

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

AT MBEYA

MISC. LAND APPLICATION NO. 48 OF 2018.

(Arising From Misc. Land Application No. 81 of 2017, in the High Court of Tanzania, at Mbeya).

ATUPAKISYE MWAKIKUTI.....APPLICANT

VERSUS

1. SEKELA MWAKIKUTI.....1ST RESPONDENT

2. MBONILE KAPALATA.....2ND RESPNDENT

RULING

13/05 & 22. 07. 2020.

UTAMWA, J:

In this application, the applicant, ATUPAKISYE MWAKIKUTI is applying for leave to appeal to the Court of Appeal of Tanzania (CAT) against a ruling of this court in Misc. Land Application No. 81 of 2017 date 4th July, 2018 (impugned ruling).

This application is made under section 47 (1) of the Land Disputes Courts Act, Cap. 216 R. E. 2002 (Now R. E. 2019). It was supported by an affidavit of Mr. Justinian Mushokorwa, learned counsel for the applicant. The two respondents, SEKELA MWAKIKUTI and MBONILE KAPALATA (first and second respondent respectively) objected the application vide a counter affidavit sworn by Mr. Mika T. Mbise, learned advocate for both respondents.

Before I consider the affidavit, the counter affidavit and the arguments by the parties, it is incumbent that I narrate the chequered background of this matter, albeit briefly. According to the record, this matter originated in the District Land and Housing Tribunal for Mbeya District, at Mbeya (the DLHT). The applicant had sued the two respondents before the DLHT for a landed property. She lost the matter and appealed to this court. Her appeal was registered as Land Case Appeal No. 16 of 2008 (the Appeal). At the end of the day, this court (Lukelelwa, J. as he then was) dismissed the appeal with costs. Aggrieved by the judgment on appeal, the applicant successfully sought leave to appeal to the CAT vide Application No. 27 of 2012 (decided by Karua, J. as he then was). She was however, ordered to present her appeal within 10 days from the date of the order. The applicant did not however, meet the time limit set by this court (Karua, J. as he then was).

Due to the delay just mentioned above, the applicant filed some unsuccessful applications that ended by being struck out on technical grounds. She then filed Application No. 26 of 2014 seeking for an extension of time to comply with the order made by Karua, J. Later on, through her

counsel, the applicant successfully prayed for amending the chamber summons. She was given 7 days to do so (By Levira, J. as she then was). However, she did not comply with the order to amend timely. Due to that delay, the applicant filed another Application No. 81 of 2017 seeking for extension of the time (granted by Levira, J. as she then was in Application No. 26 of 2014) so that she could amend the chamber summons (in the said Application No. 26 of 2014).

The respondents, through their counsel, resisted the Application No. 81 of 2017 by a counter affidavit. Their counsel also lodged a preliminary objection (PO) against that application (No. 81 of 2017) on a single ground of time limitation. This court, (Levira, J. as she then was) upheld the PO and dismissed the said application (No. 81 of 2017) with costs vide the impugned ruling.

Now, the applicant seeks for leave to appeal to the CAT against that impugned ruling (in Application No. 81 of 2017) through this application at hand (i. e. No. 48 of 2018). This application (at hand) was argued by written submissions.

In the affidavit supporting the application at hand, the learned counsel for the applicant essentially deponed that, in making the impugned ruling, the Hon. Judge erred in dismissing the application (No. 81 of 2017) which she had found incompetent. She would have only struck out the same. She also exercised her discretion wrongly in not granting extension of time to the applicant to amend the chamber summons in Application No. 26 of 2014 without considering reasons for the delay. The dismissal of the

application rendered the leave to appeal that had already been granted (By Karua, J. as he then was) nugatory. It was further deponed that, the applicant has filed the notice of appeal to the CAT and has requested for copy of proceedings from the Deputy Registrar of this court.

