IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUGASHA, J.A., KWARIKO, J.A. And MWANDAMBO, J.A.)

CIVIL REFERENCE NO. 17 OF 2017

NURU OMARY LIGALWIKE ..... APPLICANT

VERSUS

KIPWELE E.O. NDUNGURU ..... RESPONDENT

(Reference from the decision of the Single Justice of the Court of Appeal of Tanzania at Dar es Salaam)

(Mmilla, J.A)

dated the 16th day of June, 2017

in

Civil Application No. 2/17 of 2017

RULING OF THE COURT

08th & 22nd July, 2019

KWARIKO, J. A.:

The respondent won a suit against the applicant over a fifteen-acre farm situated at Kwembe village, Kinondoni District in Dar es Salaam Region in Land Case No. 12 of 2005 in the High Court of Tanzania, Land Division at Dar es Salaam.

Aggrieved by that decision, the applicant applied before that court for extension of time to file an application for leave to appeal against it vide

Miscellaneous Land Application No. 343 of 2016 which application was dismissed by Ndika, J. (as he then was) on 11/11/2016.

Undaunted, the applicant came before this Court with an application for extension of time to apply for leave to appeal as a second bite vide Civil Application No. 2/17 of 2017 before a single Justice. Before that application was heard, the Court probed the advocates for the parties on whether the application was competent considering that the High Court, dealing with a land matter had exclusive jurisdiction on applications for leave to appeal in terms of section 47 (1) of the Land Disputes Courts Act [CAP 216 RE. 2002] (hereinafter to be called the Act). Messrs. Leonard Manyama and Melchisedeck Lutema, learned advocates, who appeared for the applicant and the respondent respectively conceded that the application was wrongly instituted in the Court. In the end, the Court found that the application was misconceived hence incompetent and it was accordingly struck out.

Subsequent to the said order, surprisingly, the applicant expressed his dissatisfaction with the order of the Single Justice, hence lodged a letter to initiate this application for reference under Rule 62 (1) (b) of the Tanzania Court of Appeal Rules, 2009 (the Rules) through the same

advocate, Mr. Leonard Manyama. In his letter instituting the application for reference, the applicant complained that the Single Justice of Appeal misinterpreted section 47 (1) of the Act hence reaching to a wrong decision.

In compliance with Rule 106 (1) (2) of the Rules, both learned Advocates filed their respective written submissions for and against the application. On 8/7/2019 when the application was called on for hearing, Mr. Melchisedeck Lutema assisted by Ms. Dora Mallaba both learned advocates appeared for the respondent. Neither the applicant nor her advocate appeared. The record showed that the applicant was duly served with a notice of hearing through her counsel, Smile Star Attorneys on 18/6/2019. The affidavit of the process server, one Mbai Kikwa bears that testimony.

On the non-appearance of the applicant, we would have dismissed the application in terms of Rule 63 (1) of the Rules. However, because both parties had filed their written submissions, we did not take such move, instead we resorted to entertain the application pursuant to Rule

106 (12) (b) of the Rules as amended by the Tanzania Court of Appeal (Amendments) Rules, GN. No. 344 of 2019 which provides thus: -

> *"106- (12) Where an appeal or application is called on for hearing and written submissions have been duly filed and-*
>
> *(a) neither party nor their advocates appear to present oral arguments; or*
>
> *(b) either party or his advocate appears to present an oral argument,*
>
> *the appeal shall be treated as having been argued and shall be considered as such:*
>
> *Provided that a party or his advocate who appears, shall be afforded an opportunity to present oral argument."*

Due to the fact that neither the applicant nor his advocate had appeared, we afforded opportunity to the respondent's counsel to present his oral argument.

In the written submission in support of the application which was filed by Mr. Manyama learned advocate, it has been argued that because the High Court has concurrent powers with the Court of Appeal in granting

leave to appeal to the Court of Appeal, this Court has also powers to entertain application for extension of time to apply for leave to appeal to the Court once refused by the High Court. To fortify his contention, Mr. Manyama referred us to the decision of the Court in **Pius Kuhangaika & Two Others v. COWI Consult (T) Ltd,** Civil Application No. 191 of 2013 (unreported). The learned counsel argued further that, once an application for leave is refused by the High Court, the applicant may file a fresh application with the Court, for section 47 (1) of the Act does not deny this Court jurisdiction to entertain either the application for leave to appeal or extension of time to apply for leave. He made reference to Rule 45 (b) of the Rules to that effect.

Finally, Mr. Manyama submitted that this Court is vested with jurisdiction to entertain an application for extension of time to apply for leave upon the applicant showing good cause for the delay as required under Rule 10 of the Rules. With these arguments, Mr. Manyama urged the Court to reverse the impugned order because the single Justice misinterpreted section 47 (1) of the Act.

In his reply, both in the written submission and oral argument Mr. Lutema contended that this application is misconceived. He argued that section 5 (1) (c) of the Appellate Jurisdiction Act [CAP 141 R.E. 2002] (the AJA) governs appeals to the Court from decrees, orders, judgment decision or finding of the High Court with leave of the High Court or of the Court of Appeal. Thus, the two courts have concurrent jurisdiction as regards application for leave to appeal by following the procedure under Rule 47 of the Rules.

