

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY

IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF MBEYA)
AT MBEYA

MISC. LAND APPLICATION NO. 65 OF 2017

(From The High Court of Tanzania Mbeya District Registry in Land Case No.
11 of 2010)

RHODA MWASIFIGA.....APPLICANT

VERSUS

THE MANAGER NBC BANK.....1ST RESPONDENT
DIRECTOR MATEMA SECURITY LTD.....2ND RESPONDENT
ANTHONY ALEX GEORGE.....3RD RESPONDENT
PETER MWASIFIGA.....4TH RESPONDENT

RULING

Date of Last Order: 06/12/2019
Date of Ruling : 05/03/2020

MONGELLA, J.

This is a ruling on preliminary objection raised by the Counsel for 3rd Respondent, Mr. Mika Mbise against the Applicant's application for extension of time within which to appeal to the Court of Appeal out of time. The preliminary objection raised contains two points of law to wit:

- 1. The application is incompetent for being filed out of 60 days limited by law.*

2. *The application is incompetent for being supported by a defective affidavit which is undated and wrongly verified.*

The Applicant on his part enjoyed the services of Mr. Omary Issa Ndamungu, learned Advocate. The preliminary objection was argued by written submissions.

Arguing on the first point Mr. Mbise contended that the judgment in Land Case No.11 of 2010 was delivered on 22nd day of March 2017. The application for leave was supposed to have been made within 14 days from the date of the decision something which was not done. He added that the Applicant failed to act within that period and thus she ought to have applied for extension of time within 60 days from the last date she was supposed to have applied for leave. However, this was not done and instead she came up with the current application on 22/06/2017 thereby delaying for three months. He contended that the Applicant is hopelessly out of time set under the law, that is, Item 21 of Part III of the Schedule to the Law of Limitation Act, Cap 89 R.E. 2002. He cited section 3 (1) of the Law of Limitation Act, and argued that the provision demands that every application filed out of time limitation by law should be dismissed whether limitation has been raised in objection or not. He also cited the case of **Michael Kazimoto and 2 Others v. Mbeya RETCO and Another**, Civil Case No. 15 of 1993 (unreported) and that of **Atupakisye Mwakikuti v. Sekela Mwakikuti and Another**, Misc. Land Application No. 81 of 2017 (unreported) to support his arguments.

Responding to Mr. Mbise's arguments, Mr. Ndamungu actually conceded to the point regarding time limitation. However, he went ahead and pleaded for the Court to make an exception on the Applicant's application given the circumstances for the delay. In support of his prayer he cited the case of **Mafimbo Madwary v. Udugu Hamidu Mgeni and Another**, Civil Application No. 123A of 2008 in which the CAT (Luanda, J.A.) granted extension of time irrespective of the application being filed out of time. He argued that the Hon. Justice only looked at the factors for the delay, that is, if the applicant had adduced sufficient reasons. He also cited the case of **Citi Bank Tanzania Limited v. Tanzania Telecommunications Company Ltd. and Four Others**, Misc. Commercial Case No. 255 of 2015 whereby Sehel, J. (as she then was) granted extension of time despite the fact that the application was filed out of the time limit of sixty days as in the case at hand. He prayed for the Court to exercise its discretion and extend time for the Applicant to file her application for leave to appeal to the Court of Appeal despite having delayed for few months.

On the second point, Mr. Mbise argued that the Applicant's affidavit in support of her chamber summons is defective and cannot be relied upon to grant the orders prayed for. He contended that the defects are glaring on the face of the affidavit itself. He said that the affidavit shows it was verified on unknown date of May, 2017 by Rhoda Mwasifiga but it was sworn on 18th June, 2017. He added that the said affidavit consists of 9 paragraphs but only 8 paragraphs have been verified. On those defects he concluded that the chamber summons is not supported by a valid affidavit and should collapse.

Replying to this second point, Mr. Ndamungu conceded on the defectiveness, but argued that the same are curable. He contended that the difference in dates can be rectified in accordance with section 97 of the Civil Procedure Code, Cap 33 R.E. 2002. Regarding the unverified paragraph 9 of the affidavit, Mr. Ndamungu argued that it is a practice and so a rule of law in Mainland Tanzania that if the affidavit carries defective paragraph, the Court can expunge such paragraph and read the affidavit with the remaining paragraphs. He prayed for paragraph 9 to be expunged and the Court to proceed determining the application with the remaining paragraphs. He urged the Court to invoke the overriding objective introduced under sections 3A, 3B, and 3C of the Appellate Jurisdiction Act, Cap 141 R.E. 2018 as amended by the Written Laws (Miscellaneous Amendment) Act, No. 4 of 2018 which requires the Court to avoid technicalities and to determine matters on merits to its finality.

In rejoinder Mr. Mbise was appreciative of the fact that the Applicant's counsel conceded to the preliminary objections. However, he challenged the prayers by the learned counsel urging this Court to grant the Applicant's application by invoking the overriding objective principle. He challenged the cases cited by Mr. Ndamungu and argued that they are relevant to applications for extension of time, factors to be considered, but none of them deals with the issue of sixty days limitation and there were no objections raised in limitation. On the issue of defective affidavit he cited a number of cases where applications were rejected by the court for being accompanied by a defective affidavit. He cited the case

of **Ignazio Messina v. Willow Investment SPRL**, Civil Application No. 21 of 2001 (CAT, unreported) in which it was held:

"We are not impressed. First, rules governing the form of affidavits cannot be deliberately flouted in the hope that the Court can always pick the seed from the chaff, but that would be abuse of the Court process. The only assistance the Court can give in such a situation is to strike out the Affidavit."

