IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CIVIL REVISION NO. 66 OF 2005

TANZANIA CHAMBERS COMMERCE
INDUSTRIES AND AGROCULTURES ..... APPLICANT

VERSUS

LEVINA KATO ..... RESPONDENT

Date of last Order: 18/05/2007
Date of Ruling : 19/06/2008

RULING

MLAY, J.

This ruling is on preliminary objections raised by the advocate of the Respondent to an application for revision of the proceedings in Kinondoni District Court, Civil Case No. 180 of 2003. The application made under Section 44 (1) (b) of the Magistrates Courts Act, 1984 and Section 79 (1) (a) and (c) and 95 of the Civil Procedure Code, 1966 was filed on 13/10/2005 while the judgment and decree which is the subject of the proposed revision, was made on 5/1/2005.

Mr. Rutabingwa advocate for the respondent raised three preliminary objections, namely:

a) The application for revision is time barred and no application has been sought for extension of time.
b) The supporting affidavit has a defective jurat.
c) The application is supported by an affidavit sworn by the counsel instead of the applicant and contains matter in the role knowledge of the applicant.

With leave of this court Mr. Rutabingwa advocate for the respondent and Mr. Maira advocate for all applicant filed written submissions on the preliminary objections.

On the first ground, Mr. Rutabingwa submitted that under item 21 of the 1st Schedule to the Law of Limitation Act 1971, the application for revision is required to be filed within sixty days. He contended that in this application the judgment was entered in favour of the respondent on 14/12/2004 and delivered on 18/1/2005. He argued that from 18/1/2005 when the judgment was delivered to 13/10/2005 when the application for revision was filed, it is more than 180 days. He submitted that the application was made beyond the prescribed period and it should be dismissed.

On the second ground Mr. ***Rutabingwa argued that the jurat of the affidavit which states "Solemnly sworn by the said MOSES MAIRA at Dar es Salaam this 13th day of October 2005",*** is incurably defective because it is the settled practice that the jurat should indicate whether a deponent is known to the Commissioner for oaths.

Mr. Rutabingwa relied on the decision of Kalegeya, J in TANZANIA POSTAL BANK VS SHANI OMARY Civil Application No. 10 of 2005 (unreported).

On the last ground Mr. Rutabingwa submitted that the applicants counsel swore the affidavit on matters which are in the sole knowledge of the applicant. He argued that all the facts contained in the affidavit are based on information which is not within the independence knowledge of the said counsel. He contended further that there was no reasons for the counsel to swear the affidavit while his client could have taken the affidavit. He refered to the case of CORDURA LTD OYSTERBAY HOTEL AND JUBILEE INSURANCLE COMPANY OF TANZANIA LTD, Misc. Case No. 21 of 2002 (unreported) where Nsekela, J (ashed was, stated;

> *"I agree with Mr. Kesaria that as a matter of prudence and practice an advocate should not swear/affirm an*

affidavit an behalf of this / her client if the latter is available".

He also referred to and quoted from the decision of the Court of Appeal of Kenya in DAVID KINYANJUI and 2 OTHERS VS MECHACK OMARI MANYORO in which Shah JA stated:

" I would want to sound warning to Counsel not to attempt to give evidence in future unless it is absolutely necessary".

Mr. Rutabingwa submitted that there is no way one can say that it was necessary for Mr. Maira to swear the affidavit instead of Mr. Marian Kalenye. He also contended that the case was being handled first by Mr. Magesa advocate and Mr. Maira came in for the purpose of this application, in which case all the facts were strange to Mr. Maira.

For the above reasons he prayed that the application be dismissed with costs.

In reply to the 1st point of objection, Mr.Maira conceded that the exparte judgment was given on 18/1/2005 but he argued that it was not delivered in the presence of the applicant. He contended that as he has stated in paragraph 3 of his affidavit, he rushed to the District Court and conducted a

search and it took up to 7/10/2005 to photocopy the judgment and decree. He therefore argued that Under section 19 (2) of the Law of Limitation Act, the period of limitation Under item 21 of the 1st Schedule is deemed to run from 7/10/2005. Alternatively, he submitted that the time should not start to run until the day the applicant discovered the concealment, which was fraudulent.

On the second point which challenges the affidavit sworn by an advocate, Mr. Maira contended that the application was filed under a certificate of urgency and "***the counsel was in a hurry to have the Chamber application and its supporting affidavit filed in order to prevent the payment of the money to the Respondent***". He further argued that "***prudence and common sence dictated that the counsel who had carried out the research and obtained all the information from the court record".***

On the question whether or not the Commissioner for Oaths knows the deponent, or the deponent was identified to him by some other person, Mr. Maira argued that it "***cannot go to the root of the matter..... In the circumstances of this case***". In essence Mr. Maira submitted that he is a Senior Member of the Bar being No. 100 out of 700 in the Roll of Advocates and in addition, his Chambers are in Suite No. 5

while Mr. Lugailas Chambers (The Commissioner for Oaths) is in suit No.6 on the same floor of Vijana Building.

Still on the issue of the advocates affidavit, Mr. Maira made a second argument that the affidavit is made under Order 43 Rule 3 of the Civil Procedure Code and for that reason, it is different from an affidavit made under Order 19 of the Civil Procedure Code. He further contended that Section 43 of the Civil Procedure Code does not have an equivalent provision in the Civil Procedure Codes of Kenya, Uganda, Zanzibar and as the result, the decision in the DAVID KINYANJUIS (as cited by the Respondent's advocate), does not apply to this application.

