

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

MISC. CIVIL APPLICATION NO. 37 OF 2020

(Originating from Arumeru District Court, Civil Appeal No. 25 of 2016)

LEONARD KERAINE APPLICANT

VERSUS

LOY ELIAS.....RESPONDENT

RULING

11/8/2021 & 22/9/2021

ROBERT, J:-

The Applicant, **Leornand Keraïne**, moved this Court under section 25 (1) (b) of **the Magistrate's Court Act**, Cap. 11 (R.E 2002) and Rule 3 of the **Civil Procedure (Appeal in Proceedings Originating in Primary Courts) Rules**, 1963 G.N No. 312 of 1964 seeking an order for extension of time to file an appeal to this Court against the decision of Arumeru District Court in Civil Appeal No. 25 of 2016 dated 22nd February 2017. The application is supported by an affidavit sworn by the Applicant.

The Applicant and Respondent were the Appellant and Respondent respectively at the District Court of Arumeru in Civil Appeal No. 25 of 2016. The appeal was decided in favour of the Respondent herein on 22nd Feb, 2017. Aggrieved, the Applicant registered before this court (PC) Civil Appeal No. 13 of 2017 on 21st March 2017. However, the appeal was struck out with costs for technical reasons. Still determined, the Applicant filed an application for extension of time to file an appeal to this Court (Misc. Civil Application No. 103 of 2017). The application was allowed and the Applicant was granted 14 days to file his appeal.

On 24th May, 2019 the Applicant lodged his petition of appeal through the District Court of Arumeru ((DC) Civil Appeal No. 25 of 2016) paid for through exchequer receipt No. 25308090. However, the said appeal was allegedly misplaced and therefore not dispatched to the High Court on time. Hence, the Applicant was directed to bring a fresh appeal which was given a new number ((PC) Civil Appeal No. 1 of 2020). The said appeal was struck out on 23rd March, 2020 for being time barred as a result of the preliminary objection raised by the Respondent to that effect. Thereafter, the Applicant preferred the present application on 20th April, 2020 seeking extension of time to file his appeal.

On 13th April, 2021 when this application came up for hearing, the Applicant was represented by Mr. Severin John Lawena, Learned Counsel. Mr. Lawena also held brief for Mr. Elibariki Maeda, learned counsel for the Respondent. Hearing proceeded by way of written submissions as successfully prayed by parties.

Submitting in support of the application, Mr. Lawena argued that, section 25 (1) (b) of the **Magistrates' Courts Act**, Cap. 11 R.E 2002 and Rule 3 of the **Civil procedure (Appeals in proceedings Originating in Primary Courts) Rule**, 1963 G.N No. 312 of 1964 prescribes time limit for appeals on matters originating from a primary court to be thirty days, however, the court may extend time on sufficient cause being shown by the Applicant.

He submitted that, the Applicant's delay to file his appeal was caused by late supply of copies of Ruling and drawn order and the Applicant's efforts to seek legal assistance. He maintained that, the copy of the Ruling and the Drawn Order was important in proving that the previous appeal was struck out on technical grounds. He recounted that, the first appeal was filed within time but it was misplaced due to the negligence of court officials at the district court's registry. He clarified that, the time taken from dismissal of the second appeal to the date of filling

the present application was used to apply for the copy of the ruling and drawn order and the preparation of this application. He maintained that, the Applicant's delay was not inordinate and the reasons for delay has been clearly shown. He made reference to the case of **Bank M (Tanzania) Limited vs Enock Mwakyusa**, Civil Application No. 520/18 of 2017 CAT (Unreported) and **Mbrances Gold Corporation Ltd vs Minister for Energy and Minerals and Others** (1988) T.L.R 425 in support of his submissions.

Based on his submissions and the cited decisions, he prayed that their application be granted.

Responding to this application, Mr. Maeda started by attacking the affidavit in support of this application. He submitted that, the affidavit does not meet the requirements of the law. First, the verification clause does not reflect the contents of the verified paragraphs. He clarified that, paragraph 7 of the affidavit is an advice from the Applicant's lawyer, paragraph 10 is information from the person who informed the Applicant that records were missing, and in paragraph 12 and 13 the Applicant alleged to have contacted the person from the registry where he received the information but in verification clause all of this information was termed as it came from the Applicant's knowledge.

In order to hammer his point, he cited the case of **Salima Vuai Fom vs. Registrar of Corporation Societies and Others** [1995] TLR 75, where the CAT stated,

"Where an affidavit is made on information it should not be acted upon by any Court unless the sources of information are specified"

He argued that, since the source of information is not specified under the said affidavit, this court should not act upon it but expunge it from the record.

Secondly, he submitted that paragraph 16 of the Applicant's affidavit contains arguments and opinions which is contrary to the law. He referred the court to the case of **Jumuiya ya Wafanyakazi vs Shinyanga Region Cooperative Union** (1997) TLR 22) where the Court held that:

"An affidavit is essentially a substitute for oral evidence and should only contain statements of fact and circumstances. That being the case then we hold in common with Sir Udo Udoma CJ in case of Uganda vs Commissioner of Prisons, Exparte Matovu (1966) EA 514 to which we have been referred such an affidavit must not contain extraneous matters by way of objection or prayer or legal argument or conclusion."

Thirdly, he argued that, the jurat did not contain the name of the person who attested the affidavit which is contrary to section 8 of the **Notaries Public and Commissioner for Oath Act** [Cap 12 R.E 2019].

