

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO 172 OF 2012

JOHN BULLET KASIDI.....APPLICANT

VERSUS

CAPITAL DEVELOPMENT AUTHORITY.....1ST RESPONDENT

ERICK AUCTION MART & COURT BROKERS.....2ND RESPONDENT

TANZANIA SCHOOLS & OFFICES CO. LTD.....3RD RESPONDENT

R U L I N G

Date of Last Order: 12/12/2014

Date of Ruling: 13/3/2015

BONGOLE,J

In this Application, three (3) reliefs are being sought from the court.

These are:-

1. That this court be pleased to extend time within which to appeal against the Ruling and Order dated 29th January, 2010 in RM Misc. Civil Cause No 190 of 1999, Hon Mugeta SRM refusing to set aside sale of the applicant's property described as :- Plot No 14 Block 22 Certificate of Title No 36074, Gerezani, Nyamwezi Street, Kariakoo

Area Dar es Salaam, Arising from an Ex-parte Judgment dated 09/04/1999 of Dodoma Resident Magistrate's Court in civil Case No 41 of 1998, Hon Mruma RM [as he then was].

2. Any other reliefs that this Honourable Court may deem fit and or equitable to grant in so far as the decreed sale discloses being tainted with illegalities, irregularities and fraud and
3. Costs.

The application is support by a sworn affidavit of the applicant.

Upon service of the Chamber Summons to the Respondents, the Respondents filed counter affidavit along with a notice of Preliminary Objections; to wit:-

- (i) That the application for extension of time is incurably defective for being time barred.
- (ii) That the application is incurably defective for wrong citation of law misconceived and made under the wrong provision of the law.

They pray the application be struck out with costs.

In this application, Mr. Mtogesewa learned Advocate appeared for the applicant and whereas Mr. Kamsumbile; Ms Teresia Masampe & Mr. Ringia

learned counsels appeared for the 1st, 2nd and 3rd respondents respectively. Arguing the 1st Preliminary Objection Mr. Ringia submitted that the gist of the application is found under prayer (1) of the chamber application in that the applicant is seeking for an extension of time to appeal against the Ruling and order of Hon Mugeta who refused to set aside the sale of the applicant's property. He said, the application is misconceived as no appeal lies to warrant the nature of this application. That S.74 of the CPC specifically provides for orders to which appeal lies and that application to set aside sale is not one among the orders where appeal lies. He cited the case of **Thomas Joseph Kimaro Vs. Vaisaria Martin Mkumbo and Osca Mushi 2002 TLR** (269 & 270) in backing his argument.

Further that even if this court is to extend time, then the intended appeal is bared by the law.

That on time barred, looking at page one of the application it shows, that the impugned ruling was made on 29th January, 2010 and whereas the application was filed on 5th November, 2012.

Under the law of limitation he said there is no specific time for this kind of application. That the relevant law is in the 1st schedule of the Law of Limitation Act item 21 where the limitation is 60 days.

Further that if this application had been brought 60 days from the date of the Impugned ruling still the applicant had subsequent 60 days to file this application which is not the case. He concluded by saying that this application of extension of time by itself is out of time.

By way of reply, Mr. Mtogesewa argued that whether the order sought is appealable or not that matter is pre-mature because the appeal itself is not yet in existence. That in this application we don't know what the appellant intends to raise in his appeal. That this court being a creature of the law he pray that let it use its inherent powers to intervene in this matter citing the case of **Transport Equipment Vs Valambia 1998** TLR 89 and **Chama cha Walimu Tanzania Vs. A.G Civil Appeal No 151 of 2008** (unreported) at page 15 and 23 where the Court of Appeal of Tanzania held that "A court of Justice will not simply strike the application. He invited this court to adopt the same position.

In any event he said the intended appeal from an order refusing to set aside sale in law and in fact is appealable referring to order XL rule 1 of the CPC Cap. 33 R.E 2002. He therefore said that the authority cited by Mr. Ringia was in respect of interpretation of general law and not specific to rule 1 (one) cited above.