Mr. Lutema went on to argue that since the High Court of Tanzania issued the decision in Land Case No. 12 of 2005 in its original jurisdiction, in the absence of section 47 (1) of the Act regulating appeals from the land division of the High Court to the Court in a land matter, section 5 (1) (a) of the AJA would have been applicable and not section 5 (1) (c) which gives concurrent jurisdiction to the two courts in respect of applications for leave to appeal. However, he contended that section 47 (1) of the Act gives exclusive jurisdiction to the High Court, on a land matter to entertain applications for leave to appeal to the Court. The learned counsel pointed out that in the circumstances, the issue of a second bite by the Court does not arise. To bolster the foregoing contention, Mr. Lutema referred us to

the decision of the Court involving the same parties in **Civil Application No. 42 of 2015** (unreported).

He argued that after the refusal by the High Court for the extension of time to apply for leave to appeal, the applicant ought to have appealed against that decision.

Mr. Lutema further submitted that even though Rule 10 of the Rules empowers the Court to extend time for doing any act authorized or required by the Rules, the Court can only exercise original jurisdiction in matters in respect of which it has concurrent jurisdiction with the High Court as provided under Rule 47 of the Rules. However, this jurisdiction cannot be exercised where only the High Court has exclusive mandate to do so like in the present case, the learned counsel argued. Finally, Mr. Lutema argued that in any event, the applicant having conceded to the incompetence of the application before the single Justice, challenging the same order amounted to an abuse of the court process. The learned counsel ultimately urged us to find that the application lacks merit and thus it should be dismissed with costs.

We have considered the order of the single Justice, the ground for this application and the submissions for and against the application. We find it apposite to start with the provisions of the law relating appeals to the Court of Appeal requiring leave. Section 5 (1) (c) of the AJA 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-*
>
> *(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."*

According to this provision, the High Court and the Court of Appeal have concurrent jurisdiction to entertain applications for leave to appeal to the Court of Appeal. The modality regarding such applications is governed by Rule 47 of the Rules which provides in part that: -

> *"Whenever application may be 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....."*

Although the High Court and the Court of Appeal have concurrent jurisdiction as shown above the same is subject to the provisions of *any other written law for the time being in force.* For the purpose of the issue under scrutiny *such other law* at the time the applicant was supposed to file the application for leave is section 47 (1) of the Act (before its amendment vide the Written Laws (Miscellaneous Amendments) (No. 3) Act No. 8 of 2018) which provided that: -

> *"Any person who is aggrieved by the decision of the High Court in the exercise of its original, revisional or appellate jurisdiction, may* ***with leave from the High Court*** *appeal to the Court of Appeal in accordance with the Appellate Jurisdiction Act, 1979."* (Emphasis supplied).

This provision of the law clearly shows that in land matters, it was the High Court which had exclusive jurisdiction to entertain an application for leave to appeal to the Court Appeal. Therefore, that being the legal position, the question of the second bite could not arise when the application for extension of time to apply for leave was refused by the High Court. There are many pronouncements of this Court in this matter. Some of them are: - **Felista John Mwenda v. Elizabeth Haron Lyimo,** MSH

Civil Application No. 9 of 2013, **Nuru Omary Ligalwike v. Kipwele Ndunguru,** (supra) **Tumsifu Anasi Maresi v. Luhende Jumanne Selemani and Another,** TBR Civil Application No. 184/11 of 2017 and **Yusufu Juma Risasi v. Anderson Julius Bicha,** Civil Application No. 179/11 of 2017 (all unreported). For instance, in **Felista John Mwenda** (supra), it was said thus: -

> *"The Court of Appeal, in terms of the clear provisions of section 47 (1) of Cap 216 lacks jurisdiction to entertain the application."*

The foregoing position was also expressed in Civil Application No. 42 of 2015 involving the present parties where Mr. Manyama was the counsel for the applicant. The Court said thus: -

> *"The applicant should not have come to this Court to seek leave by way of section 5 (1) (c) of AJA* ***because section 47 (1) of the Land Courts Act exclusively vests that jurisdiction on the High Court."*** (Emphasis provided).

Now, if the Court of Appeal lacks jurisdiction to entertain applications for leave to appeal in land matters, it is clear that Rule 45 (b) of the Rules

which sets time limit to apply for leave in both courts cannot be invoked as argued by Mr. Manyama.

Having pondered over the counsel's arguments, we are in agreement with Mr. Lutema that, the rightful course the applicant should have followed after the refusal by the High Court to extend time to apply for leave, was to appeal against that order. This is actually what was said in **Tumsifu Anasi Maresi** and **Yusufu Juma Risasi** (supra). In the latter case it was said thus: -

> *"In view of what we have stated herein above, we do not find any sound reasons to depart from our earlier decisions wherein we have emphasized the remedy for refusal of leave under section 47 (1) of LDCA, is to appeal to the Court."*

In our considered view, the case of **Pius Kuhangaika and Two Others** (supra) cited by Mr. Manyama is distinguishable because it dealt with extension of time to file a notice of appeal from Civil Revision of the High Court, it did not concern a land matter and as such, there was no discussion regarding section 47 (1) of the Act which is the subject matter in the present case.

For what we have shown herein, we are of the settled mind that the single Justice did not at all misinterpret section 47 (1) of the Act. As we indicated earlier, it is surprising that Mr. Manyama who had conceded before the single Justice that the application was incompetent, turned around and filed this application. As correctly submitted by Mr. Lutema, this amounts to abuse of the court process and it is a waste of the Court's precious time. This conduct is highly deplorable to say the least.

All said and done, we find the application devoid of merit and we hereby dismiss it with costs.

DATED at **DAR ES SALAAM** this 12th day of July, 2019.

S. E. A. MUGASHA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

I certify that this is a true copy of the Original.

THE COURT OF APPEAL OF TANZANIA

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL