IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MBEYA

AT MBEYA

MISC. LAND APPLICATION NO. 119 OF 2020

(Originating from the District Land and Housing Tribunal for Kyela, at Kyela in Land Application No. 10 of 2017)

ANDERSON MWANKUSYE.....APPLICANT

VERSUS

MARTIN NDUNGURU.....RESPONDENT

RULING

Date of last Order: 18.05.2022

Date of Ruling: 28.06.2022

Ebrahim, J.

This ruling follows a decision of this court of 17.12.2021 overruling the preliminary objection made by the respondent and consequently allowing the applicant to file a proper affidavit and correct the semantic mistakes. ANDERSON MWANKUSYE has made the instant application seeking for extension of time to appeal against the decision of the District Land and Housing Tribunal for Kyela, at Kyela in Land Application No. 10 of 2017. The application is preferred under **section 41 (2) of the Land Disputes Courts Act, Cap. 216 R.E 2019** and

supported by an affidavit of the applicant. The respondent MARTIN NDUNGURU objected the application through counter affidavit.

According to the applicant's averments in his affidavit, the District Land and Housing Tribunal for Kyela, delivered judgement against the applicant which is subject of this application on 19th November 2018. On 3rd December, 2018, the applicant was supplied with the said copies and filed memorandum of appeal on 3rd January 2019 before the lapse of 45 days. However, he fell sick and appeared before the court registry on 11.01.2019 to pay for the admitted documents. The objection was raised that the memorandum of appeal was time barred but because of illness the applicant could not file an application for extension of time from 20th November 2019 as he was hospitalized in different hospitals. He thus made the instant application praying for extension of time on the basis that the matter is res judicata.

The Respondent on the other hand objected the application and averred in his counter affidavit that there is no proof of the applicant's sickness or admission and that the annexures were not marked. Furthermore, there is no explanation as to the delay from 20.11.2019 to 24.09.2020 considering that he was represented by the same advocate in the struck out appeal.

In this application, the applicant was represented by advocate Caroline Mseja; and the respondent preferred the services of advocate Emmanuel Clarence.

On 31.03.2022, this court ordered the application to be argued by way of written submission as per the following schedule;

1. Applicant's submission to be filed on 14.04.2022
2. Respondent's reply to be filed 0n 28.04.2022
3. Rejoinder if any on 05.05.2022
4. Mention on 18.05.2022

Upon perusal of the documents pertaining to this matter, I found that the applicant filed the reply outside the time frame set by the court on 31.03.2022 without leave. The set date to file the applicant's submission as I have indicated above was 14.04.2022 but the applicant's submission was filed on 22.04.2022. It is therefore apparent that the applicant's counsel did not comply with the set schedule by the court.

The act of not complying with the court order was picked up by the counsel for the respondent in his reply to the counsel for the applicant's submission where he firstly pointed out that the same has been filed out of time of the schedule set by the court since the applicant's submission was supposed to be filed on 14.04.2022. However, the same was filed

on 22.04.2022. He argued on the settled principle of the law that arguing an application by way of written submission is synonymous with presenting oral submission before the court. Hence, failure to adhere to the set scheduled date is equated to failure by the party to appear on a hearing date which is followed by the consequential order of dismissal. He thus prayed for the court to dismiss this application with costs for want of prosecution.

Out-rightly, I agree with the counsel for the respondent that failure to adhere to the set scheduled date by the court is equated to none-appearing of a party on a hearing day. Time and time again this court has emphasized on the obligation to follow court order. In the case of **TBL Vs. Edson Dhobe**, Miscellaneous Application No. 96 of 2006 (unreported) this court held as follows:

"Court order should be respected and complied with. Court should not condone such failures. To do so is to set a bad precedent and invite chaos. This should not be allowed to occur. Always Court should exercise firm control over proceedings"

I subscribe fully to the above holding. All in all, written submissions are equivalent to a hearing therefore non filing of the same or failure to comply with the set schedule amounts to non-appearance or in other circumstances want of prosecution. This position was well discussed in

the case of **Fredrick A. M. Mutafurwa Vs CRDB (1996) Ltd & Others**, Land Case No. 146 of 2004 (Unreported).

