cited case that: -

"On the basis of the above, it cannot be validly said that the defect affected the competency of the application. This is particularly so when as correctly submitted by Mr. Mbamba, I consider that the defect is a matter of form which may be relaxed /acquiesced in terms of the principle of overriding objectives introduced by section 3A and 3B of Act No. 8 of 2018 which is geared at seeing to it that cases are dealt with justly, efficiently and expeditiously at proportionate costs."

In the strength of what is stated in the above quoted case the court has found that, although it is true that the applicant who introduced himself in the affidavit as a Muslim swore his affidavit instead of affirming the same but the stated defect is not fatal. It can be cured by the principle of overring objectives provided under sections 3A and 3B of the Civil Procedure Code, Cap 33 R.E 2019.

As for the second point of law raised by the counsel for the respondent it states the application has been preferred under ignorance of the law as the respondent has already lodged notice of appeal to the Court of Appeal in the court and served its copy to the applicant. The court has found the counsel for the respondent argued that, under that circumstances the applicant is not required to file another notice of appeal in the court but he was required to wait to be served with copy of memorandum of appeal so

that he can file his notice of cross appeal in the court pursuant to Rule 94 (1) and (2) of the Rules. The court has found the referred provision of the law states as follows: -

> *"94 (1) A respondent who desires to contend at the hearing of the appeal that the decision of the High Court or any part of it shall be varied or reversed, either in any event or in the event of the appeal being allowed in whole or in part, shall give notice to that effect, specifying the grounds of his contention and the nature of the order which he proposes to ask the Court to make or to make in that event, as the case may be.*
>
> *(2) A notice given by a respondent under this rule shall state the names and addresses of any persons intended to be served with copies of the notice and shall be lodged in quadruplicate in the appropriate registry not more than thirty days after service on the respondent of the memorandum of appeal and the record of appeal."*

The court has found it is true that Rule 94 (2) provides that a respondent who desires to challenge decision of the High Court or any party of it where notice of appeal has already been lodged in an appropriate registry by his counter party and served with the copy of the notice of appeal is required to lodge his notice of cross appeal in the appropriate registry not more than thirty days after being served with the memorandum of appeal

and the record of appeal. However, the interpretation of the wording of the cited provision of the law which is in pari materia with Rule 87 of the Court of Appeal Rules GN No. 102 of 1979 was done by the Court of Appeal when determining the similar objection raised in the case of **Judge – In – Charge High Court at Arusha and the Attorney General V. N. I. N. NG.UNI,** [2004] TLR 44 and the Court of Appeal stated as follows: -

> *"Rule 87 of the Tanzania Court of Appeal Rules, 1979 does not prohibit the filing of a notice of cross appeal before filing, or before receipt of a copy of the record and memorandum of appeal: the respondent, therefore, was entitled to file his notice of cross appeal as he did."*

From the wording of the above quoted excerpt, it is the finding of this court that, although under Rule 94 (2) of the Court of Appeal Rules the applicant is required to file his notice of appeal in the court within thirty days after being served with the copy of the record of appeal and the memorandum of appeal but the applicant is not prohibited by the afore cited provision of the law to file in the court his notice of cross appeal on the ground that he has not been served with the copy of the record and memorandum of appeal.

To the view of this corut a party who has been served with a copy of notice of appeal to the Court of Appeal can also file his notice of cross appeal in the court even before being served with the copy of memorandum of appeal and record of appeal. In the premises the court has found this point of law is also lacking merit and it cannot be sustained. Consequently, the court has found both points raised by the counsel for the respondent to oppose the application of the applicant cannot dispose of the application at hand.

Turning to the merit or demerit of the present application, the court has found the counsel for the applicant heavily relied on the provision of Rule 10 of the Court of Appeal Rules to show what the applicant is required to establish to move the court to exercise its discretionary power to grant him extension of time is seeking in the present application. The court has found that, with due respect to the counsel for the applicant, it was not right to rely on Rule 10 of the Court of Appeal Rules because the cited rule is not applicable in the applications filed in this court. It is applicable in the application for extension of time filed in the Court of Appeal. That was stated so clearly in the case of **Godfrey Kimbe V. Peter Ngonyani**, [2018] TLR 157 where it was held inter alia that: -

"An application for extension of time in the High Court cannot legally be preferred under rule 10 of the Rules, for, that provision is within exclusive jurisdiction of the Court of Appeal."

