

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. APPLICATION NO.61 OF 2023

(Originating from the decision of the High Court of Tanzania in Misc. Application No.899 of 2016)

POLYCARP LAZARO APPLICANT

VERSUS

RASHID KAVIKUTA RESPONDENT

RULING

28/3/2023 & 25/04/2023

A. MSAFIRI, J

The applicant is seeking an order of the Court for extension of time within which to appeal to the Court of Appeal on orders which dismissed the application for setting aside the dismissal order in respect of Misc. Application No. 899 of 2016 on point of technicality and illegality, he also prays for costs and any other reliefs.

The applicant filed this application under Sections 14(1) (2) of the Law of Limitation Act, Cap 89 [R.E. 2019]. It was supported by the affidavit sworn by the applicant himself.

The respondent also filed his counter affidavit affirmed by himself in which he raised two preliminary points of objections namely; -

1) That this Court have no Jurisdiction to entertain the Applicant's application.



2) That the Applicant's application is bad in law for it contain a defective jurat of attestation.

It is a principle that where a preliminary objection on point of law has been raised, this Court had to hear and determine the raised preliminary objection first before proceeding with the hearing of the matter on merit. (see the decision of the Court of Appeal in **Salmin Ali Jaffar vs Fatma Tangawizi Ngura & Another**, Civil Appeal No. 299 of 2019).

By mutual agreement and leave of the Court, the preliminary objection was heard by way of written submissions, on which the respondent's written submission was drawn gratis by Ms. Irene Felix Nambuo, learned advocate while the applicant's submissions were drawn and filed by himself.

The respondent submitted on the first ground of preliminary objection that this Court has no jurisdiction to determine the application since that the same ought to be filed in the higher hierarchy meaning the Court of Appeal. He referred to Rule 22 of the Court of Appeal (Amendment) Rules 2019.

He further submitted that all appeals against the decree and orders of this Court are to be directed to the Court of Appeal and not otherwise, as per section 5(1)(c) of the Appellate Jurisdiction Act, Cap 141 R.E. 2019 which provides thus;

'5. - (1) In civil proceedings, except where any other written law for the time being in force provides otherwise, an appeal shall lie to the Court of Appeal-

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(c) with the leave of the High Court or of the Court of Appeal, against every other decree, order, judgment, decision or finding of the High Court.'

He contended that this Court can extend time only if the applicant was applying for extension of time to file Notice of intention to appeal against the orders of this Court as per Section 11(1) of the Appellate Jurisdiction Act, which reads;

'11.-(1) Subject to subsection (2), the High Court or, where an appeal lies from a subordinate court exercising extended powers, the subordinate court concerned, may extend the time for giving notice of intention to appeal from a judgment of the High Court or of the subordinate court concerned, for making an application for leave to appeal or for a certificate that the case is a fit case for appeal, notwithstanding that the time for giving the notice or making the application has already expired.'

He added that this Court cannot act beyond its legal powers.

On the second ground of preliminary objection, the respondent submitted that the Jurat of the affidavit must show whether the deponent was known to the Commissioner for Oaths personally or whether was identified to him by a person personally known to the Commissioner for Oaths, failure of which that the applicant's affidavit is fatally defective. He referred to the case of **Thomas John Paizon vs. Khalid A. Nongwa**, Misc. Land Application No. 954 of 2017 [2018] TZHC Land Division (Unreported).

He further stated that since the applicant's affidavit contains such defects, he was of the view that the application be dismissed with costs. *Acels.*

In response, the applicant contended that the raised two grounds of preliminary objections have no merit hence they are good to overrule.

On the first ground of preliminary objection, he stated that this Court is vested with power under section 14(1) and (2) of the Law of Limitation Act to grant the application for extension of time within which the applicant can lodge the appeal to the Court of Appeal.

He expounded more that this is an application to be extended time to appeal out of time to appeal to the Court of appeal and not the Appeal itself that has to be lodged in the Court of Appeal.

He said further that the respondent must be able to distinguish the application for extension of time and Appeal itself. He further stated that the law cited under Section 5 of the Appellate Jurisdiction Act, is not applicable because this is not an appeal yet.

On the second ground of preliminary objection, the applicant contended that though the said defect is within the jurat of attestation, the same is not fatal and that it can be cured under the overriding objective. He referred this Court to the case of **Gaspar Peter vs Mtwara Urban Water Supply**, Court of Appeal, Mtwara, [[2019], **Yakobo Magoiga Gichere vs Mwenge Gas and Lub Oil Limited**, Civil Application No, 76 of 1999, **Sanyou Service Station Ltd vs BP Tanzania Ltd (Now Puma Energy (T) Ltd**. That, in the above cited cases it was held that the defective jurat was curable.

Having gone through the submissions of the parties, the issue for determination is whether this Court has Jurisdiction to entertain this application.

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It is on record that the applicant's application in Misc. Land Application No. 899 of 2016 before this Court was dismissed for want of prosecution on 09.10.2017 whereas, the applicant filed another Misc. Land Application No. 909 of 2017 whereas the same was also dismissed by this Court before Hon. Makuru, J. It is from this application the applicant is seeking an order for extension of time to appeal to the Court of Appeal against Misc. Land Application No. 909 of 2017 delivered on 23.11.2018.

I will be guided by the enabling provision in this application, that is Section 14(1)(2) of the Law of Limitation Act which provides;

*'14 -(1) Notwithstanding the provisions of this Act, the court may, for any reasonable or sufficient cause, **extend the period of limitation** for the institution of an appeal or an application, other than an application for the execution of a decree, and an application for such extension may be made either before or after the expiry of the period of limitation prescribed for such appeal or application.*

*(2) For the purposes of this section "the court" **means the court having jurisdiction to entertain the appeal or, as the case may be, the application.*** (emphasis added).

Section 4 of the Appellate Jurisdiction Act, provides thus;

*'4(1); The **Court of Appeal** shall have jurisdiction to hear and determine appeals **from the High Court** and from subordinate courts with extended jurisdiction.* (emphasis added).

Coming to the instant Application, the Court with jurisdiction to extend time under Section 14(2) of the Law of Limitation Act, is the Court

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having jurisdiction to determine the appeal or as the case may be the application.

Therefore, since the application intended to be challenged had ended before this Court, then the proper Court having jurisdiction is the Court of Appeal, if that is the case then application for extension of time to appeal to the Court of Appeal must be granted by the Court having jurisdiction to entertain the appeal which is the Court of Appeal itself. This Court cannot grant such extension of time because it is not the Court having jurisdiction to entertain appeal.

On the foregoing reason, I sustain the first ground of the preliminary objection. I find no need to resolve the second preliminary objection as the first preliminary objection is capable of disposing the application.

It is my finding therefore, that this application is incompetent before this Court as it has no jurisdiction to entertain the same.

I proceed to struck out the application with costs.

It is so ordered.


A. MSAFIRI
JUDGE
25/05/2023