The above notwithstanding, upon perusal of the records pertaining to the instant appeal, I also observed that the genesis of this application is the dismissal order of this court of 20.11.2019 by my brother honourable Dr. Utamwa J when he dismissed Land Appeal No. 3 of 2019 in terms of **section 3(1) of the Law of Limitation Act, Cap 89 RE 2019**. The said appeal originated from the decision of the District Court and Housing Tribunal for Kyela at Kyela in Land Application No 16 of 2017 of which the applicant is seeking extension of time to file the same appeal again. In dismissing the said appeal, this court stated that:

> "On my part, I agree with the parties that, the legal remedy for a time barred matter is to dismiss it as per section 3(1) of Cap 89; see also the decision by the Court of Appeal of Tanzania (CAT) in **Hezron Nyachiya V Tanzania Union of Industrial Commercial Workers and another, Court of Appeal of Tanzania, Civil Appeal No. 79 of 2001** (unreported). *I therefore dismiss the appeal for being time barred.*" (the emphasis in italic is mine).

Following the above observation, this court raised a point of law **suo motto** as to whether the instant application is legally tenable before this court after the first filed appeal had already been dismissed by this court in terms of **section 3(1) of the Law of Limitation Act, Cap 89, RE**

2019? Meaning that whether applicant is allowed to come back and apply for extension of time to institute the same appeal that had already been dismissed for being time barred?

Seeing that the point has been raised by the court suo motto, I called upon parties to address me on the issue before I court adjudicate on the raised point of law.

On 23.06.2022 advocate Caroline Mseja for the Applicant; and advocate Emmanuel Clarence for the Respondent appeared before me to submit on the issues raised by the court.

Advocate Mseja admitted that the matter was dismissed for being time barred under **section 3(1) of the Law of Limitation Act, Cap 89 RE 2019.** She however, referred to the cases of **Christopher Leonard and 6 Others Vs Khebanza Marketing Co. Limited**, Miscellaneous Land Application No. 10 of 2019 (HC-Mbeya); and **Patrick Timotheo Yandilo Vs China Chongging International Construction (CICO)**, Labour Application No. 5 of 2018 (HC-Mbeya) where it was held that dismissal of an appeal that has been declared time barred is equivalent to strike out hence a party can re-file again upon making an application for extension of time. She thus prayed for the application to be granted on the foundation of stare decisis.

Advocate Clarence for the Respondent subscribed to the position argued by Advocate Mseja and the cited cases. He urged the court to waive costs since the issue has been raised by the court suo-motto.

There was no rejoinder from advocate Mseja.

Advocate Mseja, urged the court to follow the position of this court in the similar circumstances on the foundation of **stare decisis**. In a simple meaning Counsel for the Applicant urges the court to stand by what has been established before by the same court on similar facts and issues so as to avoid uncertainties and inconsistencies in administration of justice. Nevertheless, since the decisions of the same court are persuasive, the same court is free in both civil and criminal cases to depart from such a decision when it appears right to do so in consideration of the consequences of doing so and the circumstances of a particular case.

Coming to the instant application, the principle as to whether a matter that has been declared to be time barred by the court can be revived by applying for extension of time has been well articulated by the Court of Appeal in the case of **East African Development Vs Blue Line Enterprises Limited**, Civil Appeal No. 101 of 2009 where a party after having the petition dismissed for being time barred filed an application

for extension of time which was struck out hence lodged an appeal to the Court Appeal. The Court held as follows:

"*...that it is not open for a party to go back to the same court to seek extension of time* ***after the previous matter has been determined to be time barred".*** *(Emphasis is mine)*

In another case of **MM Worldwide Trading Company Limited and 2 Others Vs National Bank of Commerce Limited,** Civil Appeal No. 258 of 2017 when imploring the spirit of **section 3(1) of the Law of Limitation Act, Cap 89 RE 2019**, the Court of Appeal of Tanzania stated as follows:

"The above excerpt is directly relevant to the instant appeal in that the order striking out the ***suit in the former suit for being time barred amounted to conclusive determination of that suit by the trial court".*** *(emphasis is mine)*

In the above cited case, the Court of Appeal discussed the position of the law in the matter where the order has been to struck out a time barred matter. The position illustrated above is, still, the effect is a conclusive determination of that matter.

The regard should now be that the legal effect is clear in our case as the appeal was expressly dismissed for being time barred.

In discussing the propriety of the order of determining that the matter is time barred under the spirit of section 3(1) of the Act , the case of **Ngoni-Matengo Co-operative Marketing Union Limited Vs Ali Mohamed Osman** [1959] E.A. 577 held that:

> *"It is clear to us that irrespective of the words used,* ***the final order amounted to a conclusive determination by the trial court disposing of the former suit being time barred. In our views, it was not open for the respondent to institute a fresh suit as it were, simply because the trial court struck out the former suit rather than dismissing it as mandated by section 3(1) of the Act"***
>
> (emphasis is mine) ...

