IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC LAND APPLICATION NO. 243 OF 2023

(Arises from the Judgment of Hon. Mgonya, J in
Land Case No. 37 of 2017 dated 12th December, 2018)

DUNCAN SHILLY NKYA.....1ST APPLICANT

KIWANGO SECURITY CO. LTD.....2ND APPLICANT

VERSUS

OYSTERBAY HOSPITAL CO. LTD.....RESPONDENT

RULING

20th-25th July, 2023

E.B. LUVANDA, J

In this application, the first Applicant named above is praying for an order of this Court to extend time for the First Applicant to file notice of intention to appeal (sic, notice of appeal) and time to file leave application (sic, application for leave) out of time. In the affidavit in support, the Applicant pleaded delay due to technical delay in prosecuting other applications, sickness and illegality.

In a counter affidavit, the Respondent opposed the application on the ground that several unwarranted applications filed at the instance of one Pendo Sist Chuwa, always ended been thrown out of courts. That

the alleged illegalities are either a ground of appeal on disguise, some call for argumentation and are not manifest on the face of record. On the sickness, the Respondent stated that it is a deceptive ploy to solicit this court's sympathy.

It is to be noted that the Respondent has raised a preliminary objection, challenging the competency of the application on the ground that it is omnibus.

The preliminary objection was argued along with the merit of the application.

Mr. Ashiru Hussein Lugwisa learned Counsel for Respondent, submitted that an application for extension of time to file a notice of appeal is diametrically opposed to an application for extension of time to apply for leave to the Court of Appeal, for the for the reasons that the procedural relating to filing a notice of appeal are not the same as those required for leave to appeal to the Court of Appeal, citing **Rehema Hassan @ Rehema Shinghuly vs. Ramadhani Samata,** Misc. Land Application No. 211/2020. The second reason is that considerations for granting extension of time to file notice of appeal are absolutely different from those in extension of time for leave to appeal. He submitted that the Applicant has anautomatic right to file a notice of appeal in the event time is extended. But the second application

requires the Applicant to prove existence of issue of public importance worthy of being determined by the Court of Appeal. He cited the case of **Ali Chamani vs. Karagwe District Council and Another,** Civil Application No. 411/04 of 2017, **Buhimu Ng'waje vs. Kephuleni Lubimbi & Another,** Land Revision No. 10/2021.

In opposition, Mr. Nickson Ludovick learned Counsel for Applicant submitted that the two prayers in one application are acceptable in law on the following conditions. One, prayers are not different, both prayers seek for the same remedy of extension of time; Two, the application is brought under the same provision of the law section 11(1) of the Appellate Jurisdiction Act, Cap 141 R.E. 2019; Three, both prayers have the same time frame, pre suppose filing within thirty days, cited rules 82(2) and 45 of the Court of Appeal Rules; Four, grounds advanced for granting or refusing the two prayers depend on the same facts. He cited the case of **Method Milambo vs. Saikos Namundujee,** Misc. Land Application No. 69/2021; **Haji Shaban Kibwana vs. Tabu Ramadhani Mataka,** Misc. Civil Application No. 216/2022; **Leonard Faustine vs. Makufuli Motors Limited,** Labour Revision No. 78/2019. He distinguished **Ali Chaman** (supra) being in applicable, in that at the Court of Appeal some prayers are granted by a single Judge and some are granted by full bench. He submitted that prayers in this

case are the same and can be granted by this court. He submitted that **Rehema @ Shughuly** (supra) is not binding. He distinguished **Kephuleni** (supra) that do not apply, because facts are totally different.

On my part, this objection cannot detain me much, this is because in the case of **Mustafa Haji vs. Ally Haji** in Misc. Land Application No. 272 of 2023 Land Division, I said it all regarding applicability of omnibus to this court. Facts in **Ali Chamani** (supra) are distinguishable to the facts herein. This is because in **Ali Chamani** (supra), the apex Court was dealing with combined applications falling under distinct and separate rules namely 44 to 66 of the Court of Appeal Rules, unlike under section 11(1) where extension of time for giving notice of intention to appeal, an application for leave or certificate on point of law are grouped and lumped together under one subsection (1). For easy of reference, I reproduce the provision of section 11(1),

> *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.

Therefore, it cannot be said that the import of the law above dictate for separate applications.

In **MIC Tanzania Limited** (supra) the apex Court the way back in 2006 had this to say regarding applicability of the rule of omnibus in the High Court and subordinate courts. I reproduce extensively for appreciation.

In the TANZANIA KNITWEAR LTD case (supra), the application had united ***two distinct applications,*** *namely one for setting aside a temporary injunction and another for issuance of a temporary injunction. Objection was taken against such a combination on the ground that it was bad in law. Mapigano, J. (As he then was) held:*

In my opinion the combination of the two applications is not bad at law. I know of no law that forbirds such a course. Courts of law abhor multiplicity of proceedings. Courts of law encourage the opposite.

The learned State Attorney in this appeal has invited us to disregard the holding of Mapigano, J. because we are not bound

by it. Indeed we are not bound by it and there is no direct decision of this Court on the issue. However, that cannot be a hindrance to us in our endeavors to ensure that substantive justice always prevails. After all, judicial process is not a discovery process but a creation process. Having so observed, we hold that the ruling of Mapigano, J on the issue cannot be faulted, and we are respectfully in agreement with him.

It is also our settled view that the holding of Katiti, J. was predicated more upon fears than practicality and that is why he went on to determine the main application on merit. If the position he took is sustained on only those grounds, it would lead to undesirable consequences. There will be a multiplicity of unnecessary applications. The parties will find themselves wasting more money and time on avoidable applications which would have been conveniently combined. The Courts' time will be equally wasted in dealing with such applications. Therefore, unless there is a specific law barring the combination of more than one prayer in one Chamber Summons, the Courts should encourage this procedure rather than thwart it for fanciful reasons. We wish to emphasize, all the same, that each case must be decided on the basis of its own peculiar facts.

Having perused the chamber summons and its supporting affidavit as well as the respondents' Counter affidavit in the High Court, we are satisfied that the three prayers were properly combined in one Chamber Summons. They were not diametrically opposed to each other, but one easily follows the

other. Once extension of time is granted then an application for leave follows. As the respondents' appear to concede, once leave is granted then the court may, in its discretion, grant or refuse to grant an order for stay of execution of the challenged decision. Viewed from this perspective, the reason for combining the three prayers in one chamber summons becomes obvious. The application was, therefore, competently before the High Court"

Need less to say **Ali Chamani** (supra) is totally irrelevant and inapplicable to the situation of this case.

The preliminary objection is overruled.

Arguing on the merit of the application, the learned Counsel for Applicant submitted that they seek extension of time based on technical delay, on the explanation that since the First Applicant became aware of the *exparte* judgment from 10/01/2019, the First Applicant has been in Court corridors searching for his right until on 28/04/2023 when the First Applicant filed this application. He cited the case of **Hamis Mohamed (as the Administrator of Estate of the Late Risasi Ngawe) vs. Mtumwa Moshi (As the Administrator of the Estate of the Late Moshi Abdallah,** Civil Application No. 407/17 of 2019 CAT pages 7, 8, 9 and 10; **Adolfu Sitivini & Another vs. Yaled and Another,** Misc. Land Application No. 220/2022. On the illegality, the

learned Counsel pointed out that the matter went *exparte* and the first Applicant was not summoned to attend the said *exparte* judgment; also absence of the board resolution to institute the suit, citing the case of **Boimanda Modern Construction Co. Ltd vs. Tenende Mwakipesile & Others**, Land Case No. 8/2022; **PM Group (T) Limited vs. (sic, AC) Technology Limited,** Civil Appeal No. 267/2021 HC Dsm. The Applicant pointed out another illegality being acts beyond control of any human being, citing illness of the First Applicant that it hampered him to participate from decision of the High Court. He cited the case of **Alhaj Abdallah Talib vs. Eshakwe Ndoto Kiweni Mushi** (1990) TLR 108, **Salum Sururu Nabhani vs. Zahor Abdallah Zahor** (1988) TLR 41; **John Chuwa vs. Anthony Ciza** (1992) TLR 233.

