

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

CIVIL APPLICATION NO. 339/02 OF 2017

**ISAWAKWE IDUWANDUMI NG'UNDA.....APPLICANT
VERSUS**

**JENIFER DANISTER.....1ST RESPONDENT
DANISTER ISAKWASE.....2ND RESPONDENT**

**(Appeal from the decision of the High Court of Tanzania
at Moshi)**

(Moshi,J.)

**dated 19th day of June , 2015
in
Matrimonial Cause No. 1 of 2014**

RULING

28th September & 30th November, 2017

LILA, J.A.:

By way of a notice of motion filed on 2/8/2017, the applicant seeks to move the Court under Rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules) to extend time within which to apply for revision of the proceedings, judgment, decree/order of the High Court (Moshi, J.) dated 19th June, 2014 in Matrimonial Cause Number 1 of 2014. The application is supported by an affidavit sworn by Isawakwe Iduwandumi Ng'unda, the applicant.

In resisting the application, apart from filing an affidavit in reply, the 1st Respondent also filed a two point notice of preliminary objection. The points of objection read thus:-

“

- 1. That the applicant has no locus standi, is precluded from institution the present application.*
- 2. That notice of motion is supported by incurable defective affidavit for lack the signature of Deputy Registrar as required by law.*
- 3. The application in this Court is premature as the proper available remedy was not sought.”*

Since a deep rooted practice is that hearing of the points of preliminary objection takes precedent of the main matter, I first heard the parties on the raised legal issues.

At the hearing were Mr. Innocent Mwanga and John Shirima, learned counsel who appeared for the applicant and 1st Respondent,

respectively. The 2nd respondent appeared in person and was unrepresented.

Mr. Shirima opted to submit on first and third points of objection jointly. He contended that the applicant was not a party in Matrimonial Cause No. 1 of 2014 as in that cause the parties were Jenifer Danister (then petitioner) and the 2nd respondent (then respondent). For this reason, he said, the applicant has no locus to make the present application. He further said, Rule 65(4) of the Rules allows only a party to the case to institute the application for revision. He contended that even if the application is granted the applicant will still get stuck on the way on the reason that Rule 65(4) of the Rules bars any other person not a party to the proceedings in the lower court from instituting an application for revision. He said the applicant had other avenues to seek remedy as he could file objection proceedings under Rule 57(2) of Order XXI of the Civil Procedure Code Act Cap 33 R.E. 2002 (the CPC) or file a suit under Rule 76 of Order XXI of the CPC. As the applicant did not exhaust

such avenues, he prayed the objection be upheld and the application be struck out.

On the second point of objection, Mr. Shirima contended that the affidavit in support of the notice of motion is defective for want of the Deputy Registrar's signature and seal as required under Rule 23 of the Rules. He prayed the application be struck out.

The 2nd respondent had nothing to say in respect of the legal matters raised, he being a layman.

Mr. Mwanga resisted the points of objection stating that Rule 65(1) and (4) of the Rules allows any person whose interests are affected by the High Court decision, though not a party, to institute revisional proceedings. He said, if the word party is restrictively interpreted to mean only a party to the proceedings then that will lead to an absurdity. He was, however, quick to state that the issue of *locus standi* is a substantive issue which is to be determined in the application for revision. For that reason, he said, that issue

cannot be determined in this application which concern extension of time to file revision. He concluded by stating that Rule 65 of the Rules is inapplicable herein but will come into play after the application for revision is instituted.

Regarding filing of objection proceedings or a suit as the alternative avenues available to the applicant beforehand, Mr. Mwanga argued that the property subject of attachment was not subject of the High Court order hence the applicant could not file objection proceedings or a suit.