Guided by the same spirit, once the court has determined that the matter is time barred, a party does not have an open door to file extension of time to revive the application in the same court. This court is not only functus-officio for having already determined the matter conclusively; the court does not also have jurisdiction to determine a time barred matter.

I am further inspired by the principle held by the Court of Appeal in the case of **Hezron M. Nyachiya Vs Tanzania Union of Industrial and Commercial Workers and Another**, Civil Appeal No. 79 of 2001. In

the cited case the Court of Appeal was confronted with the issue of deciding as to whether the genesis of **section 3 of the Law of Limitation Act** applies in respect of the proceedings instituted under the **Fatal Accidents and Miscellaneous Provisions Ordinance**. The Court employed the role of the Law of Limitation Act and concluded that one of the roles of CAP 89 is to prescribe the consequences where the proceedings are instituted out of time without leave of the court. In substantiating its position, the Court interpreted the provisions of **Section 46 of the Law of Limitation Act** and concluded as follows:

> *"In the instant case, the time limit for instituting proceedings under the Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance is six months as provided for under Section 17A(3) of the Ordinance.* ***But the Ordinance does not prescribe the consequence when such proceedings are instituted out of time without leave of the court. The Law of Limitation has a provision for the consequence where a proceeding is instituted out of time without leave of the Court. It is section 3.*** *Under that provision, that is, Section 3, the consequence is that, such proceedings shall be dismissed whether or not limitation has been set up as a defence.* ***Since under Section 46 where a period of limitation for any proceeding is prescribed by any other written law the provisions of this Act shall***

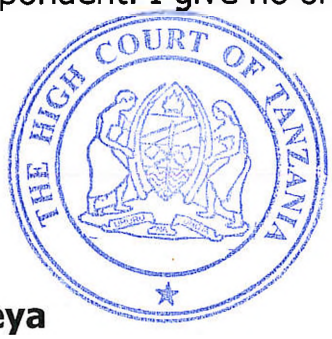
apply, it is our considered view that, section 3 of the Law of Limitation applies also in respect of proceedings instituted under the (Fatal Accidents and Miscellaneous Provisions) Ordinance. Thus, the appellant's application which was instituted out of time without leave of the Court, deserves to be dismissed". [Emphasis is mine].

I am also inspired by the spirit in the cases of **Olam Uganda Limited suing through its Attorney United Youth Shipping Company Limited Vs Tanzania Habours Authority,** Civil Appeal No. 57 of 2002; and **Hashim Madongo and Two Others Vs Minister for Industry and Two Others,** Civil Appeal No. 2003) which emphasised that aggrieved party can only revive the matter that has been declared by the court to be time barred through review, appeal or revision but not by filing an application for extension of time in the same court.

Guided by the above authorities from the Court of Appeal and following the principle set in the cited case of **MM Worldwide Trading Company Limited and 2 Others Vs National Bank of Commerce Limited (supra)**, it is clear that since the applicant's appeal was dismissed by this court for being time barred, the remedy would not be coming to this court again by way of an application for extension of time. Rather, it is my position that when a matter is dismissed for being

time barred under the provisions of **section 3(1) of the Law of Limitation Act irrespective of the phrase used**, such dismissal order becomes final and conclusive in that court. In-fact this court is then ousted with jurisdiction to entertain a time barred case. In order to revive a matter, a party can either file a review, an appeal or revision.

In the up-short, I dismiss the application for the same has already been conclusively ordered by this court to be time barred. As the legal issue was raised by the court suo – motto and as prayed by the counsel for the Respondent. I give no order as to costs. Each party to bear its own.



R. A Ebrahim

JUDGE

At Mbeya

28.06.2022

Date: 28.06.2022.

Coram: Hon. Z.D. Laizer, Ag-DR.

Applicant:

For the Applicant:

Respondent: Present in person.

For the Respondent: Mr. Mwamakamba (adv) h/b for Mr. Clarence (adv)

B/C: Patrick Nundwe.

Court: Ruling delivered in the presence of Mr. Mwamakamba, (advocate) h/b for Mr. Clarence (advocate) and the respondent.

Sgd: Z.D. Laizer

Ag-Deputy Registrar

28.06.2022

Order: (1) Right of Appeal Explained.

Z.D. Laizer

Ag-Deputy Registrar

28.06.2022

DEPUTY REGISTRAR
HIGH COURT OF TANZANIA
MBEYA