In opposition, the learned Counsel for Respondent submitted that the Applicant ought to file notice of appeal and lodge leave to appeal by 13/01/2019, citing rules 83(2) and 45(a) of Tanzania Court of Appeal Rules, 2009, respectively. He submitted that the Applicant explanation that he was busy in court corridors does not sufficiently explain the delay. He submitted that even if is assumed the Applicant became aware of the decision on 10/01/2019, there is no sufficient explanation why it was not done immediately thereafter. He submitted that five

years delay to lodge notice and applying leave to appeal is inordinate delay and therefore the application should be refused. He submitted that the Applicant and her Advocate Muganyizi, deliberately forfeited their right to be heard by absenting themselves from the proceedings, resulting to an *exparte* judgment. On technical delay, the learned Counsel submitted that the alleged applications had no relevance to the matter at hand. He submitted that filing a notice of appeal does not have connections to any of the applications previously filed by the Applicant. He distinguished **Mohamed Hamis** (supra) that therein the Applicant had filed all his applications in time, including notice of appeal and leave to appeal which were struck out on technical grounds. On the illegality, the learned Counsel submitted that the said illegalities are not manifest on the face of the record, as most of them require long drawn arguments to establish their substance, arguing that **Hamis Mtundwa** and **Sophia Chitundi** (supra) are distinguishable in that respect. On illness, the learned Counsel submitted that it has not been established how the alleged illness prevented the First Applicant from lodging his application within time, and has all long been represented by an advocate. He submitted that the Applicant failed to demonstrate that he has an arguable case in the event the application is allowed. He submitted that the impugned decision originates from this court in its

original jurisdiction which does not require leave to challenge the same, citing section 5(1) of the Appellate Jurisdiction Act, Cap 141 R.E. 2019. The learned Counsel argued the Court not to entertain a like application which instead of pursuing rights, on the contrary it pervert justice and therefore prejudice the rights of his client to execute the decree.

On rejoinder, the learned Counsel for Applicant submitted that they delayed in filing a notice of appeal and application for leave because was not summoned on the judgment, therefore the First Applicant was not aware of the date of judgment. He submitted that the applicant was in court pursuing his right but in a wrong forum. He submitted that interms of section 47(2) of the Land Disputes Court Act, Cap 216 R.E 2019, no appeal on land case can be filed to the Court of Appeal without leave of the High Court. He submitted that the Respondent cannot be prejudiced because the issue challenged is on the ownership of the disputed land.

It is common knowledge that for the ground of illegality to sail through, the alleged illegality must be apparent and manifest on the face of records, and should not entail drawing long argument or reasonings. Herein, the alleged illegalities, as alluded by the Counsel for Respondent that are not manifest on records, look like grounds of appeal on disguise, and call for long argumentation. Therefore, the purported

illegalities, neither of them meet a minimum threshold of illegality neither raises any point of significance importance and worthy for the attention of the apex Court consideration. Therefore, this ground fail.

On the ground of illment, according to a medical report annexure D12 to the affidavit in support, on the first paragraph, suggest the general surgeon was making reference to the past history of the patient that is why he used a phrase known with left sided hemiplegia following a cerebral vascular accident (CVA) due to hypertension since 2016. The general surgeon avoided to say if it was diagnosed thereat. My undertaking is grounded on a fact that, on the proceding paragraph, the general surgeon, indicated that the patient has been attending their surgical outpatient clinic since February 2021. Meaning that from February 2021 retroact, it is unknown as to which facility the first Applicant was attending a clinic. Be as it may, the general surgeon said nothing whether the First Applicant was relieved from attending any duty or activity or even taking a walk anywhere or spefically to court. This is because a medical report suggest the first Applicant was under the management of the facility for outpatient clinic.

