

**IN THE HIGH COURT OF TANZANIA
(MWANZA DISTRICT REGISTRY)
AT MWANZA**

MISC. LAND APPLICATION NO. 152 OF 2018

YUSUPH BAKARI NYAHORI }1ST APPLICANT
(An administrator of the estate of }
Mwanaasha Yusuph Matienyi }

FATUMA BAKARI 2ND APPLICANT

VERSUS

COMMISSIONER FOR LANDS HOUSING)
AND HUMAN SETTLEMENT DEVELOPMENT) 1ST RESPONDENT
THE HONOURABLE ATTORNEY GENERAL 2ND RESPONDENT
MUSOMA MUNICIPAL DIRECTOR 3RD RESPONDENT
DONALD J. KAMORI 4TH RESPONDENT
HILARY PATRICE OTAIGO 5TH RESPONDENT
SAIDI ABDALLAH MATAMBO 6TH RESPONDENT

Date of the last Order: 08/04/2020

Date of Ruling: 21/04/2020

RULING

ISMAIL, J.

This ruling is in respect of the preliminary objection raised by the counsel for the 1st and 2nd respondents, contending that an application that is pending in this Court is time barred.

The subject of the objection is an application filed in this Court on 7th August, 2018. Its institution in Court was pursuant to an order of the Court, delivered vide a ruling dated 26th June, 2018. The ruling acceded to the applicant's request for enlargement of time to set aside a dismissal order, issued by the Court (Hon. Matupa, J) on 22nd June, 2016, in respect of Land Case No. 9 of 2018. The order for extension of time gave the applicant 14 days within which to institute the application for setting aside. The extension ran from the date the ruling was delivered. The contention by the 1st and 2nd respondents is that the application was filed out of the enlarged period.

The contest on the matter pitted Mr. Lameck Merumba, learned State Attorney, who represented the 1st and 2nd respondents, against Mr. Emmanuel Sayi, learned counsel for the applicants. In his laconic submission, Mr. Merumba contended that the current application stems from Misc. Land Application No. 254 of

2016 whose decision is referred to in the pending application. He argued that the Court (Hon. Gwae, J) ordered that the application be filed within 14 days from 26th June, 2018, the date on which the ruling was delivered. He submitted that, in disregard of the order of the Court, the application was filed on 7th August, 2018, far beyond the fourteen days granted by the Court. By his reckoning, the application ought to have been filed not later than 10th of July, 2018. He prayed that the application be dismissed for being time barred.

Mr. Sayi poured some cold water on the respondent's contention. Imputing an anomaly on the date the decision was delivered, he was of the view that the decision was delivered on 27th July, 2018, as seen at the top of the ruling and not on 26th June, 2018, as indicated at the foot of the ruling. He contended that the question of when the ruling was delivered is one of evidence and, until such time this is confirmed through review of the original file, such question will remain as an unascertained fact. The learned counsel invoked the holding in **Masangang'wanda v. Chief Japhet Wanzagi and Others** [2006] TLR 351 that made reference to the case of **Mukisa Biscuit Manufacturing Co. Ltd. v. West End Distributors** [1969] EA 696. The latter held that a preliminary objection has to be

on a pure point of law and not on an unascertained facts. He urged this Court to retrieve the record and ascertain this fact. He maintained that the application was filed timeously. In the alternative, Mr. Sayi sought a solace from Amendment Act No. 3 of 2018 which added **sections 3A** and **3B** to the Civil Procedure Code (CPC), Cap. 33 [R.E. 33]. These provisions introduced the principle of overriding objective which are intended to avoid technicalities in the conduct of proceedings. He maintained his urge that the Court should scrutinize the record and hold that the application is timeous.

Mr. Merumba, maintained in his rejoinder that the ruling was delivered on 26th June, 2018. He argued that this is the day on which the ruling was signed and sealed, meaning that this is the day the same was delivered. On the alleged anomaly on the dates, Mr. Merumba played down the contention that this was a typo, holding the view that if that was the case, the applicant had the option of applying **section 93** of the CPC, and move rectification of clerical or arithmetic errors or mistakes but he spurned it. He was of the view that the principle of overriding objective is inapplicable in such circumstances. He urged the Court to dismiss the application.

From these opposing submissions, the issue which calls for resolution is whether the application that is pending in this Court is time barred.

Unlike a majority of cases whose pursuit is curtailed on account of failure to conform to statutory prescriptions, in this case, the respondents' blemished conduct is predicated on the order of the Court whose date of delivery is a subject of hot disputation. The applicant's counsel relies on the date printed at the top of the ruling, while his counterpart holds the view that it is the bottom date on which the Judge's signature is appended that holds the sway.

