

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM
CIVIL REVISION NO 45 OF 2017

(Originating from Civil Revision No. 16 of 2011 in the District Court Ilala and Civil
Revision No. 73, High Court of Tanzania at Dar es Salaam Registry)

SHAMSA JUMA APPLICATION

VERSUS

OREST INYASI MARESI 1st RESPONDENT

SALID JUMA..... 2nd RESPONDENT

RULING

MASABO, J.:-

This ruling is in respect of preliminary objections on points of law. The Applicant Shamsa Juma had moved this court under section 21(2) of the Law of Limitation Act [CaP 89 RE 2002] and section 44(1) (b) of the Magistrate Court Act [Cap 11 RE 2002] praying that the court be pleased to call for, inspect and examine the records of the proceedings of the court of Ilala in Civil Revision No. 16 of 2011. Upon being served with the application the Respondent raised two preliminary points of law that:

1. The application is incurably defective for wrong citation of provisions of the law
2. The application is incompetent for being time barred

Before I delve into the submission of the parties, for convenience, the genesis of the application is as follows: The 1st Respondent **Orest Inyasi Maresi** was dissatisfied with the decision of the Ilala Primary Court, Mirathi No. 113 of 2001 (to which he was not the party). On 25th August 2010 he filed an application for revision before Ilala District Court (Civil Revision No. 17 of 2010). The application was dismissed on 13th May 2011 after the Applicant and the 2nd respondent successfully argued a preliminary objection that the application was time barred. Still dissatisfied, on 17th May 2011 the 1st Respondent filed an application for extension of time so that he can file an application for revision of the Ilala Primary Court's decision. He subsequently filed an application for revision on the same day. The two applications were admitted as Civil Revision No. 16 of 2011. The Applicant raised preliminary objections which were overruled on 14th March 2013. Disgruntled, the applicant sought for revision in this court through Miscellaneous Civil Application No 73 of 2013 but this too ended without fruition as it was struck out on 27/10/2017 on the ground that the Application was brought under a wrong provision. On 15th November 2017 he lodged this application.

At the hearing the Applicant was represented by Mr Msafiri Mabera, learned counsel while the Respondents enjoyed the service of Mr. Samson Rusumo, learned counsel.

In support of the preliminary objection Mr. Rusumo submitted that the Applicant wrongly moved this court under Section 21(2) of the Law of Limitation Act Cap 89 RE 2002 and Section 44(1) (b) of the Magistrates

Courts Act, Cap 11 RE 2002. He reasoned that Section 21(2) of Cap 89 does not provide for moving the court in the instant application but the provision provide foe exclusion of time if there is another application pending. He supported his submission with the case of **Citibank Tanzania Limited V Tanzania Telecommunications Company Ltd and Others**, Civil Application No. 64 of 2004 (CAT); and **Leila Meghji T/A Le House Enterprise v International Commercial Bank**, Miscellaneous Commercial Cause No. 328 of 2104 where it was held that non-citation is unacceptable and the case was struck out. On the second preliminary objection Mr. Rusumo submitted that this application is time barred because the decision for which the revision is sought was delivered in 2011 while the instant application was filed on 15 /11/2017 so the delay is for 6 years.

In response Mr. Mabera submitted that the argument that section 22 of Law of Limitation Act can only be applied when there is a pending case is misconceived as there is no such limitation in the Law of Limitation. He submitted further that Section 44(1)(b) of Magistrates Courts Act Cap 11 is not an automatic provision under which the applicant could move the court. He averred that **Section 44(1) (b) MCA** has been properly cited as it is a correct provision to move this application that **Section 44(1)(a)** is used by the court *suo moto* and **Section 44(1)(b)** empowers the court to revise suo motto. Regarding the second preliminary objection Mr. Mabera argued that the Respondent's Counsel argument that the decision being challenged was delivered in 2011 is a misconception.

I have given due consideration to the submission by both parties in respect of the preliminary objections. I agree with the applicant's counsel that section 44 (1) (b) has been correctly cited as an enabling provision. The provision is not only self-explanatory but has on numerous occasions been confirmed to be the enabling provision for revisional applications filed in the High Court (see **Abdallah Hassan vs Mohamed Athuman** [1989] TLR 140; **Zabron Pangamaleza V Joachim Kiwaraka and Another** [1987] TLR 140; **Gapco Tanzania Limited V Sharif Mansoor** [2002] TLR 99).

Regarding the use of Section 22(1) of the Law of Limitations Act as an enabling provision, I subscribe to Mr. Rusumo's submission that section 21(2) was wrongly cited as an enabling provision. For convenience, the provision states that:

(2) In computing the period of limitation prescribed for any application, the time during which the applicant has been prosecuting, with due diligence, another civil proceeding, whether in a court of first instance or in a court of appeal, against the same party, for the same relief, shall be excluded where such proceeding is prosecuted in good faith, in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

As correctly argued by Mr. Rusumo this provision cannot stand as an enabling provision. Its content is relevant in assisting the court to determine whether or not the application for extension of time should be granted, in other words,

it provides the threshold upon which to compute the time limitation. The section is useful in supporting the Applicant's submission but cannot be relied upon as an enabling provision. I however differ with Mr. Rusumo on the effect of wrong citation of an enabling provision. There are numerous authorities to the effect that non citation or wrong citation of an enabling provision does not render the application incurably defective as held in and **Gundelinda Wandeline v. National Insurance Corporation of Tanzania and Another**, Misc. Civil Application No. 78 of 2009 High Court of Tanzania (unreported) where it was states that:

“...the mere omission to cite the subsection that vests the court with jurisdiction to entertain an application does not render the application in competent.”

(Also see **Fortunatus Masha vs William Shija & another** (1997) TLR 154;

Regarding the second preliminary objection that the application is time barred, it is vivid from the record that the decision against which revision is sought (Civil Revision No. 16 of 2011) was delivered by the District Court of Ilala on 13/3/2013 whereas this application was filed on 15/11/2017, approximately 4 years and 8 months from the date of delivery of the judgment. Considering that the application for revision has to be lodged within 60days after the delivery of the impugned decision pursuant to the provision of item 21 of part III of the first Schedule to the Law of Limitation Act, cap 89 RE 2002, there is no gain in insisting that the application is not time barred.

In the course of scrutinizing the court records, I have taken note of the facts that after soon after the impugned decision the Applicant filed an application for revision (Misc.Civil Application No. 73 of 2013) which was struck out by Mtungi J on 25th October 2015. I would like to underline that, the fact that the Applicant filed an application for revision and that the same was struck out for incompetence do not exonerate the Applicant from the mandatory requirement to obtain leave prior to filing an application out of time. Since it is vivid that leave was neither sought nor obtained this application cannot be sustained.

In the result I sustain the preliminary objection and accordingly strike out the application with costs.

DATED at DAR ES SALAAM this 16th day of December 2019.



J.L. MASABO

JUDGE