Regarding a technical delay, it is the contention of the Applicant that he became aware of the *exparte* judgment on 10/01/2019, alleged on the same date the first Applicant's advocate filed an application Misc.

Land Application No. 78/2019, to set aside the *exparte* judgment, although the record reveal it was filed on 15/02/2019. The said Misc. Land Application No. 78/2019 was struck out for being time barred, it was on 31/08/2020. On 21/9/2020 he filed Misc. Land Application No. 534/2020 for extension of time to set aside the *exparte* judgment, which was dismissed on 02/07/2021 for account of insufficient reasons. On 27/07/2021 the Applicant lodged a notice of appeal and when they appeared for an application for stay of execution at the Court of Appeal on 13/02/2023 (presumably on Civil Application No. 395/17 of 2021) they were advised to go back to the High Court and plan to start the process of appealing against the said *exparte* judgment instead of struggling to set aside the *exparte* judgment. They filed Application for Review No. 777/2022 which was dismissed on 30/03/2023 for the reason that the court was *functus officio,* and it was held to be an abuse of court process. The first Applicant alleged to have obtained that ruling on 21/04/2023, hence this application.

I rebuttal, the Respondent submitted that one Pendo Sist Chuwa filed several unwarranted applications, always ended up been thrown out of courts. He submitted that the alleged applications had no relevance to the matter at hand on the explanation that filing a notice of appeal have

no connections to any of the applications previously filed by the Applicant.

Essentially, a fact that the Applicant was busy prosecuting other applications in court was not dispelled by the Respondent. The argument of the Respondent was on the relevance of the previous applications to the application at hand. Literally, a point for consideration is on regard to the time taken and whether the Applicant acted Applicant diligently to take essential steps for recourse after every knockdown. Herein, no argument was forthcoming from the Respondent that there was either laxity or inordinate delay on the journey of the Applicant in the course of lodging and prosecuting the previous applications. The chronological of events above narrated, vindicate that the Applicant have been keen to take action to fight for his right.

In the circumstances, I hold a view that the Applicant was diligent in pursuing his right to challenge the impugned decision, as such is entitled to an extension.

I have taken note of the argument of the leaned Counsel for Respondent that obtaining leave to appeal on land matters on original jurisdiction is no longer a requirement of the law. The Counsel for Applicant snubed it being ignorance of the law, but to my view, the

argument of the Counsel for Respondent, is valid. In the case of **Hamis Mohamed** (supra) cited by the Counsel for Applicant at Page 7, the apex Court made the following obiterdictum, I quote:-

> *"However that application was struck out for being overtaken by events because the law that required an aggrieved party to obtain leave to appeal on land matters originating from the High Court was abolished by the Written Laws (Miscellaneous Amendments) Act No. 8 of 2018 published on 25th September, 2018"*

Section 9 of Act No. 8 of 2018 which amended section 47 of the Land Disputes Courts Act, Cap 216, provide, I quote

> *"A person who is aggrieved by the decision of the High Court in exercise of its original jurisdiction may appeal to the Court of Appeal in accordance with the provisions of the Appellate Jurisdiction Act Cap 141 R.E 2019".*

According to the provision of section 5(1)(a) of the Appellate Jurisdiction Act, Cap 141, R.E. 2019, all appeals against every decree including decree exparte arising from the High Court in exercise of original jurisdiction, lies to the Court of Appeal without leave.

Herein, the impugned decision decree *exparte* emanate from Land Case No. 37/2017 original jurisdiction. Therefore granting extension of time to file leave, will be worthless.

I therefore grant the Applicant an extension of time to file the intended notice of appeal within 14 days which will commence running from today.

The application is granted. I make no order for costs.

THE HIGH COURT OF TANZANIA
LAND DIVISION

E.B. LUVANDA
JUDGE
25/07/2023