In his written submissions, the applicant's counsel underlined the contents of the affidavit supporting the application. He added that, the extension of time sought in the Application No. 81 of 2017 was based on illness which was a sufficient cause for granting extension of time. He supported the contention by the case of **Shabilushifanya v. Omary Ally [1992] TLR. 245** (CAT). He further contended that, in some cases, courts can grant extension of time irrespective of inaction of a counsel to avoid punishing a party to proceedings. He cemented the point by the case of **Yusuf Same v. Hadija Yusuf, Civil Appeal No. 1 of 2002, CAT at Dar es Salaam** (unreported). He further challenged the grounds based by this court in dismissing the application arguing that, there is not limitation against applications for extension of time under section 14 (1) of the Law of Limitation Act, Cap. 89 or section 93 of the Civil Procedure Act, Cap. 33. It only depends on the reasons for the delay adduced by the applicant.

In his counter affidavit, the learned counsel for the respondents contested the affidavit of the applicant's counsel on the following grounds, that; the applicant will not maintain the intended appeal to the CAT since she did not file the mandatory notice of appeal and serve copies thereof on the respondents within the time set by the law or at all. The said Application No. 81 of 2017 was decided on its demerits and rightly dismissed for *inter alia*, being time barred.

In his replying submissions, the respondents' counsel basically supported the counter affidavit and added that, the applicant's conduct of filing multi-applications in this court which were defective wastes the time of the parties and the court. It also adds unnecessary expenses to the parties. The trend also makes the case endless. There are also no good reasons in the affidavit for this court to exercise its discretion in granting the leave to appeal. The learned counsel for the respondents further argued that, the ruling by Karua J. cannot be the basis for this court to grant leave to appeal against the impugned ruling. Furthermore, the major complaint by the applicant which pushes her to go to the CAT is that, her application was dismissed instead of being struck out. Nonetheless, the complaint is baseless because the law guides that, a matter dismissed for time limitation is not *res-judicata*. The application was not heard and dismissed on merits. The applicant can thus, apply for a review. He thus, urged this court to dismiss the application at hand.

In his rejoinder submissions, the learned counsel for the applicant contented that, the respondents' counsel did not cite any law that guides that a matter dismissed for time limitation is not *res-judicata*. He further argued that, the court may consider law, facts or its wisdom in granting leave to appeal to the CAT.

I have considered the arguments by the parties, the record and the law. The major issue here is *whether or not this court can grant the sought leave to appeal to the CAT*. Conditions for granting applications of this nature were summarised by my Brother, Massati, J. (as he then was) in the case of **Citibank Tanzania Limited v. Tanzania Telecommunications**

Company Ltd and 5 others, High Court of Tanzania (Commercial Division), Misc. Commercial Cause No. 6 of 2003, at Dar es Salaam (unreported) herein called the **Citibank case**, where he remarked, and I quote him for a readymade reference;

"I think it is now settled that, for an application for leave to appeal to succeed, the applicant must demonstrate that the proposed appeal raises contentious issues worth taking to the Court of Appeal or are of such public importance, or contain serious issues of misdirection or non-direction likely to result in a failure of justice and worth consideration by the Court of Appeal....In an application of this nature, all that the Court needs to be addressed on, is whether or not the issues raised are contentious....the Court cannot look at nor decide either way on the merits or otherwise of the proposed grounds of appeal."

In arriving into the decision in the **Citibank case** (supra), the learned Judge keenly considered and followed various precedents including the following: **Gaudencia Mzungu v. IDM Mzumbe, CAT Civil Application No. 94 of 1999** (unreported), which held that;

"...leave is not granted because there is an arguable appeal. There is always arguable appeals. What is important is whether there are *prima facie*, grounds meriting an appeal to this Court. The echo stands as guidance for the High Court and Court of Appeal."

The Judge (in the **Citibank case** cited above) also followed the East African Court of Appeal decision in **Sango Bay Estates Ltd & others v. Dresdner Bank [1971] EA 17 (2)**. In that case it was stated that:-

"Leave to appeal from an order in civil proceedings will normally be granted where *prima facie*, it appears that there are grounds of appeal which merit serious judicial consideration."

