IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM REGISTRY)

AT DAR ES SALAAM

CIVIL CASE No. 73 OF 2007

1. **EDWARD MSIKA.....1ST APPLICANT**
2. **IBRAHIM BAKARI.....2ND APPLICANT**

Versus;

1. **PC LEO.....1ST RESPONDENT**
2. **INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT**
3. **ATTORNEY GENERAL (AG).....3RD RESPONDENT**

RULING

23/05/2013 & 13/05/2014.

Utamwa, J.

This is a ruling on two different preliminary objections (POs). The first PO is against this application filed by the two applicants, **Edward Msika** and **Ibrahim Bakari.** The applicants moved this court by way of chamber application supported by affidavit seeking for the following orders;

i. That this Honourable court be pleased to extend time to set aside the dismissal order issued by Madam Massengi J, on the 19/11/2009 on the ground that the dismissal was obtained fraudulently.

ii. That if the above prayer is granted, let this Honourable Court set aside the above said dismissal order.

iii. That costs and incidental to this application abide results of this application.

iv. Any other orders this Honourable Court may deem fit to grant.

The application is preferred under s. 14 (1) of the Law of Limitation Act 1971 (Cap. 89 R. E. 2002) and Order VIIIA, rule 5 of the Civil Procedure Code, 1966 (Cap. 33, R. E.2002) and any other enabling provisions of the law.

This first PO was raised on 03/05/2012 by the second and third respondents in this application, the **Inspector General of Police** and the **Attorney General.** It is based on a single point of law that this application is time bared in view of paragraph 5 of part III of the schedule to Cap. 89. For this ground the two respondents urged this court to dismiss the application with costs.

The second PO was lodged on 30/05/2012 by the applicants against the joint counter affidavit filed by the second and third respondents. It is based on the sole ground that the *jurat* of attestation on the said counter affidavit is incurably defective as it does no state how the Commissioner for Oaths came to identify the deponent of the same; he wants this court to thus discard the counter affidavit. Each side of the POs countered the PO raised by the other side.

Following the agreement by the parties, this court directed that both POs be disposed of simultaneously and by way of written submissions, hence this ruling. It is my adjudicating plan therefore, to deal with these cross-POs in the following manner; I will first determine the first PO raised by the two respondents before I test the second PO raised by the applicants. In case the first PO will be overruled, I will proceed to test the second PO. But if the first PO will be upheld, that will mark the accomplishment of my task in this ruling. The rationale for this proposed schedule is this; in case the first PO is upheld, the legal effect will not permit me to discuss the second PO. On the other hand, if I test the second PO before examining the first one, the exercise of entertaining that second PO will be rendered superfluous and a mere academic toil in case the second PO will ultimately be

upheld. In other words, the legitimacy to inquire into the entire application, let alone the propriety of the impugned counter affidavit depends much on the outcome of the first PO. My above judicial discretion is fortified by the position of our law that, the remedy for a time barred matter is none other than dismissing it, see s. 3 of Cap. 89 and decisions in the cases of **Hezron Nyachiya v. Tanzania Union of Industrial Commercial Workers and another, Civil Appeal No. 79 of 2001** (CAT), **Tanzania Breweries Ltd v. Robert Chacha, High Court Civil Revision No. 34 of 1998, at Dar es salaam** (unreported) and **Stephen Mapunda v. Shirika la Usafiri Dar es salaam and another [1982] TLR. 258** (HC).

I now embark on testing the first PO raised by the two respondents. The issue before me here is whether or not the application is time barred. In her written submissions, **Ms. Lesulie** learned State Attorney for both the second and third respondents argued that, according to paragraph 5 of Part III of the schedule to Cap. 89 the time limitation in respect of an application for an order to set aside a decree under Cap. 33 is only 30 days. She also contended that in the matter at hand, the dismissal order was made on the 19th day of November, 2009 and thus 30 days (from the date of the order) expired on 18th December, 2009 without the applicant filing any application. The learned State Attorney submitted (apparently in the alternative) to the effect that, paragraph 21 of part III of the schedule to the same Cap. 89 provides that the time limitation for applications under Cap. 33 or other laws for which no period of limitation is provided by law is sixty days. To cement her point, the learned State Attorney cited the Court of Appeal of the United Republic of Tanzania (CAT) decision in the case of **Ali Vuai Ali v. the Wakf and Trust Property Commission (the administrator of the estate of Suwed Mzee Suwed), Civil Application No. 10 of 2008** which also set the limitation period of sixty days in respect of such applications in civil and criminal

proceedings. The sixty days expired on 18th December, 2010 without the applicants filing the application, she argued. She added that, the application in the matter at hand was filed on the 2nd August, 2011, hence out of time for one year and eight months.

