

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
IN THE DISTRICT REGISTRY OF ARUSHA  
AT ARUSHA**

**MISC.CIVIL APPLICATION NO. 54 OF 2021**

*(C/f the decision of Civil Appeal No. 3 of 2020 in the District Court of Babati and  
Original Probate and Administration Cause No. 6 of 2019 Galapo Primary Court)*

**PASKALI TLUWAY ARBAY .....APPLICANT**

**VERSUS**

**NG'AIDA TLAA ..... RESPONDENT**

**RULING**

13/09/2022 & 15/11/2022

**KAMUZORA, J.**

This is an application for the extension of time preferred by Paskali Tluway Arbay, within which to file an appeal before this court out of time against the decision of the District Court of Babati (first appellate court) in Civil Appeal No. 3 of 2020. The application was made by way of a chamber summons under section 14(1) of the Law of Limitation Act [CAP 89 R.E 2019] and was supported by an affidavit sworn by the Applicant himself. The Applicant's application was contested through a counter affidavit deposed by the Respondent himself and a notice of preliminary objection on a point of law to the effect that;

*This application is incurably incompetent for wrong citation of the proper provision of the law contrary to section 25(1) (b) of the Magistrates' Courts Act [CAP 11 R.E 2019]*

The brief background of the matter is such that, the Respondent petitioned for the grant of probate and letters of administration at Galapo Primary court (trial court) and the Applicant lodged a caveat opposing the said petition and the matter was ruled in favour of the Respondent. Dissatisfied the Applicant lodged an appeal to the District Court of Babati (First Appellate Court) which upheld the trial courts decision. Being aggrieved by the District Court's decision and as time to appeal had lapsed the Applicant preferred this current application.

When the matter was called for hearing, this court made an order that both the preliminary objection and the application to be argued simultaneously to serve the court's time and that of the parties. In acknowledging that the parties should be accorded full hearing, this court gave choice for each party to use the means affordable to them in arguing the matter at hand. The Applicant filed the written submission while the Respondent submitted orally and the rejoinder was also by oral submission.

During the composition of the ruling it was discovered that, in their submissions, the parties did not address the preliminary objection as they only argued the application. In considering that the preliminary objection was to be determined before determining the application, this court called upon the parties to address the court on the preliminary objection for it to make a proper determination of the matter. The preliminary objection was argued by both parties by way of written submissions except that no rejoinder submission was filed. I will start by determining the preliminary objection and if sustained, I will not proceed with the determination of the main application but if the objection will be overruled, I will proceed with the determination of the main application.

Arguing in support of the Preliminary objection it is the submission by the Respondent that, the Applicant in his chamber application moved this court under section 14(1) of the Law of Limitation Act which is not applicable law as the applicable law is section 25(1) (b) of the Magistrates Courts Act. That, as the MCA provides for extension of time, section 43 and 46 of the LLA prohibits the applicability of the LLA in an application for extension of time. The Respondent added that, the Law of Limitation Act is only applicable where the Magistrates Courts Act is

silence on the extension of time. To support his submission the Respondent cited the case of **Herzon M. Nyacheiya Vs. Tanzania Union of Industrial and Commercial Workers and another**, Civil Appeal No. 79 of 2001 (unreported), **Shorisael Ezekiel Kaay Vs. Varael Ndekirwa Kimambio**, Civil Application No 16 of 2022 HC at Arusha (Unreported). **Almasi Iddie Mwinyi Vs. National Bank of Commerce and another** [2001] TLR 83. It is the Respondent's prayer that the Applicants application be struck out with costs.

Replying to the Respondent preliminary point of objection, it is the submission by the Applicant that much as the Respondent has cited the provision of section 46 of the Law of limitation Act Cap 89 the same gives the reason as to why the Applicant used section 14(1) of the Law of Limitation Act Cap 89 R.E 2019. The Applicant is of the view that, the Magistrates Courts Act does not show any contrary intention and therefore section 14(1) of Cap 89 is applicable in the present application. Citing the case of **Damari Watson Bijinja Vs. Innocent Sangano**, Misc. Application No 30 of 2021 HC at Kigoma (Unreported) the Applicant submitted that, it is not the first time that section 14(1) of the Law of Limitation Act Cap 89 R.E 2019 have been invoked in prayers for extension of time to appeal out of time. The Applicant added that, for

the interest of justice even though the Applicant has cited a wrong provision it does not bar the hearing of the application under the Written Laws (Miscellaneous) Amendments (3) Act, 2018 No. 8 of 2018 under the overriding objective. To cement this, the case of **Yakobo Magoiga Gichere Vs. Peninah Yusuph** Civil Appeal No 55 of 2017 (Unreported). The Applicant prays that the preliminary objection be dismissed.