The court has also found that, although the counsel for the applicant made his submission by referring to Rule 10 of the Court of Appeal Rules but the application filed in the court by the applicant, is not made under Rule 10 of the Rules. It is made under section 11 (1) of the Appellate Jurisdiction Act which to the view of this court is the correct provision of the law to govern application of the applicant. That being the position of the matter the task of this court is now to determine whether the applicant deserve to be granted extension of time is seeking from this court for lodging in the court his notice of appeal to the Court of Appeal.

The court has found that, as stated earlier in this ruling the counsel for the respondent simply adopted the counter affidavit of the respondent and he didn't say anything else in respect of the merit of the application at hand. The court has found what is deposed in the counter affidavit of the respondent was replied by the applicant in the applicant's reply to the counter affidavit. That being the position of the matter the task of this court

is to determine whether the applicant has managed to establish he deserves to be granted the order of extension of time is seeking from this court.

The court has found as stated in number of cases including the cases of **Tanga Cement Company Limited V. Jumanne D. Masangwa & Another,** Civil Application no. 6 of 2001, **Tauka Theodory Ferdinand V. Eva Zakayo Mwita *(As Administratrix of the Estate of the Late Albanus Mwita)*** and **Wambura NJ. Waryuba V. The Principal Secretary, Ministry of Finance and Another,** Civil Application No. 225/01 of 2019 (all unreported), the applicant is requirements to show sufficient reason for the delay to move the court to exercise its discretionary power to grant him the order of extension of time is seeking from this court.

Now the question is what is sufficient cause or reason which the applicant is required to show to move the court to grant him the extension of time is seeking from the court. The court has found when the court was dealing with the application for extension of time made under section 11 (1) of the Appellate Jurisdiction Act in the case of **William Maji Ya Pwani V. Tanzania Port Authority,** [2011] TLR 442 it stated that: -

"What constitute sufficient reasons cannot be laid down by any hard and fast rules. Sufficiency of reasons must inevitably be determined by reference of each particular case."

That being the position of the law the court has found the applicant deposes in his affidavit and it was argued by his counsel that, the impugned decision was delivered orally on 17th June 2022. It was stated after the judgment being delivered orally on 20th July, 2022 the applicant lodged in the court his letter requesting to be supplied with copies of the judgment, decree and proceedings. The sought documents were supplied to the applicant on 25th July, 2022 and the present application was filed in the court on 29th July, 2022.

The court has found that, under normal circumstances and as provided under the law the applicant was required to lodge his notice of appeal in the court within 30 days from the date of the decision. Since the judgment was delivered on 17th June, 2022 then the applicant was required to lodge his notice of appeal in the court on or before 16th July 2022 but he didn't do so. To the contrary he has filed the present application in the court seeking for extension of time to lodge the notice of appeal to the Court of Appeal out of time.

The court has found the applicant deposed at paragraphs 9, 10 and 11 of his affidavit and it was also argued by his advocate that, when the judgment was pronounced to them they didn't see any reason to appeal against the decision pronounced orally by the court. However, after being supplied with the written copies of the sought documents and read the same the applicant found there was some variation from what was pronounced orally by the court and what is contained in the written judgment. The applicant deposed that the stated variation aggrieved him and find there is a need to appeal against the decision of the court to the Court of Appeal.

It is apparent clear that copies of judgment, decree and proceedings are not necessary documents when a party is filing notice of appeal in the court as there is no provision of the law requiring a party to use them in lodging in the court the notice of appeal to the Court of Appeal. However, after considering what is deposed at paragraphs 9, 10 and 11 of the affidavit of the applicant and what was argued before the court by his advocate the court has found the applicant has shown how the said documents prompted him to see there is a need for him to lodge in the court his notice of appeal to the Court of Appeal.

The court has found that, the sequence of events from when the impugned judgment was delivered up to when the present application was filed in the court shows the applicant has acted diligently and without sloppy in lodging the present application in the court. The court has found the delay from when the judgment was delivered and the four days from when the copies of judgment, decree and proceedings were supplied to the applicant until when the present application was filed in the court have been accounted for. The court has also found there is nothing showing if the application is granted the respondent will be prejudiced. Consequently, the application of the applicant is hereby granted with no order as to costs. The applicant to lodge his notice of appeal in the court within thirty days from the date of delivery of this ruling. It is so ordered.

Dated at Dar es Salaam this 30th day of November, 2022

I. Arufani

JUDGE

30/11/2022

Court:

Ruling delivered today 30th day of November, 2022 in the presence of Mr. Theofil Kimaro, counsel for the applicant and also holding brief of Mr. Kalolo Bundala, counsel for the respondent. Right of appeal to the Court of Appeal is fully explained to the parties.

I. Arufani

JUDGE

30/11/2022