

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

MISC. LAND APPLICATION NO. 658 OF 2023

(Arising from the Judgment of the High Court of Tanzania, Land Division at Dar es Salaam in Land Appeal No. 58 of 2016 by Hon. Makuru J as she then was)

KIBURA ABDALLAH YUSUPH.....1ST APPLICANT

VERSUS

IBRAHIM HUSSEIN UHEMA.....1ST RESPONDENT

MWARAMI ALLY SAID.....2ND RESPONDENT

RULING

Date of Last Order: 29th April 2024

Date of Ruling: 30th April 2024

MWAIPOPO, J:

The Applicant herein has filed an Application under the provisions of Section 11 (1) of the Appellate Jurisdiction Act Cap 141 RE:2019 Section 47 (3) of the land Disputes courts Act Cap 216 RE: 2019 and Rule 47 of the Tanzania Court of Appeal Rules, Revised Edition, praying for the following reliefs: -

1. That this honorable court be pleased to grant extension of time on which the Applicant may be allowed to give the Respondent a Notice of intention to appeal and lodge an Application for

certification on point of law to the Applicant to appeal to the Court Appeal of Tanzania out of time against the decision of this Honorable court made by Hon. Makuru J. on the 19th day of June 2017 in Land Appeal No. 58 of 2016 between the same parties herein.

2. Costs of this Application be costs in the cause.
3. Any other reliefs as this honorable court shall deem fit and just to grant.

The chamber Application is supported by the Affidavit of Kibura Abdallah Yusuph herein after to be referred to as the Applicant and opposed by the Counter Affidavit of Ibrahim Hussein Uhemba, the 1st Respondent herein. The 2nd Respondent, refused summons to appear in court, hence did not defend the matter. Thus, the hearing of the Application proceeded exparte.

At the commencement of hearing, parties fended for themselves.

Arguing in support of the Application, the Applicant submitted that the Application is made under the provisions of Section 11 (1) of the Appellate Jurisdiction Act Cap.141 RE 2019, Section 47 (3) of the Land Disputes courts Act, Cap 216 RE 2019 and Rule 47 of the Tanzania Court of Appeal Rules, Revised Edition 2019 and is further supported by

the sworn Affidavit of Kibura Abdallah Yusuph which he prayed for it to be adopted and form part of the submissions. In support of his Application, the Applicant cited the provisions of Section II (1) of the Appellate jurisdiction Act to state that the High is empowered to extend time for giving the Notice of intention to appeal from a Judgment of the High Court or for the Certificate that a case is a fit case for appeal, notwithstanding that the time for giving the notice or making the Application has already expired.

Further the Applicant cited Section 47 (3) of the Land Disputes courts Act (supra) which provides that the procedure to appeal to the Court of Appeal under this Section shall be governed by the Court of Appeal Rules.

Similarly, he cited the provisions of Rule 47 of the Tanzania Court of Appeal Rules, which read as follows: -

Whenever the Application is made either to the Court or to the High court, it shall in the first instance be made to the High court or Tribunal as the case may be, but in any criminal matter the court may on its own motion give leave to appeal or extend time for the doing of any act, notwithstanding the fact that no application has been made to the High Court.

In his submissions, the Applicant contended that, sometimes in the year 2014, he instituted against the Respondents herein a land dispute before Vikindu Ward Tribunal at Mkuranga which was registered as Land case No. 122 of 2014. The matter was heard and the decision given in favour of the Respondents. Aggrieved by the said decision of Vikindu Ward Tribunal, he lodged an appeal to the Mkuranga District Land and Housing Tribunal which was registered as Appeal No. 3/2015 whereby the same was also heard to its finality on 8th January 2016 and Judgment was entered in favor of the Applicant herein.

Having been further aggrieved by the judgment of Mkuranga DLHT, the 1st Respondent herein also lodged an Appeal to the High Court of Tanzania Land Division at Dar es Salaam which was registered as Land Appeal no 581/2016 whereby the same was also heard to its finality and on 19th June, 2017, Judgment was entered against the Applicant herein. The Applicant being aggrieved by the said decision did apply for the certified copies of Proceedings, judgment and Decree for appeal purposes on 28th June 2017 against the Respondent alone, leaving ought the 2nd Respondent without being notified with the appeal.