In respect of the 2nd point of objection, Mr. Mwanga contended that it was true that the Deputy Registrar did not sign the affidavit but he said Rule 23 of the Rules does not apply in the present case. Instead, he said, Rule 18 of the Rules required signing and endorsement by Registrar of documents filed in Court. He accordingly said, the defect is curable as it does not affect the affidavit filed it not being part of the affidavit. He, in supporting his arguments, referred the Court to the Court's decision in **21st**

Century Food and Packaging Ltd Vs Tanzania Sugar Producers Association and 8 others, Civil Appeal No. 91 of 2013 pages 7 and 9 where it was held that if endorsement is not done then it is the Registrar who is to bear the blame and the objection was overruled. Also relying on Rule 4(1) and 2 (b) of the Rules, Mr. Mwanga argued that the Court can, for the interest of justice, give direction where the other party is not prejudiced. To bolster his argument he referred to the case of **Samson Ngwalida Vs Commissioner General**, Civil Appeal No. 86 of 2008. He concluded by urging the Court to dismiss all the points of objection and proceed to hear the application on merit and the applicant be paid costs.

In rejoinder, Mr. Shirima attacked the cited case of **21st Century Food and Packaging Ltd Vs Tanzania Sugar Producers Association and 8 Others** (supra) as concerning filing of notice of appeal hence irrelevant in the present matter. Regarding the case of **Samson Ngwalida Vs Commissioner General** (supra) he said, the objection was dismissed for failure to cite Rule 107(1) of the Rules and Rule 21 of the Tax Revenue Appeals Tribunal Rules,

2001 hence irrelevant to the present issue of the Registrar's failure to sign an affidavit. He, otherwise, reiterated his earlier submissions.

I have dispassionately considered the respective submissions by counsel for the 1st respondent and the applicant. I would however wish to remind the parties that the present application is for extension of time within which to apply for revision. It is not an application for revision. The two applications are quite distinct and have different factors for consideration for their grant. In an application for revision the Court is moved to satisfy itself as to the correctness, legality or propriety of any finding, order or any decision of the High Court as opposed to the present application where the Court considers whether the applicant has showed good cause warranting the exercise of its discretion to extend time.

The power of the Court for granting extension of time is provided under Rule 10 of the Rules. That Rule states:-

***"The Court may, upon good cause shown,
extend the time limited by these Rules or by***

any decision of the High Court or tribunal, for the doing of any act authorized or required by these Rules, whether before or after the expiration of that time and whether before or after the doing of the act; and any reference in these Rules to any such time shall be construed as a reference to that time as so extended”(Emphasis added)

Given the above proposition of the law, the power of the Court to enlarge time is discretionary and for a party to succeed he must show good cause for the delay. The Court have clearly pronounced itself that in considering whether or not to grant such an application, the courts may take into consideration such factors as, the length of delay, the reason for the delay and the degree of prejudice that the respondent may suffer if the application is granted (**See Tanzania Revenue Authority Vs Tango Transport Co. Ltd, Tango Transport Co. Ltd Vs Tanzania Revenue Authority**, consolidated Civil Applications No. 4 of 2009 and 9 of 2008, **Unilever Tanzania Limited Vs Said Sudi and 26 Others**, Civil Application No. 88 of

2013 and **Rutagatina C.L Vs The Advocates Committee and Another**, Civil Application No. 98 of 2010 (All unreported). Another principle applicable in considering application for extension of time is that each day of delay must be accounted for (**See Wambele Mtumwa Shahame Vs Mohamed Hamis**, Civil Application No. 138 of 2016, **Bushfire Hassan Vs Latina Lucia Masaya**, Civil Application No. 3 of 2007 and **Mustafa Mohamed Raze Vs Mehboob Hassanali Versi**, Civil Application No. 1168 of 2014 (both unreported)).

The above established principles are matters the proof of which parties are expected to contest in applications of this nature. In determining applications of this nature the Court is availed with sketchy and scant facts. For this reasons, the Court cannot go beyond what is contained in the record and determine any dispute or controversy between the parties. Issues like whether the applicant was or was not a party to the cause or has no *locus standi*, the property subject of attachment was or was not subject of a High Court order in Matrimonial Cause No. 1 of 2014 are matters which

will be resolved during hearing and determination of an intended application for revision. It is then when the Court will be availed with the relevant lower Court records. Further, determining such issues at this stage will amount to determining the matters which are subject of the intended application for revision for which as a single justice I have no powers. That caution was spelt out by the Court in the case of **The Regional Manager- TANROADS Lindi vs DB Shapriya and Company Ltd**, Civil Application No. 29 of 2012 CAT (unreported) that :-

"...it is now settled that a Court hearing an application should refrain from considering substantive issues that are to be dealt with by the appellate Court. This is so in order to avoid making decisions on the substantive issue before the appeal itself is heard. Further to prevent a single judge of the Court from hearing an application by sitting or examining issues which are not his/her purviews?"