The said provision needs the attesting officer to insert his name and not to appear only at a rubber stamp. Further to that, he maintained that the attesting officer had not yet renewed her practice certificate when she delivered the services to the Applicant which is contrary to the law. He referred the Court to the website: tams.judiciary.go.tz and noted that if one enters the name of the said advocate he will note that from 1st February to April 17th 2020 the practicing certificate of the individual in question was not yet renewed.

Coming to the merit of the application, Mr. Maeda submitted that, the main argument by the Applicant is that his appeal which was filed on 24/5/2019 was mishandled and disappeared from the file. He maintained that, the Applicant did not furnish enough evidence to substantiate the claims e.g. an affidavit from the officer at the District Court's registry. Further to this, the exchequer receipt annexed as LK5 bears information about DC Civil Appeal No. 25/2016 and not the current appeal. He maintained that, there is no tangible proof that the delay resulted from the registry officer. He prayed for this appeal to be dismissed with costs.

Before dealing with the crux of the matter, I find it imperative on the outset to address the question whether the affidavit in support of this

application is marred with irregularities alleged by the learned counsel for the Respondent.

First, Mr Maeda argued that the affidavit supporting this application bears defective verification clause because it generalizes all information contained in the affidavit to come from the Applicant's knowledge while paragraph 7 of the affidavit contains advice from the Applicant's lawyer, paragraph 10 contains information from the court registry and paragraph 12 and 13 provides for information received from a person at the registry office.

Having perused the affidavit in support of this application, this Court noted, as stated by the learned counsel for the Respondent that, at the end of the affidavit the Applicant verified that all information contained in the affidavit is true and correct to the best of his knowledge. It states as follows:

"I, LEORNALD KERAINÉ, being the Applicant herein verify that what I stated in paragraph 1,2,3,4,5,6,7,8,9,10,11,12,13,14,15,16, 17,18 and 19 herein above is true and correct to the best of my knowledge."

The Applicant's affidavit, being a substitute for oral evidence, contain statements of facts and circumstances to which the witness deposes either of his own personal knowledge or from information which he believes to be true, the Applicant's verification clause should therefore

specify the sources of information deposed in the affidavit. Unfortunately, that was done.

In the case of **Anatol Peter Rwebangira vs the Principal Secretary, Minister of Defence and National Service and Another**, Civil Application No. 548/04 of 2018, CAT at Bukoba (unreported) the Court of Appeal when dealing with similar matter held that:

"It is thus settled law that, if the facts contained in the affidavit are based on knowledge, then it can be safely verified as such. However, the law does not allow a blanket or rather a general verification that the facts contained in the entire affidavit are based on what is true according to knowledge, belief and information without specifying the respective paragraphs. In the present application, according to the applicant's verification clause which we have earlier on reproduced, it is not possible to decipher the facts which are true based on the applicant's knowledge and those based on his belief."

To that end, this Court is in agreement with the learned counsel for the Respondent that the affidavit supporting this application bears defective verification clause as it generalizes all information contained in the affidavit by indicating its source to the Applicant's knowledge contrary to what is stated in the contents of the said affidavit. The Court took note of the fact that the learned counsel for the Applicant did not bother to file rejoinder submissions to challenge issues raised by the Respondent in the reply submissions which is considered to be an admission on his part.

Secondly, on the issue that paragraph 16 of the affidavit contains arguments and opinions, having looked at the contents of the said paragraph, it is clear that the contents of the said paragraph deposed arguments and allegations against the Court clerk on what the Applicant regarded as cheating based on directives he received from the said Court Clerk. I agree with Mr. Maed that the cited paragraph deposed arguments and which is contrary to law. Thus, the contents of paragraph 16 of the affidavit in support of the application are hereby expunged.

Thirdly, the learned counsel alleged that, the jurat did not contain the name of the commissioner for oath as required by Section 8 of the **Notaries Public and Commissioner for Oath Act** [Cap 12 R.E 2019]. The said provision reads;

"Every notary public and commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall insert his name and state truly in the jurat of attestation at what place and on what date the oath or affidavit is taken or made."

Having gone through the affidavit supporting the application particularly in the jurat of attestation, I have noted that the Commissioner

for oath did not insert his name, the date and place where the oath was taken is not indicated which is contrary to the law.

Lastly, the learned counsel argued that at the time of signing the affidavit the Commissioner for Oaths who signed the affidavit in question was not permitted to practice as an advocate because he did not renew his practising certificate. Having subjected the names appearing on the stamp for Commissioner for Oaths (Emmanuel Laban Kileo) through a verification process using tams.judiciary.go.tz for a period beginning on 1st February to April 17, 2020 I have learned that the purported Commissioner for Oaths had not renewed his practising certificate under the specified period. However, the signature of the Commissioner for Oaths in the said affidavit was appended on 20th April, 2020 which means by the time of witnessing the said affidavit, he was already allowed to practice. I think the learned counsel for the Respondent mixed the dates when the Applicant signed the affidavit and the day it was witnessed by the Commissioner. Be it as it may, the difference between the date of signing the affidavit by the Applicant and the date the oath or affidavit was taken before the Commissioner can only add to the list of irregularities in the affidavit supporting this application.

In the circumstances, I find the affidavit in support of this application to be marred with irregularities. As a consequence, I hereby struck out this application for being incompetent as it was supported by a defective affidavit.

It is so ordered.




K.N. ROBERT
JUDGE
3/9/2021