As per paragraph 7 of his Affidavit, the Applicant, after being availed with certified records, on 30th June 2017 within the stated time, he filed

an Application for leave to appeal to the Court of Appeal and to be provided with a Certificate on points of law to appeal to the Court of Appeal of Tanzania against the decision of this Court. The same was registered as Misc. Land Application within the statutory time, he then filed an Application for leave to appeal to the court of Appeal and certificate in point of law to appeal to the Court of Appeal of Tanzania against the decision of this court. The same was registered as Misc. Land Application No.527/2017. The following points were to be considered by the Court of Appeal: -

- i. Whether the second sale Agreement can prevail over the subsisting first Sale Agreement without revoking the same.
- ii. Whether the High Court was justified in holding that the Seller was right to effect the second Sale transaction to the Respondent while the seller had no land to sale as title over the land in dispute had already passed to the Applicant.

The Applicant submitted that, the said Misc. Land Application no 527/2017 was lodged in this court without the 2nd Respondent in court as a party to it, the High Court upon hearing the same, granted leave and certified points of law within which the Applicant could appeal to the Court of Appeal. Thus having been supplied with certified records, the

Applicant was also provided with the certificate of delay and lodged his Appeal to the Court of Appeal No. 157/2021. However, since it was filed without joining the 2nd Respondent the same was withdrawn before the court upon a short dialogue with the parties with a view of joining the 2nd Respondent subject to time limitation.

The Ruling of the Court of Appeal was supplied to the Applicant on 29th September 2023 and on 3rd October 2023, the Applicant instituted the instant Application.

The Applicant has contended that failure to give the Notice of Appeal and lodge the Application for certification on points of law to appeal to the Court of Appeal of Tanzania within the prescribed time was caused by bonafide proceedings as the Civil Appeal No. 151/2021 of the CAT was filed in time but was against the 1st Respondent alone without joining the 2nd Respondent. The Applicant has contended that his delay has been caused by sufficient reasons therefore it deserves an extension of time. He referred the court to the case of **Mrs. Kamiz Abdallah MD Kermal vs. The Registrar of Buildings and Miss Hawa Bayona 1988 TLR 199 CA**. He submitted further that he acted prudently by applying for extension of time to give the Respondent a notice of intention of appeal and lodge an Application for certification on points of

law to the Applicant to appeal to the Court of Appeal of Tanzania out of time against the decision of this court in Land Appeal No. 58/2016.

The decision was taken promptly since the withdrawal of the matter on the 29th September 2023, the Applicant immediately prepared the instant Application.

Thus, the Applicant argued that, in computing the time of limitation, such a period in which he has been prosecuting another matter diligently in another court of first instance or Court of Appeal shall be excluded. That the question of time limitation is a procedural issue and it should not impede justice where the Applicant has taken time to cure it in order to facilitate substantive justice. He referred the court to the case of **Cropper vs Smith (1884) 26 CLD 700 at pg. 710** where it was held that: -

It is a well established principle that the object of courts is to decide the rights of the parties and not to punish them for mistakes they made in the conduct of their cases by deciding otherwise than in accordance with their rights....

I know of no kind of error or mistakes which if not fraudulent or intended to over rich, the court ought to correct if it can be done without injustices to the party. Courts do not exist for the

sake of discipline but for the sake of deciding matters in controversy (Lord Bowen).

He also cited the case of **General Marketing co. Ltd vs A.A Sharifu 1980 TLR 61 at pg 65** Biron J, where he stated that, Rules of procedure are handmaid of justice and should not be used to defect justice.

Based on the above sufficient reasons, the Applicant prayed to be granted extension of time as prayed in the chamber Application.

Submitting in rebuttal the 1st Respondent began by giving his own account of the matter as follows: -

That on 1st December 2013, the first Respondent herein purchased a disputed land through a sale agreement dated 01/12/2013 and in august 2014 when the 1st Respondent herein was preparing for construction, the applicant trespassed into the disputed land and disrupted the developments made by the 1st Respondent herein. The 1st respondent then reported about trespass of the applicant herein to the village Land Council of Vikindu Village and the case was admitted as Case No. 228/200/09/2024. When it was at the Village Council, the applicant herein failed to prove his ownership as he did not have the sale agreement to prove his ownership since he claimed to obtain land by

purchase. The person whom the applicant claimed to be his seller also denied to have sold the disputed land to the applicant. The Village Land Council decided that, the Applicant herein should vacate from the disputed land and same land be handed over to the 1st Respondent herein.