Again, the Judge in the **Citibank case** (supra) considered the CAT decision in the case of **Lazaro Mabinza v. The General Manager,**

Mbeya Cement Co. Ltd, Civil Application to 1 of 1999 (at Mbeya Registry, unreported) that held thus:

"Leave to appeal should be granted in matters of public importance and serious issues of misdirection or non-direction likely to result in a failure of justice."

He further considered the case of **Saidi Ramadhani Mnyanga v. Abdallah Salehe [1996] TLR 74** where it was held that, for leave to appeal to be granted the application must demonstrate that there are serious and contentious issues of law or fact fit for consideration by the CAT.

The sub-issue now is, *whether or not the application at hand meets the conditions highlighted above (or any of them), for granting the sought leave to appeal to the CAT*. I will answer the sub-issue by considering the reasons adduced by the applicant in this matter. As shown above, one of the complaints by the applicant is that, in making the impugned ruling, this court did not consider the reasons for the delay which were the basis for the prayed extension of time. In my view, I find sense in this complaint. This is because; in reading the impugned ruling, it is clear that, this court was deciding the PO that had been raised by the learned counsel for the respondents. The ground for the PO was only that, the said application (No. 81 of 2017) was time barred. The respondents' contended that, though no law sets time limitation against applications for extension of time Item 21 of Part III of Cap. 89 sets the time. It provides that, time limitation for all applications, the time limitation of which is not set by the law, is 60 days. He supported the contention by the decision of the CAT in **Bank of Tanzania v. Said A. Marinda and 30 others, Civil Reference No. 3 of**

2014, CAT. The counsel then argued that, the said application (No. 81 of 2017) had been filed after the expiry of the said 60 days.

The applicant's counsel (in the Application No. 81 of 2017) did not concede to the PO. He basically contended that, Item 21 of Part III of Cap. 89 did not apply to the matter.

Ultimately the learned judge upheld the PO and dismissed the application. The record shows that, she did not end in upholding the PO, she also considered the merits and demerits of the application and found that, the reasons adduced by the applicant were not sufficient. This fact is also acknowledged by the respondents in paragraph 5 of the counter affidavit of the respondents' counsel. In taking that course, the learned Judge made the following reasoning and finding, and I quote her verbatim for ease of reference, from page 5 – 7 of the typed version of the impugned ruling:

"Having considered the submissions by both sides and the court records, I agree with Mr. Mbise's submission that the application was supposed to be filed within 60 days as per the Item 21 Part III of the Law of Limitation (supra) because this is a land matter. The cited Section 93 of the Civil Procedure Code (supra) by Mr. Mushokorwa is about orders of the court as per the Civil Procedure Code.

Despite that, had it been that section 93 was the proper section, I find that Mr. Mushokorwa has failed to adhere to court order as he was already granted leave to amend the application but failed to do so within the given time. **He has advanced the reason that he was sick but the evidence he filed do not support that allegation. His sickness and recovery from that sickness occurred before the decision of this court which allowed him to amend the application.**

In the circumstance, I find that there is no sufficient ground advanced for me to grant this application. The applicant has been given opportunity several times by this court but he never complied.

Therefore, allowing this application for another time it will be an abuse of discretionary powers of this court.

That being said, I sustain the preliminary objection raised and consequently this application is hereby dismissed with costs.” (Bold emphasis is mine).

Now, in my view, the mandate of the learned judge was limited to the consideration of the PO only, to wit; in deciding whether or not the application was time barred. It was not open to her to also consider the merits or demerits of the application (as shown in the bold text of the quotation just displayed above) upon finding the application time barred. This was because; the parties had not argued the merits and demerits of the application itself. The applicant was thus, denied the right to be heard regarding the merits or demerits of the application. This denial was fatal to the impugned ruling since it offended the applicant’s right to fair trial. This right is fundamental and is well enshrined under article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977, Cap. 2. R. E. 2002. It follows thus, that, even if it is presumed (without deciding), that the application by the applicant (No. 81 of 2017) was trivial as argued by the respondents’ counsel, that could not be the reason for the denial of the denial of the right to be heard.