He further argued that limitation is not a matter of mere technicality and cannot be ignored thus the overriding objective principle cannot be applied. He cited the case of **Mondorosi Village Council and Others v. Tanzania Breweries Ltd and Others**, Civil Appeal No. 66 of 2017 (CAT, unreported) in which it was ruled:

"Regarding the overriding objective principle, we are of the considered view that, the same cannot be applied blindly against the mandatory provisions of the procedural law which go to the very foundation of the case. This can be gleaned from the objects and reasons of introducing the principle under Section 3 of the Appellate Jurisdiction Act, (Cap 141 R.E. 2002) as amended by the Written Laws (Miscellaneous Amendments) (No. 3) Act No. 8 of 2018, which enjoins the Courts to do away with technicalities and instead, should determine cases justly."

He also cited the case of **Martin D. Kumaliya and 117 Others v. Iron and Steel Ltd.**, Civil Application No. 70/18 of 2018 (CAT, unreported) in which the Court stated:

"We wish to comment on Mr. Seka's plea that the overriding objective principle be applied to save the Notice of Appeal. We are aware that the Court is enjoined by the provisions of

Section 3A and 3B of the Appellate Jurisdiction Act, Cap 141 R.E. 2018 introduced recently vide the Written Laws (Miscellaneous Amendments) (No. 3) Act, No. 8 of 2018 to give effect to the overriding objective of facilitating the just, expeditious, proportionate and affordable resolution of disputes. While this principle is a vehicle for attainment of substantive justice, it will not help a party to circumvent the mandatory rules of the Court. We are loath to accept Mr. Seka's prayer because doing so would bless the Respondent's inaction and render superfluous the rules of the Court that the Respondent thrashed so brazenly."

Basing on the above cases, Mr. Mbise concluded that the overriding objective principle is of no avail to the Applicant in the circumstances of the application at hand. He prayed for the same to be dismissed with costs.

I have gone through the submissions of both counsels and it is undisputed that the Applicant's application is time barred and supported by a defective affidavit at the same time.

On the issue of time limitation, Mr. Ndamungu prayed for this Court to invoke its discretionary powers to grant the application basing on the reasons advanced for the delay. However, the Applicant's application as submitted by Mr. Mbise, does not fall under applications for extension of time where the Court has to consider the advanced reasons for the delay. Her application falls under the limitation period set under Item 21 of Part III of the Schedule to the Law of Limitation Act. Basically this provision has already given the delaying party an extension after the expiration of the initial period of filing the application which is 14 days. In **Michael Kazimoto**,

and 2 Others v. Mbeya Retco and Another (supra) Lukelelwa, J. (as he then was) observed:

"In the case at hand, I doubt whether this application is itself not time barred. Since there is no period of limitation provided for making the application in the Rules, Item 21 Part III to the Schedule to the Law of Limitation Act which provides limitation period of sixty days is applicable."


See also: **Bank of Tanzania v. Said A. Marinda & 30 Others**, Civil Reference No. 3 of 2014 (unreported) where the CAT also ruled that the limitation for extension of time is sixty days. Mr. Ndamungu basically sought to serve his client through the overriding objective principle. The limitation period in the application at hand is mandatorily couched under the law, that is, Item 21 Part III of the Schedule to the Law of Limitation Act. Being as such the overriding objective principle cannot be applicable. Apart from the cases cited by Mr. Mbise above the same was also recently decided in the case of **Mariam Samburo v. Masoud Mohamed Joshi and Others**, Civil Appeal No. 109 of 2016 (CAT, unreported).

The Affidavit has basically two defects, one is lack of date on verification clause; and two is unverified paragraph, which is paragraph 9. In my considered opinion, the overriding objective principle can only be invoked on the defect regarding date of verification whereby this Court can even allow the Applicant to write the date in hand print. It cannot however, be invoked on unverified paragraphs. In the case of **Mantrac Tanzania Ltd. v. Raymond Costa**, Civil Appeal No. 11 of 2010 (CAT-Mwanza, unreported), the Court ruled that an affidavit intended to be used in judicial proceedings should, among other things, be properly

verified. It follows therefore that the requirement to properly verify the affidavit is set as a mandatory requirement under the law. Under the circumstances therefore the overriding objective cannot be invoked. Mr. Ndamungu also called the Court to invoke the provisions of Section 97 of the Civil Procedure Code. This provision however, empowers the Court to amend the defects or errors in proceedings in a suit whereby the Court can regulate its own proceedings. It does not empower the Court to amend defective documents filed in court by parties such as affidavits as misconceived by Mr. Ndamungu.

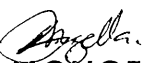
In conclusion, the Applicant's application is time barred and is supported by a defective affidavit. I would have struck out the application if it was only supported by a defective affidavit, but since it is also time barred, I dismiss the same with costs.

Dated at Mbeya on this 05th day of March 2020.


L. M. MONGELLA
JUDGE
05/03/2020

Court: Ruling delivered in Mbeya in Chambers on this 05th day of March 2020 in the presence of Mr. Omary Ndamungu for the Applicant and Mr. Kiranga holding brief for Mr. Mika Mbise for the Respondent.




L. M. MONGELLA
JUDGE
05/03/2020