Further, the applicant herein did not respect the decision of the Village Land Council and the case was transferred to the Ward Tribunal of Vikundu. At the Ward Tribunal of Vikundu, the Applicant herein claimed to purchase the disputed land on 07/12/2013 but the person whom the applicant claimed to be the seller denied to have sold the disputed land to him. The decision at the ward Tribunal of Vikindu and the District Land and Housing Tribunal of Mkuranga were made for the Applicant to be the owner of a disputed land without having any document to prove his purchase of the disputed land and while the person who is said to have sold the disputed land to the applicant herein denied to have sold that disputed land to the Appellant herein. The 1st Respondent herein made an appeal to the High Court of Tanzania (Land Division) at Dar es Salaam where it was decided for the disputed land to be owned by the 1st Respondent herein and the Applicant herein appealed to the Court of Appeal of Tanzania against the decision of the High Court (Land Division).

That on the date of hearing of the Appeal filed by the Applicant herein at the Court of Appeal of Tanzania, the Applicant herein prayed to withdraw his appeal and his prayer was granted without given leave to refile the appeal. The applicant opted to file this application.

The 1st Respondent proceeded to submit that, the Applicant's submissions are based on two issues i.e. whether the Application is proper before this Hon. Court and secondly whether there is good and sufficient reason advanced by the Applicant for extension of time as prayed for in the chamber summons. He also prayed to adopt his Counter Affidavit as part of his submissions in court.

With regard to the first issue, as to whether the Application is proper before the court, the 1st Respondent argued that, the Application is not proper since the Applicant did exercise his right of appeal, and at the end opted to withdraw the Appeal and the same was marked withdrawn without leave to refile it. He contended that the law is clear that once the Plaintiff or Applicant withdraws his case in court, he is bound not to restart a fresh the same case since he was not given leave to do so. He referred the court to the provisions of order XXIII Rule 1 and (3) of the Civil Procedure Code CAP 33 R.E 2019 and also the case of **Halima**

Hamisi Rajab Budda and 4 others vs. Abubakar Hamis, Misc. Application No. 34 of 2022 the High Court of Tanzania at Arusha District Registry, to show that these provisions are applicable to normal suits as well as Appeals. Similarly, he cited the case of **Mechman Corporation (Maiyusia) Berhad (in liquidation) Vs. VIP Engineering and Marketing Ltd and 3 others, Civil Application No. 190 of 2013**, CAT where it was stated that, withdrawal of legal action be it a suit, petition or appeal is in itself its end. Secondly, it leaves the rights of the parties undetermined in so far as they here asserted in that action. Finally, a party withdrawing his action, is liable for such costs as the court may award.

Based on the foregoing cases, the 1st Respondent thus argued that, the Application before this court is not proper since the Applicant withdrew his Appeal before the court of Appeal without leave to refile it.

Secondly the 1st Respondent argued that the orders prayed by the Applicant in this Application are contradictory with the intentions of the Application and are making more confusion even if granted. The Applicant on his chamber Application prays for among other things to be granted extension of time within which he could be allowed to give the Respondent a notice of intention to appeal and lodge an Application for

certification on points of law to the Applicant to appeal to the Court of Appeal of Tanzania out of time against the decision of the Hon. Court made by Honorable Makuru, J on the 19th of June 2017 in Land Appeal No. 58/2016 between the same parties. The 1st Respondent has submitted that the Applicant cannot afford to file the appeal even if the orders prayed will be granted. That is due to the fact that the Applicant is praying for extension of time to be allowed to give the Respondent a notice of intention to appeal instead of praying for leave to lodge the notice of Appeal out of time. The interpretation of the orders sought by the Applicant herein is that the Applicant is praying for the leave of this Hon. Court to extend the time for the Applicant to serve the Respondents a Notice of intention to appeal.

The 1st Respondent contended that, the Applicant ought to have applied and prayed to file a Notice of Appeal first and then serve the Respondent, as the appeal process before the Court of Appeal is conducted pursuant to Rule 83 (1) of the Tanzania Court of Appeal Rules, 2009. He thus prayed for the court to dismiss the Application.