In a rejoinder to the Applicants submissions, Mr. Rutabingwa submitted that in every case the time accrues from the very date of judgment not otherwise and the Applicants counsel cannot use the date the copies of judgment and decree were supplied to them. He further submitted that the Applicants counsel has not shown evidence that he filed an application or a letter applying for the copies in time and the court failed to supply the same in time. He cited the decision of the Court of Appeal of Tanzania in HALAIS PROCHEMIE VERSUS WELLA AG. (1966) TLR 269 where it was observed:

"Under the provisions of Section 3 read together with the First Schedule to the law of Limitation Act, 1971 (Act 10 of 1971) Specifically paragraph 21 of the First Schedule, the period within which an application like this are ought to have been instituted is 60 days.

By any standard, a 10 months delay is too late obviously this application is not properly before us and we are bound to strike it out with costs and we so order".

Mr. Rutabingwa argued that the present application does not differ from the HALAIS V WELLA'S case and that the applicants counsel should have filed an application for extension of time. On the third ground Mr. Rutabingwa submitted that the instructions to the applicants counsel were given on the 13th day of October 2005, the same day the affidavit was soon.

Mr. Rutabingwa therefore argued that the instructing Principal Officer of the applicant could have sworn the affidavit.

On the 2nd ground he argued that the particulars of paragraph 2,5,6,7 and 8 are textually matters in which the applicants are in a better position to know. On the seniority of the Applicants counsel in the Role of Advocates and proximity of his chamber to the Chambers of the Commissioner for Oaths Mr. Lugaila, Mr. Rutabingwa submitted that the court should not be presumed to know what happens in the advocates chambers. He quoted from Miscellaneous Civil Application No. 10/2005 (unreported) whom Kalegeya J stated:

> *"indeed it is next to impossible to even entertain an idea that all the 799 advocates in the country (as per Role of Advocates" of 15/6/2005 know each other".*

He further submitted that the fact that Mr. Maira's Chambers are near to Mr. Luigalas Chambers, cannot be a sufficient reason to waive the importance of the Commissioner for Oaths stating specifically that he knows the deponent or identified to him by some one known to him personally.

As for the argument that the affidavit in question was made Under Order 43 rather than under Order 19, Mr. Rutabingwa submitted that it is devoid of merit. He contended that Order 43 Rule 2 provides for the necessary documents to accompany

a Chamber summons but what should be contained in an affidavit is provided in Order 19 of the Civil Procedure Code.

The first objection is that the application for revision is time barred. The point has not been seriously contested by Mr. Maira. The exparte judgment sought to be revised in the present application, was delivered on 18th January 2005, while this application for revision was filed on 13/10/2005. The application for revision as therefore nearly ten (10) months late as it is not in dispute that the prescribed period for filing such an application is 60 days. Mr. Maira has however argued that in terms of Section 19 of the Law of Limitation Act, time should start to run when he obtained the copy of judgment and decree. With respect, in order for section 19 of the Law of Limitation Act to come into play, the applicant must have applied for the copies of judgment and decree before the sixty days had run out.

As Mr. Rutabingwa has pointed out, there is no evidence that Mr. Maira or the Applicant had made such an application and asked for the said documents before the expiry of the period for filing the application had expired. Infact Mr. Maira concedes that the applicant became aware of the judgment through his bankers and that Mr. Maira confirmed the position when he "***rushed***" to the court and ***"carried out a search".*** By this time the period of Limitation had already

run out. The fact that the applicant was not present when the judgment was handed down or was not otherwise aware, may be matters for consideration in an application for extension of time in which to file an application for revision. The fact cannot in itself be a ground for not counting the period during which the applicant was not aware of the decision, by applying the provisions of section 19 of the Law of Limitation Act.

The application having been filed out of time, it is improperly before this court and it is accordingly dismissed.

The application being out of time it is only of academic interest to consider the two remaining grounds of objection.

We would however observe that it is doubtful it the two remaining grounds would properly constitute a preliminary objection on a pure point of law which, if decided, would determine the application. The swearing of an affidavit by an advocate is a practice which is discouraged by this court, but it has not been dicided that such a practice renders the affidavit a nullity, as to make the Chamber Summons to lack a supporting affidavit as required by Order 43 Rule 2 of the Civil Procedure Act, Cap 33 RE 2002. Again whether or not certain matters in the affidavit were within the knowledge of the deponent, I think is a question which goes to the weight to be attached to the affidavit as evidence.

It is settled law that an affidavit is a substitute for oral evidence. We do not think that the affidavit is vitiated only by doubtful matters which may or may not be within the personal knowledge of the deponent. The same would in my view apply to the failure by the Commissioner for Oaths to indicate if the deponent was known to him or introduced to him by a person known to the Commissioner for Oaths.

The shortcomings would weaken the weight to be placed on the affidavit as evidence, but not vitiate it all together.

As stated above, it is not necessary to enquire into details of the two remaining objections as the application is in any case time barred.

As stated earlier and in the final analysis, this application being time barred is improperly before this court, and it is dismissed, with costs.

J. I. Mlay,

JUDGE,

Delivered in the presence of Mr. Msafiri Advocate also holding brief for Mr. Maira for the Applicant, this 19th dayf of June 2008.

J. I. Mlay,

JUDGE,

19/06/2008.

Words: 1,239.