

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM
MISC. APPLICATION NO 199 OF 2021

IBUNI MRISHO MITIMINGIAPPLICANT
VERSUS
ROSE MATHEW MASSEBU.....RESPONDENT

RULING

Last Order: 16 November, 2021

Date of Ruling:3/2/2022

MASABO, J.:-

By a chamber summons filed in this court under section 14(1) of The Law of Limitation Act [Cap 89 R.E. 2019], the Applicant, Ibuni Mrisho Mitimangi, has moved this court for a leave for extension of time within which to apply for revision of the proceedings of the District Land and Housing Tribunal for Kinondoni at Mwananyamala in Application for three matters namely, Execution No. 106 of 2014, Application for Costs Number 436 of 2016 and Case No. 62 of 2013.

Having been served, the respondent filed a counter affidavit accompanied by a notice of preliminary objection premised on four limbs, to wit:

- 1. The application is improperly before this court as:*
 - i. the application for extension of time in case of No. 62 of 2013 is res judicata*

- ii. the court has been wrongly moved in respect of Misc. Land Application No. 679 of 2018*
 - iii. the court has been wrongly moved to extend time for bill of cost No. 436 of 2016.*
- 2. The affidavit is hopelessly defective for being contrary to order XIX Rule 3 of the Civil Procedure Code [Cap 33 RE 2019];*
 - 3. That, this case is improperly before this court if cases were truly heard ex parte in the subordinate tribunals;*
 - 4. That he has made a wrong remedy as this kind application was made at Mwananyamala District Tribunal but he failed.*

When the PO was called on for hearing both parties had representation. Mr Emmanuel Kukashu, Advocate was for the Applicant and Mr. Saiwelo Kumwenda appeared for the respondent.

Submitting in support of the 1st preliminary objection Mr. Kumwenda argued that this application is incompetent as it is *res judicata* to Misc. Land Application No. 679 of 2018 before the District Land and Housing Tribunal (DLHT) for Kinondoni at Mwananyamala. Exemplifying his point, he argued that, prior to this application, the applicant had filed Misc. Land Application No. 679 of 2018 before the DLHT which was conclusively decided on 3/6/2020 whereby the applicant ended up losing the application. Thus, he can no longer come to this court with a similar application. If he wished, he could have come by way of appeal.

Mr. Kumwenda proceeded further that, the application for extension of time in respect of the Application for Costs Number 436 of 2016 is improperly before this court as it has been wrongly moved vide section 14 (1) of the Limitation Act, Cap 89 RE 2019 instead of the Advocates Remuneration Order of 2015 which is applicable in applications emanating from the bill of costs.

In regard to the 2nd limb of the preliminary objection, Mr. Kumwenda submitted that the applicant's affidavit is decorated with prayers in paragraph 25 contrary to the provision of Order XIX rule 3 (1) of the Civil Procedure Code [Cap 33 RE 2019] which stipulates that affidavit should state facts not prayers. He strongly opined that the decoration has rendered the application incompetent. Concerning the 3rd limb of preliminary objection, it was argued that, since the matter at the DLHT proceeded *ex parte*, the application is incompetent as the only remedy for a matter decided *ex parte* is an order to set aside an *ex parte* judgment.

Responding, Mr. Kukasa questioned the competence of the 3rd and 4th limbs of the preliminary objection. He reasoned that a preliminary objection must be on a pure point of law as stated in **Mukisa Biscuits manufacturing company limited v West End Distributors Limited** (1969) EACA 699. Thus, in his opinion, the points raised in these two limbs cannot stand as preliminary objections as they are not purely points of law. Mr. Kukasa argued further that, the 2nd PO is irrelevant as paragraph 25 does not contain prayers. In the alternative he argued that, even if the court finds this point meritorious and expunges the paragraph the application will remain intact as the matters averred in the contested

paragraph do not go to the root of the application. Regarding the 1st limb of the preliminary objection. He proceeded that, the PO *res judicata* is irrelevant and inapplicable as the application was struck out not dismissed. Mr. Kukasa finally conceded that in applications for bill of costs are governed by the Advocates Remuneration Orders.

Rejoining Mr. Kumwenda submitted that the preliminary objections are pure points of law and they meet the criteria set in **Mukisa Biscuits'** case test. In regard to the 4th PO Mr. Kukasa submitted that section 11(2) of the Land Disputes Act, apply in the instant application. Regarding the 1st limb of the preliminary objection, it was argued that, since the counsel has conceded that the application was filed but struck out, it is wrong for him to move this court for extension of time as the proper remedy available was to move the court to review its decision.

Upon consideration of the submission by both parties, as summarized above, I will now proceed to determine the preliminary objection raised by the respondent which as alluded to earlier on is premised on 4 points. Before considering and determining the merit of the four points, I have observed that, in the course of his reply submission, Mr. Kukasa has challenged the competence of the 3rd and 4th limbs of the preliminary objection. In fortifying his point, he has referred us to the landmark case of **Mukisa Biscuits Manufacturing Company Limited v West End Distributors (supra)** vide which sets the bar for preliminary objections. In his case, it was established that:

“.... a preliminary objection consists of a point of law which has been pleaded or which arises by clear

implication out of the pleadings, and which, if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a plea of limitation, or a submission that the parties are bound by the contract giving to the suit to refer the dispute to arbitration."

Exemplifying the nature of preliminary objection further, the court held that;

"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is the exercise of judicial discretion."

