

**IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA**

(CORAM: JUMA, Ag. C.J., MUGASHA, J.A. And MWANGESI, J.A.)

CIVIL APPLICATION NO 167 OF 2010

**ISRAEL SOLOMON KIVUYO.....APPLICANT
VERSUS**

1. WAYANI LANGOI

2. NAISHOOKI WAYANI..... RESPONDENTS

**(Application for Review from the Judgment of the Court of Appeal of Tanzania
at Arusha)**

(Mustafa, J.A., Makame, J, A, and Kisanga, J.A.)

dated the 24th day of December, 1988

in

Civil Appeal No. 16 of 1988

RULING OF THE COURT

15th & 22nd May, 2017

JUMA, Ag. C.J.:

The applicant, Israel Solomon Kivuyo, filed this application on 21st November, 2007 under Rule 40 (1) and (2) of the Court of Appeal Rules, 1979 (the Old Rules). He is moving the Court to review its Judgment (Mustafa, J.A., Makame, J.A., and Kisanga, J.A.) which was delivered 19 years earlier on 24th December, 1988.

The background facts to this application traces back to 1982 when the applicant instituted a suit—Civil Case No. 36 of 1982 in the High Court of Tanzania at Arusha. His suit staked a claim over business premises (block of three shops) situated along Azimio Street in Arusha, comprising Certificate of Occupancy No. 055017/11. The applicant claimed that he bought the premises from the WAYANI LANGOI (the 1st Respondent herein) and NAISHOOKI WAYANI (the 2nd Respondent herein). The applicant won the suit in the High Court when the trial Judge (Mwakibete, J.) ordered the respondents to transfer the ownership of the property back to the applicant. The respondents were also ordered to pay Shs. 10,000/= as compensation to the applicant.

The two Respondents were aggrieved with the judgment of the trial court and lodged an appeal, Civil Appeal No. 16 of 1988, to this Court. In its judgment subject of instant motion dated 24 December 1988, the Court allowed the appeal when it found out that the judgment of the High Court was wholly based on an agreement which was inoperative at law. The Court in addition ordered the 1st Respondent to refund to the Applicant the purchase price plus the money that was spent on the property, which amounted to Tshs. 232,240.00.

In 1993, which was five years after the decision subject of instant motion, the applicant returned back to this Court with an application before a Single Justice (Kisanga, J.A.) in Civil Application No. 35 of 1993. He prayed for an extension of time to move the Court to effect a correction of what the applicant described as errors in that decision. The requested extension was denied.

Still aggrieved, the applicant lodged Civil Reference No. 1 of 1994 wherein he asked three Justices of the Court (Makame, JA, Mnzavas, JA and Mfalila, JA) to determine whether Kisanga, JA was right to dismiss his application for extension of time. While finding no reason to differ from the decision of Kisanga, JA, the three Justices determined that Rule 40 of the Court of Appeal Rules, 1979 governing correction of errors, was not helpful to the applicant because it would not lead to the overturn of the judgment of the decision of the Court subject of this motion. They observed:

"...even if the extension of time was granted it is improbable that the applicant would succeed in his intended application if he were to proceed by way of Rule 40 as he indicated he would, because what he contends are not mere arithmetical or clerical errors...."

Almost three months later on 24 March, 1995, the Court made its decision in Civil Application No. 15 of 1993 which the applicant filed under Rule 40 of the Old Rules. He unsuccessfully prayed for the correction of errors in the judgment of the Court in Civil Appeal No. 16 of 1988. The Court noted:

"...We agree with Mr. Lundu that the nature of this application does not fall under Rule 40, ... We have considered treating this application as one for review as the Court did in Moses Mwakibete V. The Attorney General and the Principal Secretary (Establishment). However, we are of the decided view that that venue will not assist the applicant..."

The Court ventured to advice the applicant on what he should do:

"...We can only reiterate the advice given to the applicant by this Court in Civil Reference No. 1 of 1994 that he should pursue the matter of falsified documents with appropriate authorities. He has told us that the matter is with the police. We encourage him to pursue it there."

When this application came up for hearing before us on 15 May 2017, only the applicant was present. Waiyani Langoi, the 1st Respondent was

reported deceased, while Naishooki Wayani the 2nd Respondent was indisposed.

Before we could hear the applicant on his motion seeking a review, we *suo motu* raised a preliminary issue of law, whether, when the applicant filed this motion on 21st November, 2007, his application was within the prescribed limitation period for a review.

In response to the preliminary issue of law, the applicant who is a lay person with hearing handicap; passionately recalled how the justice system had wronged him since 1988. He did not seem to worry about a nineteen years delay and submitted that since Rule 40 of the Old Rules does not prescribe any limitation period, this Court should still hear his application for review of its judgment of 24 December 1988.