I am fortified in the position just highlighted above by a judgement of the CAT in the case of **MIC Tanzania Limited v. Minister for Labour and Youth Development and the Attorney General, Civil Appeal No. 103 of 2004, CAT at Dar es Salaam** (unreported). In that case, a Judge of this court heard and upheld a PO against an application before him and found it incompetent. He however, went on to consider the merits and

demerits of the application and made substantive orders. On appeal, the CAT held that, once the Judge had found the application incompetent, he could not have considered its merits or demerits since no such application existed in law. The decision was thus, made in contravention of Principles of Natural Justice and was a nullity since parties had not been heard on the merits or demerits of the application.

By parity of reasons, I am of the view that, in the matter at hand, once the learned judge found that the application (No. 81 of 2017) was time barred, no such application existed and she could not have considered its merits or demerits. The argument by the learned counsel for the respondents that the dismissal in the application at issue was not res-judicata cannot thus, be sustainable. This is because, the learned Judge decided the application on its demerits though she had found it to be time barred. Besides, the law guides that, an issue of time limitation is fundamental as it goes to the root of the jurisdiction of the court to adjudicate on the matter before it; see the holding by the CAT in the case **Shabir Tayabali Essaji v. Farida Seifundini Essaji, Civil Appeal No. 180 of 2017, CT at Dar es Salaam** (unreported). This means that, courts do not have jurisdiction to entertain and decide on merits or demerits time barred matters before them.

There is yet another aspect of a serious concern in this matter. It is lucid from the impugned ruling (in the Application No. 81 of 2017) that there was a serious tag of war between the parties on the position of the law. This raised the issue of whether or not there is time limitation against applications for extension of time. The learned counsel for the respondents

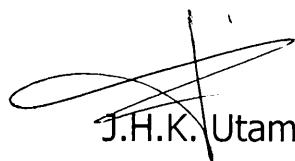
answered the issue affirmatively and based his stance on Item 21 of Part III of Cap. 89 and the **Bank of Tanzania case** (supra). On the other hand, the learned counsel for the applicant answered it negatively. In my view, this was a serious issue. It is more so since there are two schools of thought regarding this position of the law and both of them are supported by precedents of the CAT.

The first school of thought is supported by the **Bank of Tanzania case** (supra) which is also based on Item 21 of Part III of Cap. 89 as contended by the learned counsel for the respondents. The second school is to the effect that, the sixty days rule (under Item 21 of Part III of Cap. 89) applies to all applications the time limitation of which is not set by any law, except applications for extension of time; See the decision by the CAT in the case of **Tanzania Rent A Car Limited v. Peter Kimuhu, Civil Application No. 226/01 of 2017, CAT at Dar es Salaam** (unreported) which departed from its previous decision in the **Bank of Tanzania case** (supra). The **Tanzania Rent A Car case** (supra) also followed other decisions of the same CAT.

Owing to the reasons shown above, it is clear in my concerted view that, the proposed appeal in the matter at hand raises contentious issues worth taking to the CAT for its consideration. I consequently, answer the sub-issue posed above affirmatively that, the application at hand meets the conditions highlighted above for granting the sought leave to appeal to the CAT.

Having answer the sub-issue affirmatively, I accordingly answer the major issue positively that, this court has to grant the sough leave to appeal to the CAT. I therefore, grant this application. Leave to appeal to the CAT against the impugned ruling is hereby granted. Each party shall bear his own costs since none of them bears the blameworthiness in causing this application. It is so ordered.




J.H.K. Utamwa
Judge
22/07/2020

22/07/2020.


CORAM; Hon. JHK. Utamwa, J.

Applicant: present in person.

Respondents; present 1st respondent only.

BC; Mr. Patric Nundwe, RMA.

Court: Ruling delivered in the presence of the applicant in person and the first respondent in person, in court this 22nd July, 2020.


JHK. UTAMWA.
JUDGE
22/07/2020.