This is indeed the position in our jurisdiction. The principle in **Mukisa Biscuit's** case has been cemented in plethora of decisions of the Court of Appeal such that, it is now trite in our jurisdiction that, a preliminary objection should be purely on a point of law. A point requiring factual proof will automatically fail as no preliminary can lie on a point that requires evidence to establish. (**Moto Matiko Mabanga vs Ophir Energy Plc & Others**, Civil Appeal No. 199 of 2021 (unreported), **Alliance Insurance Corporation Ltd vs Arusha Art Ltd**, Civil Appeal No. 297 of 2017(unreported)). I will revert to this issue when dealing with the two points contested.

Regarding the merit of the 1st limb of the preliminary objection, it has, as demonstrated above, three sub points namely, the application *is res judicata*, the court has been wrongly moved in respect of Misc. Land Application No. 679 of 2018, and the court has been wrongly moved to extend time for bill of cost No. 436 of 2016. Mr. Kumwenda silently abandoned the second point and argued on first and third point which I prefer to start with. Much as Mr. Kumwenda did not come out clearly what can be grasped from his submission is that, the application is an omnibus as the applicant has moved the court with three distinct prayers comprising of (a) an extension of time within which to apply for revision of the DLHT in Case No. 62 of 201 (b) extension of time within which to appeal against Execution No. 106 of 2014, and (c) extension of time in respect of Application for Costs Number 436 of 2016 and each of these has its own regulations and procedure.

In particular, he has argued that, the last relief is governed by the Advocates Remuneration Order GN. No. 263 of 2015 which under Order 7(1) provides that a person aggrieved by a decision of the Taxing officer, may file reference to a judge of the High Court within 21 days of from the date of the decision a duration which can be extended by the High Court upon an application made under Order 8(1).

This point has landed me on a plethora of authorities dealing with omnibus applications in the High Court and the position as articulated in **MIC Tanzania Limited v Minister for Labour and Youths Development**, Civil Appeal No. 103 of 2004 (unreported); **Gervas Nwakafwila & 5 others v the Registered Trustees of Moravian**

Church in Southern Tanganyika, Land Case No. 12 of 2013 (unreported) **Hezron Jimson Mwankenja v Mbeya City Council**, Misc. Land Application No. 44 of 2014; **Pride Tanzania Ltd v Mwanzani Kasatu Kasamia**, Misc. Commercial Cause No. 230 of 2015 and many other cases. The position discernible from these authorities is that, omnibus applications are not bad in law as there is no law that abhors omnibus applications. In **MIC Tanzania Limited v Minister for Labour and Youths Development (supra)**, the court had this to say:

"In my opinion the combination of the two applications is not bad at law. I know of no law that forbids such course. Courts of law abhor multiplicity of proceedings. Courts of law encourage the opposite."

Cementing and exemplifying this point further in **Gervas Nwakafwila & 5 others v the Registered Trustees of Moravian Church in Southern Tanganyika** (supra), the court held that,

"I... find the reasoning in **MIC Tanzania Limited v Minister for Labour and Youths Development**, (supra) and **Knit wear Limited v Shamsu Esmaili** (supra) highly 7 persuasive. Compilation of several separate but interlinked and interdependent prayers into one chamber application, indeed, prevents multiplicity of proceedings. A combined application can still be supported by a single affidavit, which must, then, provide all necessary facts that will provide justification for granting each and every prayer in the chamber summons. The fear that a single affidavit cannot legally and properly support more than one prayer is over top. On balance, an affidavit is not mystical or magical creature that cannot be crafted to fit the circumstances of a particular case. It is just a vessel through which evidence is presented in court. I must hasten to say, however, that I am aware of the possibility

of an application being defeated for being omnibus especially where it contains prayers which are not interlinked or interdependent. I think, where combined prayers are apparently incompatible or discordant, the omnibus application may inevitably be rendered irregular and incompetent."

I entirely subscribe to this position as well as the exception which was



CHAPTER 13 The Law of the Child Act; further is also emphasized in **Rutunda Masole vs Makufuli Motors Limited**, Misc. Labour Application No. 79 of 2019 where it was held that;

"The condition precedent for applicability, of this rule is that the application should not be diametrically opposed to each other or preferred under different laws, complete with different timelines and distinct considerations in their determination."

In the instant case, as correctly argued by Mr. Kumwenda, applications for bill of costs are governed by the Advocates Remuneration Order GN. No. 263 of 2015 which stipulates the remedy for a person aggrieved by a decision of the Taxing Officer and the duration upon which to move the court to invoke the remedy and the procedure thereto, According to Order 7(1), the only remedy available for an aggrieved person is a reference to a judge of the High Court to be filed with within 21 days from the date of the decision. The duration for filing the revision can be extended by the High Court under Order 8(1). On the other hand, revisions from the DLHT are governed by section 43 (1)(b) of the Land Disputes Courts Act [Cap. 216 RE 2019] and the time limitation applicable is 60 days as per item 321 of the Third Schedule to the Law of Limitation Act.

Since the laws governing the applications comprised in the instant applications are different and their timelines are different, I find merit in the preliminary objection. As the finding here suffices to dispose of the application, I will not dwell on the reminder of the point. The application is forthwith struck out with costs.

DATED at DAR ES SALAAM this 3rd February 2022.

04/02/2022

X



Signed by: J.L.MASABO

J.L. MASABO

JUDGE