With regard to the second issue argued by the 1st Respondent, i.e. whether there is good and sufficient reason advanced by the Applicant for the extension of time. The 1st Respondent contended that there is no

good reason advanced by the Applicant for his Application to be granted, since the Appeal was withdrawn due to his own fault, i.e. failure to join the 2nd Respondent herein, after he was urged to do so by the 1st Respondent. Therefore, he should not be allowed to benefit from his own wrong. Therefore, his negligence should not be treated as a good cause for extension of time. He referred the court to the Ruling in Misc. Application No. 527/2017 indicating his own fault of not joining the 2nd Respondent. He further cited the case of **Ngao Godwin Losero vs Julius Mwarabu Civil Application No. 10 of 2015, CAT** where the court held that; to grant or refuse extension of time is within the discretion of the court, however, the same must be exercised judiciously. He also referred the court to the case of **Mbogo vs Shah (1968) EA** where the court rejected ignorance as a good cause for extension of time and also the case of **Seif vs Hafidhi Said, Misc Civil, Application No. 33 of 2018** of the High Court of Tanzania. Thus the 1st Respondent prayed for the Application to be dismissed, since the Applicant never adduced sufficient reason for extension of time.

Regarding the issue of illegality, the 1st Respondent contended that there is no any allegation of illegality stated by the Applicant herein for the court to consider in deciding this Application. He referred the court

to the case of **Selemani Seif Hafidh Said (supra)** and the case of **Lyamuya Construction Company Ltd, vs Board of Trustees of Young Women's Christian Association of Tanzania**, where the court stated that not every allegation of illegality would succeed. The point of law must be of sufficient importance and apparent on the of the record, such as jurisdiction, not one that would be discovered by a long-drawn process of argument.

The 1st Respondent thus prayed for the court to dismiss the Application since there was no any point of law apparent on the record, worth of consideration by the Court of Appeal.

In rejoinder the Applicant disputed the submissions of the 1st Respondent and reiterated his submissions in chief, that his appeal to the court of Appeal was withdrawn following the dialogue conducted therein, with a view to have the 2nd Respondent joined in the Appeal after wards. The same was withdrawn under Rule 102 (1) of the CAT Rules 2019 and not under order XXIII Rule 1 and 3 of CPC as they don't apply to the CAT, therefore it was a misconception on the part of the 1st Respondent.

With regard to the Applicant's fault of not joining the 2nd Respondent, the Applicant reiterated that Misc. Land Application No. 527/2017 was

allowed by this court and he was granted leave and certification of points of law to appeal to the Court of Appeal of Tanzania. Finally, he prayed for the Application to be allowed as prayed.

Having gone through the rival submissions of the parties, the broad question to be addressed is whether this Application has merit.

In determining this Application I find it pertinent to begin by stating that the Applicant has filed his Application under the provisions of Section 11 (1) of the Appellate Jurisdiction Act, CAP 141 RE. 2019, Section 47 (3) of the Land Disputes counts Ac Cap 216 HRE 2019 and Rule 47 of the Tanzania Court of Appeal Rules, Revised Edition 2019. In his Chamber Application he has prayed for the following orders: -

1. That this honorable court be pleased to grant extension of time on which the Application may be allowed to give the Respondent a Notice of intention to appeal and lodge an Application for certification on points of law to the Applicant to appeal to the court of Appeal of Tanzania out of time against the decision of this honorable court made by Hon. Makuru J on the 19th day of June 2017 in Land Appeal No. 58 of 2016 between the same parties herein.
2. Costs of This Application be costs in the cause.

3. Any other reliefs as this Honorable Court shall deem fit and just to grant.

The Applicant in his submissions has contended that, he has filed this Application for extension of time so that he can be allowed to give the Respondent a notice of intention to appeal and also to lodge an Application for certification on points of law to the Applicant to appeal to the Court of Appeal of Tanzania out of time.