On time limitation he said S.14(1) of the Law of Limitation Act Cap. 89 among others allows the applicant to prefer application even after expiry of such period of limitation. That a legal account should also be taken in line with S.19(2) which provides that time taken in getting the Order/Obtain the order should be excluded. That exhibit "J" shows when the order was obtained or when the documents were available. He therefore finalized by saying that both objections have no merit as they are pre-mature. He pray the same be dismissed.

By way of re-joinder Mr. Ringia argued that the order cited i.e Order XL rule 1 is irrelevant as it is confined to agricultural produce only and order XLI r.2 deals with the rights of purchaser so he said they are irrelevant in this case.

For clarity sake, I find it pertinent to reproduce the two cited provisions of the law in resolving the rival arguments advanced by the learned counsels. But, before I do that, let me extend my sincere gratitude beyond measure to the learned counsels for their persuasive arguments.

To start with; Order XL rule 1 of the CPC.

"An appeal shall lie from the following orders under the provisions of S.74, namely:-

- (i) *An order under rule 72 or 92 of Order XX1 setting aside or refusing to set aside a sale"*

"Order XX1 r. 72" Sale of agricultural produce

r.92; - Certificate to purchase.

S.19(1) of the Law of Limitation Act ap. 89 R.E 2002 provides:-

"(2) In computing the period of limitation prescribed for an appeal, an application for leave to appeal or an application for review of judgment, the day on which the judgement complained of was deliver and the period of time requisite for obtaining a copy of the decree or order appealed from or sought to be reviewed, shall be excluded"

From the record, the impugned ruling and drawn order were made on the 29th January, 2010. The ruling and drawn order were extracted on 18th September, 2012 and were Certified by the trial Magistrate on the 19th September, 2012. This Application was preferred on the 5th November, 2012.

As correctly argued by Mr. Ringia the time within which such application may be filed is 60 days. Further in computing the 60 days, the

time taken in obtaining the copy of ruling and drawn order has to be excluded.

The ruling and drawn order were ready for collection on the 19th September, 2012 the date the documents were certified and that is when the time started running ticking. A fact that this application was filed on the 5th November, 2012, it was within time.

It goes without saying therefore that the 1st Preliminary point is defeated by what I have demonstrated above the facts which are obtained from the record. The 1st P.O is overruled.

On the 2nd point that the application is incurably defective for wrong citation of the law, misconceived and made under the wrong provision of the law is that this application is made under S.93 & 95 of the Civil Procedure Code Cap 33 R.E 2002 and S.14 of the Law of Limitation Act Cap. 89 R.E 2002.

It has been Mr. Ringia's argument that even the intended appeal is barred by the law; and whereas Mr. Mtogese is of the view that the intended appeal from an order refusing to set aside sale in law and in fact is appealable by referring to order XL rule 1 of the Civil Procedure Code.

He also invited this court to use its inherent powers to entertain this matter.

I anxiously and carefully considered both the reliefs sought in this application, the arguments in support of the application and in particular the law cited i.e Order XL rule 1 and in the upshot, I am satisfied that the intended appeal is non appealable as no appeal can lie against the order of refusing sale of an immovable property save the immovable properties enumerated under Order XX1 rule 72 and 92 (Supra) which is and was not the subject in the Impugned ruling and drawn order.

That been said, the 2nd preliminary point is sustained and consequently the Application is dismissed with costs for want of merits.

S.B. Bongole

JUDGE

13/3/2015

13/3/2015

Coram: S.B. Bongole,J

For the Applicant: Absent

For the 1st Respondent: Absent

For the 2nd Respondent: Mr. Benedict/Ms Annet

For the 3rd Respondent: Mr. Benedict

C.C. Mrangi

Mr. Benedict: My lord the matter comes for ruling.

Court: Ruling delivered.

S.B. Bongole

JUDGE

13/3/2015