In his replying written submissions in respect of this first PO, **Mr. Kitale** learned counsel for the applicants urged this court to dismiss the first PO with costs on the following grounds; that in her written submissions the learned State Attorney has consistently been arguing that the application is time "based" instead of arguing that it is time barred. This was thus not a mere slip of a pen (*lapsus languae*), hence the arguments do not support the PO. Mr. Kitale further contended that the learned State Attorney is inconsistent since in the notice of PO she based the PO on paragraph 5 of part III of the schedule to Cap. 89 while in the submissions she pegged it on paragraph 21 of part III of the schedule to the same Cap. 89. He also contended that the learned State Attorney did not specify the schedule to Cap. 89 under which the PO was based as if the statute has a single schedule, which is not the case since the Act has two schedules. The learned counsel for the applicants thus submitted that this omission is a violation against the law which requires an applicant to cite a specific rule under which his or her application is brought before the court, otherwise the same is struck out. He cited the case of **Mgaza Mhina vs. The Republic HC Criminal application No. 22 of 2009, at Dar es salaam** (unreported) to back up this particular stance of the law and wanted the first PO in the matter at hand to be struck out.

Moreover the learned counsel for the applicants put it that, the **Ali Vuai Ali** case cited by the two respondents (supra) should not be considered by this court because the same is unreported and no copy thereof was provided. He also argued that the case is distinguishable from the matter at hand because, in that previous

case an application was filed out of time while in the matter at hand the applicants seek for an extension of time to file the application to set aside the dismissal order out of time and for the actual order setting aside the dismissal order. He added that the two applications in the matter at hand are combined in one application since this is a permissible practice for serving costs and time according to the holding by the CAT in the case of **MIC Tanzania Limited and Minister for Labour and Youth Development and Attorney General, CAT Civil Appeal No. 103 of 2004.** He thus argued that the learned State Attorney misconceived the application at hand thinking that it was only for setting aside the dismissal order. He further submitted that arguments on the issue of whether or not there are good reasons for the delay can suitably be made during the hearing of the application and not at the time of arguing the PO.

In my view, the arguments by the learned counsel for the applicants are mainly rising what I may call "a preliminary objection to a preliminary objection". It is apparent that the learned counsel for the applicants urges this court to dismiss the first PO even before it considers the issue posed above. This is not a course permissible in law. After all, the fact that the submissions by the learned State Attorney stated that the application is time "based" instead of time "barred" is not a fatal slip for, it is well understood from the notice of Preliminary objection and her arguments that her complaint was that the application is filed out of time. Again, the fact that the learned State Attorney cited an additional law (in the submissions) which was not cited in the notice of PO is not fatal since the applicants were availed with ample time to reply to the submissions.

As to the failure by the learned State Attorney to specify the schedule of Cap. 89 under which the PO was based, I am of the view that, the law which the learned counsel referred to in respect of this point is related to failure to cite proper

provisions in respect of applications and not in respect of POs. Even if his argument was valid, my revisit to Cap. 89 shows that the statute has a single schedule with three parts. I thus discard this argument by Mr. Kitale learned counsel for the applicants. As well, even if the argument that the **Ali Vuai Ali case** (supra) is distinguishable and its copy was not provided is true, that alone will not make this court refrain from determining the issue posed above. The learned counsel for the applicants must remain alert that a point of time limitation must be considered by courts of law and consequences must follow, whether raised by the other part or not, this is the spirit embodied in the provisions of s. 3 (1) of Cap. 89, see also the **Stephen Mapunda case (supra)**. It follows thus that, as long as there is a complaint based on the legal point of time limitation this court must determine the above posed issue whether or not the point was properly raised by the two respondents.

As it is notable from the parties' arguments shown above, it is not disputed that the dismissal order was made on the 19th November, 2009 and this application was filed on the 2nd day of August, 2011 (about two years from the date of the order). The two respondents based their PO under paragraphs 5 and 21 of part III of the schedule to Cap.89. I will thus discuss these provisions as the basis of the PO. According to the anatomy of the application and as rightly argued by the counsel for the applicants, there are two major orders sought by the applicants in the present application; the first is for extension of time within which the applicant can file an application for setting aside the dismissal order, and the second is the actual order for setting aside the dismissal order. I find that the success of the second order depends much on the victory of the first order. In other words, the applicants have lodged two applications at a time, which said course is not vehemently disputed by the respondents and the applicants argue that it is

supported by the law, see the **MIC Tanzania Limited case** (supra). I also find that this procedure is not offensive as long as it gives the parties equal and ample opportunity to be heard. And it is more so considering the fact that the parties in this matter are legally represented.