Throughout his submissions he stated the reasons as to why he should be granted extension of time. However, the 1st Respondent, in opposing the Application has contended that the Application should not be allowed for two reasons one because it is not proper before the law because when the Appeal was filed before Court of Appeal had a defect and when the Applicant withdrew it he was not given leave to refile it and

Secondly on this ground, the 1st Respondent contended also that, the Application is not proper before the court, for the reasons that the prayer sought in the chamber summons for extension of time within which the Applicant may be allowed to give the Respondent a notice of intention of appeal is out of place and impracticable since the said Notice is yet to be filed. The second ground for opposing the Application

is to the effect that the Applicant did not adduce sufficient reasons to warrant the court to grant extension of time.

Upon careful perusal of the records forming part of the Application specifically the Chamber Application and the written submissions in chief, this Court has observed that, the Applicant filed this Application on the 6th day of October 2023, following the withdrawal of his Civil Appeal No. 151/2021 from the court of Appeal of Tanzania.

The reason for the withdrawal of the Appeal was due to the fact the same was filed and lodged by the Applicant without joining the 2nd Respondent who was a party in the Trial Ward Tribunal, DLHT and the High Court. Therefore, upon a short dialogue with the Court of Appeal, the Applicant withdrew his Appeal, with the aim of seeking to join the 2nd Respondent subject to time limitation. The said Appeal was marked withdrawn pursuant to Rule 102 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules).

Since the Appeal was withdrawn for not joining the 2nd Respondent, Mwarami Ally Said, in all the processes leading up to the filing of Civil Appeal No. 151/2021, it was therefore expected that the Applicant would begin the said processes again pursuant to the laws and procedures governing the filing of Appeals to the Court of Appeal.

I have also observed that in his Notice to the Court of Appeal previously filed and lodged by the Applicant dated 23rd June 2017 and noted that pursuant to Rule 83 (1) of the Court of Appeal Rules, the Applicant did not join the 2nd Applicant, and so is the position in all the processes, e.g. the letter requesting for copies of records, the Application for leave and certificate of points of law.

Coming back to the instant Application, the Applicant in his Chamber Application has prayed for this Court to grant him extension of time so that he could be allowed to give the Respondent a Notice of intention to appeal. The 1st Respondent in his submissions has begged the question as to whether the said Notice has already been filed pursuant to Rule 83 (1) of the Court of Appeal Rules 2009, to the extent of allowing the Applicant to file an Application praying for extension of time to serve the Respondents with the said Notice.

Upon careful reflection of the matter, I agree with the 1st Respondent that the prayer by the Applicant for extension of time to serve the Respondents with a Notice of appeal, out of time, while the same is yet to be lodged in Court is misplaced and confusing. As contended by the 1st Respondent, the process of appealing to the court of Appeal begin by lodging a Notice of Appeal as stated under Rule 83 of the Rules and the

service of the same is governed under Rule 84 (1) of the Tanzania Court of Appeal Rules, 2009. Indeed, as argued by the 1st Respondent, the Applicant ought to have begun by praying for extension of time to first lodge the Notice of Appeal out of time and thereby serve the Respondents once the Application for lodging it has been accepted or granted. However, the Applicant's prayer in the chamber summons is self defecting since such a prayer is within the realm of the Court of Appeal. Further, the provisions of Section 11 (1) of the Appellate Jurisdiction Act as cited in the chamber application do not support the prayer contained in the Chamber summons. That prayer is supported under Rule. 83(1) of the Court of Appeal Rules.

Therefore based on the above analysis, submissions and provisions of the law, this court cannot proceed to grant the Applicant the prayer advanced in the chamber summons since it is within the realm of the Court of Appeal and it must be preceded by lodging the actual Notice of Appeal, subject to the prayer to be granted for that purpose.

Similarly, I have not determined the second prayer of the Applicant to be allowed to lodge an application for certification on point of law so that the applicant could appeal to the Court of Appeal because it

depended on the grant of the first prayer which has been analyzed herein above.

In the upshot, I proceed to strike out the Application. Considering the circumstances of this matter, each party shall bear its own costs, since they have both fended for themselves.

It is so ordered.



Mwaipo
S. D. MWAIPOPO

JUDGE

30/4/2024

The ruling delivered by Hon. M. Lukindo, DR in the presence of the Applicant and the 1st Respondent who appeared in person, is hereby certified as a true of the copy original.



Mwaipo
S. D. MWAIPOPO

JUDGE

30/4/2024

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