

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 38 OF 2017

(Arising From Land Appeal No. 9 OF 2015)

MASHAKA SAID MANG'WARU APPLICANT

VERSUS

SAID UREMBO MAWAMBA RESPONDENT

RULING

DYANSOBERA, J.

This is an application filed by the applicant **Mashaka Said Mang'waru** seeking this Court to review its own decision dated 26.8.2016 in Civil Appeal No. 9/2015. The said judgment was delivered in favor of the respondent in this application.

The application has been filed by chamber summons made under **section 78(1) Order XXI Rule 24(1)** and **Section 95 of the Civil Procedure Code Cap 33 R.E 2002** supported with an affidavit deposed by one **Kessynuru Mohamed Litami**.

When the application was scheduled for hearing, **Mr. Chamriho** the learned counsel for the respondent resisted the application and raised three preliminary objections as follows **first**, that the application is time barred, **Second**, that the application is preferred under wrong provision of the law and **third**, that the application forms are contrary to the law.

The same objections were argued by way of written submission.

Submitting on the first limb of the preliminary objection, **Mr. Chamriho**, the learned counsel for the respondent stated that this application is time barred for it being filed beyond the prescribed time for filing review.

According to him, part III item 3 to the schedule of the **Law of Limitation Act [Cap 89 RE 2002]** provides a prescribed time of 30 days for one to file an application for review. He added that as per **Section 6(c)** of the same law the time for filing an application starts to accrue after judgment has been delivered.

In his view, the instant application is intending to review the decision of the Court which was delivered on 26th August, 2016 but it appears filed in Court on 30th March, 2017 which is 180 days beyond the prescribed time for filing review. He added that the applicant delay in filing the application is un explainable and inexcusable as he was supposed to apply for extension of time but neglected.

In respect of the second limb of objection learned counsel he pointed out that this application has been preferred under the wrong provisions of the **Civil Procedure Code Cap 33 RE 2002**.

He also submitted that the provisions of **Section 78(1) and 95** and **Order XXI Rule 24(1)** of the same law preferred by the applicant to move this court in this application are wrong and inapplicable.

He further submitted that section 78(1) does not exist in the Civil Procedure Code but there is Section 78(a) and (b), likewise Order XXI of

the same law deals with stay of execution while the instant application is meant for review.

He also contended that **Section 95 of the Civil Procedure Code** is inapplicable in this circumstance for where there exists a specific provision under the existing laws on which the application can filed. He insisted that one cannot invoke the cited section which deals with the inherent power of the Court.

Lastly on the third limb of objection the learned counsel for the respondent attacked the form which the applicant used this application for review. He argued that filing format violates the provision of **Order XXLLII Rule 3 of the Civil Procedure Code** which states that the form of preferring appeal shall apply *mutatis mutandis* to application for review.

In the view of that reason the applicant ought to have filed a memorandum of review with his grounds of objection set forth concisely and under distinct heads instead of filing an application with chamber summons supported with an affidavit.

In reply the applicant conceded the raised preliminary objections by the learned counsel for the respondent but prayed to withdraw his application in order to file proper document before this Court. He paged his prayer under **Order XXIII Rule 1(1) of the Civil Procedure Code**.

In support of his prayer to withdraw the application, the applicant called upon this court to consider the provisions of **Article 107 A(2) of the Constitution of United Republic of Tanzania** which emphasize the

Court to dispense justice without being tied up with technicalities in the administration of justice. He lastly submitted that the court should consider his prayer to withdraw this application with an intention to re-file.

In rejoinder the learned counsel for the respondent submitted that since the applicant concedes to the preliminary objections, that is the sufficient ground for the Court to dismiss his application and grant costs to the respondent.

The respondent also resisted the prayer by the applicant to withdraw this application with the leave to re-file because the application is tainted with serious irregularities one of them being filed out of the prescribed time and so it has no justifiable ground to move this Court.

Finally, he submitted that since the applicant has no ground at all for preferring his application before this Court allowing his prayer to withdraw the application with the leave to re-file will be doing injustice to the respondent.

The Court in consideration of the submission made by both parties to this application it is of the following views:-

Looking at the chamber summons in record, it is indeed true as rightly submitted by the learned counsel for the respondent that the instant application was filed beyond the prescribed time and under wrong provisions of the law which suggests that the Court is improperly moved.

I agree with the learned counsel for the respondent for his argument that the cited provisions section **78(1)** and **Order XXI Rule 24(1)** and

section 95 of the Civil Procedure Code by the applicant to move this Court are inapplicable. Therefore, the consequences that follows in the circumstance is that this court is improperly moved.

The applicant concedes to the preliminary objection but raised a fresh prayer before this Court to withdraw the application with the leave to refile, on his submission he begged the Court to consider his rights under the Constitution of United Republic of Tanzania claiming that the defects in the application were just technicalities which the Court could afford to waive in lieu of justice.

In my opinion the law is always clear on the legal consequences of wrong citation and there are numerous Court of Appeal Decisions to that effect, see the Court of Appeal in **Juma Mhina Vs. Francis Kisampa Misc land Application No. 44 of 2007 (unreported)**

In my view, since the Court has been improperly moved in this application the prayer to withdraw the applicant is un maintainable at this juncture as rightly submitted by the learned counsel for the respondent.

You cannot withdraw what is not proper before the Court. Granting the prayer will be tantamount to condemn the pre-emption of the preliminary objection raised by the learned counsel for the respondent. I upheld the raised preliminary objection and dismiss it with no order as to costs.



W.P. DYANSOBERA
JUDGE

13/03/2018

Court: Ruling delivered today this 13th day of March, 2018 in the presence of Kessy Nuru Mohamed for the applicant and Mr. Chamriho the learned counsel for the respondent.

A handwritten signature in black ink, appearing to be 'W.P. Dyansobera', written in a cursive style.

W.P. DYANSOBERA
JUDGE