Having heard the submissions made by the parties, I opted to revisit the provision of the law referred by the parties. Section 14 of the Law of Limitation Act allows a court to extend the period of limitation for the institution of an appeal or an application, other than an application for the execution of a decree, where sufficient cause is shown. However, Section 43 (f) of the Law of Limitation Act [Cap 89 R.E. 2002] prohibits application of the Law of Limitation Act in the proceeding for which a limitation of time is provided for by another law. It stipulates that: -

*This Act shall not apply to;*

*f) Any proceeding for which a period of limitation is prescribed by any other written law, save to the extent provided for in section 46. The wanting question is whether there is other law which provides for time limitation of the proceeding at hand.*

Section 25 (1) (b) on the Magistrate Court Act Cap 11 RE 2019 provides for limitation period and the right to seek for extension of time. the said provision read: -

*"in any other proceedings any party, if aggrieved by the decision or order of a district court in the exercise of its appellate or revisional jurisdiction may, within thirty days after the date of the decision or order, appeal there from to the High Court; and **the High Court may extend the time for filing an appeal either before or after such period of thirty days has expired.**"*

The cited law above empowers this court to extend the time requisite to lodge an appeal after the lapse of the statutory time. Thus, it is a very specific provision for extension of time for a party intending to challenge the decision of the District Court in appellate or revisional jurisdiction.

It is apparent from the record that, the appeal with which the Applicant intends to challenge originates from the primary court hence the District Court was exercising its appellate jurisdiction. The proper provision for appeal and extension of time is section 25 (1)(b) of the Magistrates Courts Act Cap 11 R.E. 2002 cited above as opposed to section 14 (1) of the law of limitation Act. As there exists a specific provision of the law

covering the aspect, the applicability of the Law of Limitation Act has been ousted by section 43(f) of the Law of Limitation Act.

On the argument that section 46 of the Law of Limitation Act allows the applicability of the Law of Limitation Act, it is my view that the Applicant misconstrued the intention of that provision. The said section 46 of the Law of Limitation Act reads: -

*"Where a period of limitation for any proceeding is prescribed by any other written law, then, **unless the contrary intention appears in such written law**, and subject to the provisions of section 43, the provisions of this Act shall apply as if such period of limitation had been prescribed by this Act."*

The above provision allows the applicability of the Law of Limitation Act where the contrary intention is shown by the specific law that will require the use of the LLA in the matter related to limitation period. It goes therefore that, the application for extension of time could not be preferred under the Law of Limitation Act thus the Applicant cited the wrong provision of the law.

In the case of **Marmo Slaa @ Hofu & 3 others Vs. The Republic**, Criminal Application No. 3/2012 CAT at Arusha cited with approval the case of **Edward Bachwa & 3 others Vs. The attorney**



**General & another**, Civil Application No. 2006 (Unreported) where it was held that,

*"... The answer is found in an unbroken chain of authorities to the effect that **wrong citation of the law, section, sub-section and/ or paragraphs of the law or non-citation of the law will not move the court to do what it is asked and renders the application incompetent**" (Emphasis original).*

It was however argued by the Applicant that the defect can be cured by applying the principle of overriding objective. This position is settled by the Court of Appeal and in the case of **SGS Societe Generate De Surveillance SA & Another Vs V. I. P Engineering and Marketing Limited & Another**, Civil Appeal No. 124 of 2017 it held that: -

*"It should be noted that, the overriding objective principle was not mean to enable parties to circumvent the mandatory rules of the court to turn blind to the mandatory provisions of the procedural law which goes to the foundation of the case."*

While being guided by the position of the law stated hereinabove the court has gone through the cases **Damari Watson Bijinja (supra)** **which** the Applicant submitted that, it is not the first time that section 14(1) of the Law of Limitation Act Cap 89 R.E 2019 have been invoked in prayers for extension of time to appeal out of time. It is unfortunate



that the said case originated from Matrimonial Appeal which the Applicant did not state if it has specific provision related to extension of time.

In my view, the overriding objective cannot condone the errors where a correct law is not cited or is wrongly cited. But where the correct law is cited to which the court has jurisdiction to grant the order sought the irregularity or omission in citing the correct provision can be ignored and the court may order the correct provision to be inserted. In this matter there is wrong citation of the law which would have given the court jurisdiction to grant the order sought. Thus, the cited case by the Applicant cannot be invoked to move the court to ignore the defect or to order the correct law to be inserted in the application. This position was also taken by this court in the case Misc. Land Application No. 351 OF 2021, **Veronica Hassan Kishai Vs. Suzan Salum Malangai and 2 others** which cited with approval the decision of this court in **Alliance Tobacco Tanzania Limited & Another Vs. Mwajuma 7 Hamis & Another**, Misc. Civil Application No. 803 of 2018 where it was held that: -

*"It must be noted, however, that the imported wisdom of Rule 48 of the Court of Appeal Rules into this court is limited to circumstances*

*where an application has omitted to cite any specific provision of law or has cited a wrong provision, but the jurisdiction to grant the order sought exists. It does not cover where the application has cited wrong law altogether. In the later circumstances, in my humble view, the application should be struck out."*

Subscribing to the above cases, it is my settled mind the defect found in the application at hand is on wrong citation of the law altogether and not a wrong citation of provision of the law. The principle of overriding objective cannot be applied to ignore the said defect or order the correct law to be inserted in the application as the court has not been clothed with jurisdiction to grant the leave the Applicant is seeking from this court. The Court of Appeal of Tanzania in the case of **Alli Chamani Vs. Annat Tinda**, Civil Application No 410/4 of 2017 CAT at Bukoba (Unreported) when faced with similar issue like the present one made a ruling striking out the incompetent application filed before it.

In the upshot, I sustain the preliminary objection and since the preliminary objection goes to the competence of the application, I will not then determine the merit of the application. I therefore strike out the application with costs.

**DATED** at **ARUSHA** this 15<sup>th</sup> November, 2022.



  
D.C. KAMUZORA

JUDGE