

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

THE HIGH COURT OF TANZANIA

(IRINGA DISTRICT REGISTRY)

AT IRINGA

MISCELLANEOUS LAND APPLICATION NO.01 OF 2022

(Originating from District Land and Housing Tribunal for Njombe at Njombe
Application No. 90 of 2017)

VICTORIA YAKOBO 1ST APPLICANT

JULIUS DANDA 2ND APPLICANT

VERSUS

ISRAEL MAKINDA RESPONDENT

Date of last Order: 14/7/2022

Date of Ruling: 19/8/2022

RULING.

MATOGOLO, J.

The applicants herein above mentioned filed before this Court an application for extension of time so that they can file an appeal out of time. The application is by chamber summons made under section 14(1) of The Law of Limitation Act (Cap 89 R.E. 2019), section 95 of The Civil Procedure Code Cap. 33 R.E 2019 and section 41 (2) of The Land Disputes Courts Act Cap 216 R.E 2019. The same was supported by two affidavits one was

sworn by Mr. Geoffrey Mwakasege and another was sworn by Julius Danda. In his counter-affidavit the respondent raised preliminary objection on point of law to the effect that:-

1. After the appeal being dismissed, the application for extension of time to file an appeal on same subject matter is misplaced and not maintainable.
2. The application by Victoria Yokobo is not maintainable for lack of supporting affidavit.

Thus, the respondent prayed for this court to dismiss the application with costs. As a matter of principle parties were invited to first argue on the preliminary points of objection raised.

At the hearing of this application the applicants were represented by Mr. Geoffrey Mwakasege the learned Advocate while the respondent appeared in person (unrepresented). The matter was argued through written submissions. Regarding the first limb of objection it was the submission by the respondent that, as the applicants after being aggrieved by the decision of the District Land and Housing Tribunal for Njombe in Application No.90 of 2017 they appealed to this court in Land Appeal No.08 of 2021. He was of the considered opinion that, as the proceedings was dismissed, this court is functus officio, thus the application is superfluous and not maintainable.

He went on contending that, section 14(1) of The Law of Limitation Act and a proviso to section 41(2) of The Land Disputes Courts Act talks of

the possibility of applying for extension of time to file an appeal out of time, but cannot include a situation where an appeal was filed and then dismissed. As to the second limb of preliminary objection, he submitted that, the caption of the application indicates that, there are two applicants, but there is an affidavit of only one litigant Julius Danda. Moreover, in the chamber summons, it is indicated that the supporting affidavit is of an advocate. But Julius Danda is not an advocate, but the 2nd applicant. He said that, even if the application was to stand, Victoria Yakobo would not be a party to it, as she has not taken part in supporting it. For that reason, he prayed for this application to be dismissed with costs.

In reply with regard to the first point of preliminary objection Mr. Mwakasege conceded to the objection as pointed out by the respondent and seeks for the alternative remedy.

As to the second point of preliminary objection Mr. Mwakasege submitted that, since in application No.01 of 2022 there is an affidavit of the Advocate Mr. Mwakasege who represents both applicants then the arguments by the respondent has no merit. He argued that the absence of Victoria Yakobo's affidavit does not exclude her from the application as there is presence of the Advocate's affidavit, who represents both applicants. He went on submitting that, the affidavit of Julius Danda is a supplementary affidavit with additional details supporting the first affidavit of the advocate hence such argument lacks merit.

In rejoinder the respondent has nothing to rejoin.

Having carefully read the rival submissions by the parties and having carefully perused the court records, it is my opinion that, the issue to be determined here is whether the preliminary points of objection raised are maintainable.

Starting with the first limb of preliminary objection the main concern here is that, since appeal No. 8 of 2021 which was filed by the present applicants was dismissed after being filed out of time, this application is not maintainable hence this court becomes "functus officio".

Mr. Geoffrey Mwakasege for the Applicants has conceded to this point of objection.

It is crystal clear from the court records that, the applicants after being aggrieved by the decision of the District Land and Housing Tribunal for Njombe in Application No. 90 of 2017 they appealed to this Court in Land Appeal No.08 of 2021, but the same was dismissed on 16th November 2021 after being found it was filed out of time.

It is my considered opinion that, when an appeal is dismissed for whatever reason, the available remedy for the applicants is not to file an application for extension of time in the same court so as they can file their appeal out of time. It is that is why Mr. Geoffrey Mwakasege learned counsel for the applicants has conceded to this point of objection. In the case of ***Tanzania Breweries Ltd. v. Edson Muganyizi Barongo and 7***

Others, Miscellaneous Labour Application No 79 of 2014, High Court Labour Division, it was held that:-

"When a suit/ Application is dismissed for being time barred, the only remedy available is to appeal rather than applying for extension of time in the same court".

The applicants had opportunity under section 41(2) of the Land Disputes Courts Act to apply for extension of time either before or after expiry of the period provided.

The dismissal order in land Appeal No. 08 of 2021 was made after find that the appeal by the applicants was lodged out of time. The same was dismissed under section 3(1) of the Law of Limitation Act after being found incompetent before the court. This point of objection has merit.

In the second limb of preliminary objection, the complaint is that, in this application they are two applicants but the affidavit supporting this application was sworn by one applicant Julius Danda, and in the chamber summons it is indicated that Julius Danda is an advocate while he is the 2nd applicant.

The counsel for the applicants was of the view that, the affidavit of Julius Danda is a supplementary affidavit with additional details in supporting the first affidavit. And since in the application No.01 of 2022 there is an affidavit of Mr. Mwakasege Advocate who represents both applicants then the arguments of the respondent is without merit.

Having carefully read the court records, the same show that, when the matter came on for mention on 24/03/2022 the Advocate for the applicants prayed to file a supplementary affidavit the prayer which was granted. That is why the applicants filed a supplementary affidavit that was sworn by Julius Danda .

However although it was headed supplementary affidavit the same has same contents to that contained in the affidavit by Mr. Geoffrey Mwakasege advocate, only that there are documents annexed thereto. It is not known as to why only an affidavit of Julius Danda was filed as supplementary affidavit without the other applicant being involved. One would expect the two applicants to have sworn a joint affidavit or each has his own. Understandably supplementary affidavit supplements what is within the original affidavit. It cannot be said that the previous affidavit ceased to have legal effect but it supplement what was deposed by their advocate probably for facts which were in the knowledge of the said applicant. It is unlike amendment in the pleadings, as an affidavit being evidence in written form cannot be amended, the right course is to file supplementary affidavit stating the facts which were not revealed in the original affidavit. But what is contained in the supplementary affidavit is not new. It is that is why the question as to why the other applicant was not involved arose. In actual fact failure to include him amounts to excluding him from the application. Given that there have been two applicants from the beginning and even in the dismissed appeal, excluding the other applicant in my view renders the application incompetent, thus I

find merit in this point as well. The preliminary point of objection raised is sustained and the application is hereby dismissed with costs.

It is so ordered.




F.N. MATOGOLO

JUDGE

19/8/2022.

COURT:

Delivered in the presence of James Simon on behalf of the applicant and the respondent in person, Ms. Grace Mfyuji (clerk) also present.



MALEWO, M. A.
DEPUTY REGISTRAR

19/08/20220.

Right of appeal explained.



MALEWO, M. A.
DEPUTY REGISTRAR

19/08/2022.