There is no doubt in our minds that this motion for a review is time barred, and no application for extension of time has been applied for and granted to enable the applicant to apply for an order of review. Although the Notice of Motion was supposedly brought under Rule 40 (1) and (2) of the Old Rules, the body of the motion shows the applicant is indeed

applying for a review of the Judgment of the Court in Civil Appeal No. 16 of 1988. The Notice of Motion states:

"NOTICE OF MOTION

(Made under Rule 40 (1) and (2) of the Court of Appeal Rules of 1979 and any other enabling Provision of law)

TAKE NOTICE that on theday of 2007 at O'clock in the morning or soon thereafter as he can be heard the above named applicant will move a judge of the court for orders that;

(1) This honourable Court be pleased to review its own decision made vide Civil Appeal No. 16 of 1988 on 24th day of Decesser 1988.

(2) Cost of this applicant be provided for

(3) Any other order(s) that the honourable judge/court may deem fit."[Underlined added].

We propose to address the appropriateness of the decision of the applicant to cite Rule 40 (1) and (2) of the Old Rules in an application for review. Records show that while considering Civil Application No. 15 of

1993 this Court had on 24 March 1995 informed the applicant that there were no clerical or arithmetical mistakes in the judgment of the Court when it sat in Civil Appeal No. 16 of 1988 which can be of any benefit to the applicant. All the same, the applicant still in this instant application cited the same Rule 40 (1) and (2) of the Old Rules to pray for a review. Rule 40 of the Old Rules which makes provisions for correction of errors state:

40 (1). - A clerical or arithmetical mistake in any judgement of the Court or any error arising in it from an accidental slip or omission may at any time, whether before or after the judgement has been embodied in an order, be corrected by the Court, either of its own motion or on the application of any interested person so as to give effect to what the intention of the Court was when judgement was given.

(2) An order of the Court may at any time be corrected by the Court, either of its own motion or on the application of any interested person if it does not correspond with the judgement it purports to embody or, where the judgement has been corrected under sub-rule (1), with the judgement as corrected....

Upon our reading the body of the Notice of Motion, together with its supporting affidavit, we take it that the applicant is in fact applying for a

review of the Civil Appeal No. 16 of 1988 which was handed down nineteen (19) years ago. As his main ground of review, he is contending that during the hearing of the Civil Appeal No. 16 of 1988, the learned advocates for the two respondents had presented in Court what the applicant describe as “fake/false documents as evidence” which misled the Court.

The real issue here is whether the applicant filed this motion for review within the prescribed time. First of all, we do not share his proposition that although Rule 40 of the Old Rules does not prescribe any limitation period for correction of clerical or arithmetical mistakes in any judgement of the Court, this provision can have the effect of extending the limitation period that has been prescribed for applications for a review. Secondly, we think the words **“lodged out of time—Rule 16 (1) of CAT Rules, 1979”** which appear on the face of the Notice of Motion suggests that when the applicant filed his application on 21 November, 2007, he was duly informed by the registry officers that his application was filed out of time. These words are in line with Rule 16 of the Old Rules directs when documents are filed out of time:

“16.-(1) The Registrar or the Registrar of the High Court, as the case may be, shall not refuse to accept any document on

*the ground that it is lodged out of time, but **shall mark the document "Lodged Out of Time" and inform the person lodging it of that fact.** [Emphasis added].*

(2) When a document is accepted out of time by the Registrar of the High Court, he shall inform the Registrar of that fact."

We think, from the date he filed this motion on 21 November, 2007, the applicant knew and ought to have known that his application was already well out of time. In **Charles Barnabas vs. R.**, Criminal Application No. 13 of 2009 (unreported) the Court had an occasion to discuss the limitation period governing applications for review under the Old Rules, by stating that:

*"...Admittedly the application was filed before the above Rules [Tanzania Court of Appeal Rules, 2009] came into effect. Admittedly also, under the revoked Tanzania Court of Appeal Rules, 1979 there was no provision for review. Hitherto, time limitation and grounds for review were set by the Court through case law. In this regard, **the Court set a period of sixty days for applications for review**—see, for instance, **Benson Kibaso Nyakonda***

*@ Olembe Patroba Apiyo vs. R., Criminal Application
No. 6 of 1999 (unreported).*" [Emphasis added].

In the upshot of this application having been admittedly lodged out of time, we are inclined to strike it out for being incompetent before the Court. We shall make no order as to costs. It is so ordered.

DATED at ARUSHA this 18th day of May, 2017.

I. H. JUMA
ACTING CHIEF JUSTICE

S. E. A. MUGASHA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL



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


E. Y. MKWIZU
DEPUTY REGISTRAR