

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM SUB DISTRICT REGISTRY)
AT DAR ES SALAAM
MISC. CIVIL APPLICATION NO. 177 OF 2022

(Originating from Land Case No.3 of 2021)

OMARI MKILALU.....1ST APPLICANT

JUMA MABRUKI.....2ND APPLICANT

VERSUS

NUNU MTINGE..... 1ST RESPONDENT

TEMEKE MUNICIPAL COUNCIL..... 2ND RESPONDENT

RULING

Date of last Order: 08/10/2022.

Date of Ruling: 21/10/2022.

E. E. KAKOLAKI, J.

This ruling seeks to address the preliminary points of objection raised by the 2nd respondent on the grounds that, **One**, The application is defective for nonjoinder of a necessary party; **Two**, the application is bad in law and incurably defective for not being accompanied by the drawn order and ruling, **Three**, the application is defective for non-citation of proper provision of the law and **Four**, the application is time barred.

Briefly, in Land Case No.3 of 2022, which is still pending in this Court, the two applicants herein together with three (3) others instituted a suit against the 2nd respondent and Attorney General, claiming for ownership of business

cages, shops/flames situated at the Tandika Market within Temeke Municipality, Dar es salaam Region in which the 2nd Respondent claims ownership too. On 31/3/2022, when the suit was scheduled for 1st pre-trial conference all plaintiffs who were also represented defaulted appearance save for the 1st Respondent as their advocate did not appear in court too for undisclosed reasons. Following a prayer from the Defendants/2nd respondent, this Court partly dismiss their suit under Order VIII Rule 20(1)(a) of the Civil Procedure Code, [Cap. 33 R.E 2019] while ordering the 1st respondent's suit to proceed. It is from that decision this application has been preferred by two of the four plaintiffs whose suit was dismissed on 31/03/2022, praying for setting aside of the dismissal order and restoration of their suit. Upon being served with the application, the 2nd respondent reacted by lodging a notice of preliminary objection contained four points as narrated above.

As it has always been the practice of this court to dispose of first the preliminary points of objections when raised, parties were heard viva voce on 08/09/2022. Mr. Everius Mwendwa Elias, Careen Masonda and Peter Mhando, learned State Attorneys appeared for the 2nd respondent while

Mr. Juma Nassoro, learned advocate appeared for the applicants and the 1st respondent appeared in person unrepresented.

It was Mr. Elias who took the floor first and prayed to abandon the 3rd ground of objection on non-citation of proper provision of the law and proceeded to argue the remaining grounds. Submitting on the first ground of non-joinder of necessary party, he relied on the requirement of section 6 (3) of the Government Proceedings Act, [Cap 5 RE 2019] as amended by Act No.1 of 2020 that, in any matter where the Government is sued the Attorney General must be joined as a necessary party, in which in this matter the applicants failed to do. He argued non joinder of Attorney General vitiates the proceeding under section 6(4) of Cap. 5 as amended by Act No.1 of 2020, hence this application is incompetent before the Court and ought to be struck out. To fortify his stance he cited to the Court the decisions of this Court in the cases of **MSK Refinery Limited Vs. TIB Development Bank Ltd & Another**, Misc. Civil Application No.307 of 2022 and **Institute of African Leadership for Sustainable Development (Uongozi Institute) Vs. Khamis Mgeleka**, Revision No.627 of 2018 (HC-unreported).

On the second ground of objection he submitted, failure of the applicants to attach drawn order or ruling in their application rendered the application

incompetent as the law demands that the decision sought to be challenged must be annexed to the application. To fortify his stance the cases of **Mathias Charles Kaselele Vs. The Registered Trustees of the Archdiocese of Tanzania**, Civil appl.No.2 of 2012 and **Amos Fulgence Kalungula Vs. Kagera Co-operative Union (1990) LTD**, Civil Appl.No.151/04 of 2018 (all CAT-unreported) were cited.

Lastly was on the ground of time limitation in which Ms. Masonda submitted on. She informed the Court that, in this matter applicants are seeking to set aside the dismissal order made by this Court on 31/03/2022 in Land Case No.3 of 2021, which ought to be lodged within 14 days of the dismissal order under VIII Rule 20(2) of the CPC meaning by 14/04/2022, but to the contrary the same was filed on 02/05/2022, 18 days out of time. As the same was brought outside the prescribed time limitation, Ms. Masonda urged this Court to dismiss the application under section 3(1) of the Law of Limitation Act, [Cap. 89 R.E 2019] (the LLA).

In reply Mr. Nassoro Advocate submitted that, he would have conceded to the preliminary objection on time limitation and pray for dismissal the application under section 3(1) of the Law of Limitation Act, but refrained from so doing as the applicants' act of violating the provisions of section 6

(3) of the Government Proceedings Act, rendered the application incompetent already deserving to be struck out. He therefore prayed the Court to struck out the application and invoke the overriding objective principle to allow the applicants to file a fresh application out of time even within three days. In his view this matter is quite different from the facts in case of **MSK Refinery Ltd** (supra), as in that matter unlike in this application the AG was not joined in both main case and in the application whilst in the present application the AG is joined in the main case save in this application.