It should be clearly noted, that a decision given by the Court embodies legitimacy if the same is duly signed by the official who composed and pronounced it, and it is dated at the foot of it. The date below the signature serves to show when exactly such decision was ready for delivery. It is the date on which the decision was delivered. While significance of the bottom date is as explained shortly, the date at the top plays a different role. It helps the reader to realize that the decision was delivered within the period of 90 days set out for delivery of decisions. It is a testimony of compliance

with the 90-day rule and not as a proof of when the said decision was delivered. When these two dates are at variance with one another, the question of what is the right date will be answered by looking at the date printed at the bottom of the decision and placed beside the seal of the court. In this respect, therefore, I agree with Mr. Merumba that the date which should be considered for ascertaining compliance with time limit for filing the application is the one found below the Honourable Judge's signature, which is 27th June, 2018. This is the date on which 14 days granted for filing the application began to run.

Having ascertained this important factor, the next question is whether the application was filed within the 14 days extended by the Court. My unflustered answer to this question is in the negative. The application was filed on 7th August, 2018, while the ruling was signed and delivered on 26th June, 2018, more than 40 days from the date of the order and 26 days outside the time prescription of 14 days granted by the Court on 26th June, 2018.

The applicant's counsel has raised an issue on the purity or otherwise of the raised objection and he has rightly cited the **Mukisa**

Biscuit case (supra) as the basis for his contention. He is of the view that the contention is premised on an unascertained fact which would require evidence to have it ascertained. It is indeed a trite position that objections which are not on a pure point of law are not accepted as preliminary objections worth the name. This position was accentuated by the Court of Appeal (Nsekela, J.A.) in **Sugar Board of Tanzania v. 21st Century Food and Packaging & Two Others**, Civil Application No. 20 of 2007 (unreported). It held:

"A preliminary objection is in the nature of legal objection not based on the merits or facts of the case but on the stated legal procedural or technical grounds. Such an objection must be argued without reference to evidence. The fundamental requirement is that any alleged irregular defect or default must be apparent on the face of the notice of motion so that the objector does not condescend to affidavits or other documents accompanying the motion to support the objection."

Following in the footsteps of Sugar Board Tanzania (supra) is the decision of this Court (Hon. Mruma, J) in **Anthony Chamungwana v. Vanessa Dorey (a.k.a. Vanessa Morgan)**, Misc. Commercial Cause No. 67 of 2009 (unreported), wherein the following finding was made:

*"As regards the 1st objection, Mr. Mtafya stated that the petitioner cannot rely on the provisions of section 233 (1), because that section requires the petitioner to be a member of the company while in the present case the petitioner's membership in the company is in dispute. On the other hand the petitioner claims that he is a member of the Company and he paid up for all of his shares. From these rivalry arguments, **it goes without saying that the 1st preliminary objection cannot be argued without reference be made to evidence as to the status of the petitioner in the company.** Therefore, this cannot be disposed of as a pure point of law. The issue can conveniently be decided in the normal manner in the course of arguing on and proving the substantive petition before this court."*

While this is the position, legally, I am not convinced that the objection raised by the counsel for the 1st and 2nd respondents is not a pure point of law which would require condescending any record to be able to argue it. It is a point touching on the compliance with the order of the Court. I hold the view that both of the authorities cited by the counsel for the applicant do not add anything that justifies his view on the matter. I choose to disassociate myself with it and hold that the contention is misconceived.

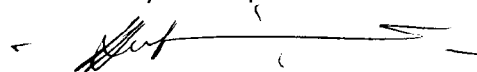
On the use of overriding objective, my considered view is that the principle of overriding objective would not and does not have an application on fundamental issues of law such as timeliness or

otherwise of the actions that are preferred in courts. It is not a mechanism of enlarging time or saving matters which are preferred out of time such as this one. It is simply a way of doing away with technicalities that stifle realization of substantial justice. It would be a fundamental failure of substantial justice if the Court were to allow matters instituted without any regard to time prescription. Acceding to the counsel's prayer would be an act of perilously stretching the application of the principle way too far. This would amount to misusing the principle.

In the end, I feel inclined to sustain the objection and hold that, since the application was filed after the expiry of the time extended therefor, the same is untenable. Inspired by **Yusuf Same and Another v. Hadija Yusuf** [1996] TLR 347, I dismiss it with costs.

It is so ordered.

DATED at **MWANZA** this 22nd day of April, 2020.


M.K. ISMAIL
JUDGE

Date: 22/04/2020

Coram: Hon. F. H. Mahimbali, DR

Appellants: 1st

2nd

Respondents: 1st

2nd

Absent

3rd

4th

5th

6th

B/C: Leonard

Order:

Ruling delivered.


F. H. Mahimbali
DEPUTY REGISTRAR

At Mwanza

22nd April, 2020