Although in the above matter it was the appeal which was to be filed, the principle, in my strong view, applies in the present case where an application for revision is to be filed upon grant of extension of time.

Guided by the above settled Court's decisions and the provisions of the law, I find myself in agreement with Mr. Mwanga that the matters raised in the 1st and 3rd points of objections are substantive matters to be determined in the application for revision. I accordingly dismiss them.

In respect of the 2nd point of objection that the notice of motion is supported by an incurably defective affidavit due to failure by the Deputy Registrar to sign it, it is uncontroverted that it is indeed true that it is not indicated by the Deputy Registrar at the foot of the affidavit, as to when (only the date) the affidavit was lodged. The relevant part of the applicant's affidavit under consideration is coached thus:-

"Lodged in Court at Dar es Salaam Main Registry this....day of July 2017

.....
Deputy Registrar "

This issue need not detain me. The Court, in **Director Public Prosecutions Vs Dodoli Kapufi and Another**, Criminal Application No. 11 of 2008 (unreported) after examining the meaning of an affidavit in Black's LAW DICTIONARY, 7th edition at page 58 and TAXMANN'S LAW Dictionary D.P Mittal at pg. 138, arrived at a conclusion that the essential ingredients of any valid affidavit are:-

"

- (i) *The statement or declaration of facts, etc by the deponent*
- (ii) *A verification clause*
- (iii) *A jurat, and*
- (iv) *The signatures of the deponent and the person who in law is authorized either to administer the oath or to accept the affirmation."*

In respect of the jurat, the Court went on to state:-

"In its brevity a jurat is a certification added to an affidavit or deposition stating when, where, and before what authority (whom) the affidavit was made. See Section 8 of the Notaries Public and Commissioner for Oaths Act, Cap 12 R.E 2002. Such authority usually a Notary Public and/or Commissioner for Oaths has to certify three matters, namely:-

- (i) that the person **signing** the document did so in his presence*
- (ii) that the **signer** appeared before him on the date and at the place indicated thereon, and*
- (iii) that he administered an oath or affirmation to the **signer**, who swore to or affirmed the contents of the document."*

Indeed, given the above elements which if complied with, makes an affidavit a valid one, it can conveniently be stated that there is no legal requirement that the Registrar or a Deputy Registrar should endorse by showing the date and time on an affidavit so as to make it valid. This being not a legal requirement, its omission is not fatal and does not render an affidavit defective. I have no doubts in

my mind that Rule 23 of the Rules is inapplicable in the present matter as it concerns summons, warrant, order, notice or other mandatory process of or document issued by the Court. An affidavit is not among such documents. For all purposes and intent, Mr. Shirima must have been referring to Rule 18 of the Rules. That too has nothing to do with the validity of an affidavit. Endorsement under that rule is intended to only show when (the date) and time when a document was filed for purposes of determining if such document was filed within the prescribed time. That is the duty of the Registrar for which the applicant cannot bear the blame in case of noncompliance as was held in **21st Century Food and Packaging Ltd** case (supra). Such endorsement together with the receipt indicating payment of filing fees are significant for determination of the date and time when any document is lodged. Further, as opposed to a memorandum of appeal which was a subject matter under discussion in the cited case which, under Rule 86(3) of the Tanzania Court of appeal Rules, 1979 (now Rule 93(3) of the Rules), was required to be in a specific format (form F in the

schedule) there is no similar requirement in respect of an affidavit.

The objection, for this reason, has no merit too.

For the foregoing reasons, the points of preliminary objection are dismissed with costs.

DATED at DAR ES SALAAM this 9th day of November, 2017

S.A. LILA
JUSTICE OF APPEAL

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



(A.H. Msumi)
DEPUTY REGISTRAR
COURT OF APPEAL