For the above reasons, I will discuss the two orders one after another in testing the merits of the PO raised by the two respondents. In regard to the first order related to the extension of time, I am settled in mind that both paragraphs 5 and 21 of part III of the schedule to Cap.89 are inapplicable. Paragraph 5 relates to applications for orders to set aside a decree *ex parte* under Cap. 33. This is a forum for a defendant who intends to set aside a decree passed against him ex parte, which is not the case in the matter at hand. As to paragraph 21, it carters for applications under the Civil Procedure Code, the Magistrates' Courts Act or other written law for which no period of limitation is provided in Cap. 89 or any other written law. As well, this paragraph will not apply in respect of the first order (for extension of time) because time limitation in respect of applications for extension of time (to file appeals or applications) is expressly provided for under s. 14 (1) of Cap. 89. I quote these provisions for a readymade reference;

> "Notwithstanding the provisions of this Act, the court may, for any reasonable or sufficient cause, extend the period of limitation for the institution of an appeal or an application, other than an application for the execution of a decree, **and an application for such extension may be made either before or after the expiry of the period of limitation prescribed for such appeal or application.**" (bold emphasis is provided).

In my view therefore, the law allows a party to court proceedings to file an application for extension of time (within which to file an appeal or application) at any time before or after the expiry of the period of limitation prescribed for such appeal or application. In other words, the legislature did not intend to set a limitation of time in respect of applications for extension of time, otherwise the courts' discretion to extend time would have been made useless. What matters in applications of this nature is thus the reasons which the party gives to support his application for extension of time, which said reasons are suitably examined during the hearing of the application and not during the PO. In other terms, I mean that, had it been true that the law fixed a specific time for filing an applications for extension of time (for filing appeals or applications), there would have been a long queue of applications before justice is obtained where there is a delay to file an appeal or application and where there is a delay to file the application for extension of time so to do. There would have been for example, an application for extension of time within which to file another application for extension of time within which to file an appeal or application out of time. This would have cause delay, chaos and absurdity in our judicial practice.

I firmly believe that the English "Purposive Approach" rule of construing legal provisions favours my above demonstrated interpretation of the law. The rule is to the effect that, in interpreting statutes in all cases, courts should adopt such a construction as will promote the general legislative purpose underlying the provisions of the statute. It further states that, whenever an interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it, by reading words if necessary, so as to do what Parliament would have done had they had the situation in mind. The "*Purposive Approach*" rule was adopted into Tanzanian laws through the decision by the CAT in **Joseph Warioba v. Stephen Wassira and Another [1997] TLR 272 (CAT)** and has been followed in other decisions of the CAT such as in **Goodluck Kyando v. Republic, Criminal Appeal No; 118 of 2003, at Mbeya** (unreported).

Having observed as above, I determine the issue posed herein above negatively to the effect that, the application in respect of the first order (for extension of time) is not time barred. I am not thus obliged to test the second order related to the actual order for setting aside the dismissal order. It follows therefore that, judicial prudence would direct that the entire application in respect of this matter be heard first, so that the court can determine whether or not it will grant the prayed order for extension of time before it will consider the prayed order for setting aside the dismissal order. I thus overrule the first PO lodged by the two respondents. This finding engages me in testing the second PO.

The issue regarding the second PO raised by the applicants is whether or not the joint counter affidavit by the second and third respondents was incurably defective. In supporting the PO the learned counsel for the applicants argued that, the *jurat* of attestation of the counter affidavit was bad in that, the commissioner for oaths who attested it did not state as to how he came to know the deponent of the counter affidavit, one Irene Lesulie (apparently the learned State Attorney appearing for the two respondents in this matter at hand). The replying submissions by the two respondents through the learned State Attorney was that, the jurat of the counter affidavit sent to court (at page 3 of the counter affidavit) indicates clearly that the deponent was identified to the attesting Commissioner for Oaths by one **Mtani Songolwa**, hence the same was proper. These court records supports the arguments by the learned State Attorney. The jurat of the counter affidavit filed in court indicate that, one Mtani Songolwa in fact, identified the deponent to the Commissioner for Oaths. It might be true that the copy supplied to the applicant did not bear this fact. But, in my view, where a party to court proceedings serves a defective copy of document to another party, the irregularity is not fatal to the proceedings if the original document filed in court is authentic.

This finding is based on the ground that in judicial proceedings court records, and not the parties' records, are presumed to be serious and genuine documents that cannot be easily impeachable unless there is evidence to the contrary, see **Halfani Sudi v. Abieza Chichili, [1998] TLR. 527**. In the case under discussion there is no any evidence that impeaches the court records. I thus determine the issue posed above negatively to the effect that the counter affidavit is not incurably defective. Consequently I overrule the second PO.

Having overruled both PO raised by the parties, I order that the application shall be heard according to the law. It is according ordered.

JHK. UTAMWA

JUDGE

15/05/2014