Responding to the point raised on non-compliance of the requirement to attach copy of the ruling or order to the application as submitted by Mr. Elias, Mr. Nassoro argued that, there is no mentioned law governing the said requirement apart from the Court of Appeal decision. He opined that, if the Court finds that it was necessary for the applicants to attach the order sought to be set aside, applicants will be obliged to be availed with the that opportunity. As to the 1st respondent she seemed not interested in the application hence had nothing to reply.

In his brief rejoinder Mr. Elias submitted that, as the applicants have conceded to the preliminary objections, the overriding objectives principle

cannot be invoked to cure what he termed open violation of the provision of the law as the principle does not apply to mandatory provisions of the law as it was stated in **Mondorosi Village Council and 2 Others Vs. Tanzania Breweries Ltd and 4 Others**, Civil Appeal No. 66 of 2017 (CAT-unreported) at page 13. Mr. Elias pressed this Court to dismiss the suit with costs.

I have carefully travelled through the submissions from both parties in support and against the raised preliminary objections which have been done at length as well as the pleadings. What is gathered from both contesting submissions is that, parties are at one now that, this application was filed in violation of the provisions of section 6(3) of the Government Proceedings Act which infraction vitiates the proceedings as per section 6(4) of the same Act thereby rendering the application incompetent. See the cases of **MSK REFINARY Ltd** (supra) and **Institute of African Leadership for Sustainable Development** (supra). It is also uncontroverted fact that, this application seeking to set aside the dismissal order of 31/03/2022 by this Court ought to be filed on or before 14/04/2022, but in contravention of Order VIII Rule 20(2) of the CPC, the same was filed on 02/05/2022, 18 days out of time. Parties part their ways when it comes to the consequences

following infraction of the provisions of section 6(3) of the Government Proceedings Act as amended and Order VIII Rule 20(2) of the CPC by the applicants, in which Mr. Nassoro prays for striking out of the application and extension of time for the applicants to refile the application while, Mr. Elias is pressing for dismissal of the application. Now the only issue which Court is called to answer is whether the application should be struck out and time extended to the applicants to refile it or dismiss it for being time barred.

It is a common knowledge as also conceded by Mr. Nassoro that, once the matter is preferred in infraction of section 6(3) of the Government Proceedings Act as amended its proceedings are vitiated under section 6(4) of the same Act, hence rendering the matter incurably defective hence incompetent before the Court. Similarly once the matter is preferred out of prescribed time limitation the same becomes incurably defective too hence incompetent before the Court. The only different between the two matters is on consequences befalling their incompetency in which the first one provides for striking out of the matter while the second one is dismissal of the suit under section 3(1) of the LLA. Now can a matter filed out of time be struck out and time extended for the party to refile the same as per Mr. Nassoro's prayer? To me the answer is negative, as that would be going

against the mandatory provisions of section 3(1) of the LLA that, once the matter is preferred outside the prescribed time limitation the same shall be dismissed whether or not limitation has been set up as a defence. Section 3(1) of the LLA provides thus:

*3.-(1) Subject to the provisions of this Act, every proceeding described in the first column of the Schedule to this Act and which is instituted after the period of limitation prescribed therefore opposite thereto in the second column, **shall be dismissed whether or not limitation has been set up as a defence.** (Emphasis supplied)*

In this matter since the provision of section 3(1) of the LLA is couched in mandatory terms, I am inclined to agree with Mr. Elias that the principle of overriding objective is inapplicable in the circumstances as it was held in the case of **Mondorosi Village Council** (supra) where the Court of Appeal observed thus:

"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."

With the above finding the two grounds disposes of this matter and I do not see the relevance of discussing the 2nd ground as that will be an academic exercise.

All said and done, since the application was preferred outside the prescribed time period, the same cannot avoid to be caught in the web of section 3(1) of the LLA, hence I refrain from accepting the invitation by Mr. Nassoro to strike out the application and extend time to refile it, instead I pick Mr. Elias' offer and proceed to dismiss this application with costs.

Dated at Dar es salaam this 21st day of October, 2022.



E. E. KAKOLAKI

JUDGE

21/10/2022.

The Ruling has been delivered at Dar es Salaam today 21st day of October, 2022 in the presence of Ms. Fauzia Kajoki, advocate holding brief for advocate Juma Nassoro for the applicants , Mr. Peter Mhando, State Attorney for the 2nd Respondent, and Ms. Asha Livanga, Court clerk.

Right of Appeal explained.



E. E. KAKOLAKI

JUDGE

21/10/2022.

