

**THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF BUKOBA)**

AT BUKOBA

MISC. LAND APPLICATION NO. 98 OF 2022

(Arising from the High Court of Tanzania at Bukoba in Misc. Land Application No. 58 of 2021 and Misc. Land Application No. 52 of 2022)

JAFFARI MWANGI KAMUKULU APPELLANT

VERSUS

INNOCENT THADEO 1ST RESPONDENT

CATHBERT SIMON 2ND RESPONDENT

RULING

Date of Ruling: 31.03.2023

A.Y. Mwenda J,

This application is for extension of time to file an appeal out of time. It is brought under section 41(2) of the Land Disputes Court's Act [CAP 216 R.E 2019] and section 95 of the Civil Procedure Code [CAP 33 R.E 2019]. It is supported by an affidavit sworn by the applicant. In counter thereof, the counsel for the 1st respondent filed a counter affidavit accompanied with a notice of preliminary points of objection. The same reads as follows and I quote;

- 1) That much as paragraph 8 and 12 of the affidavit disclosed that the applications akin to this one already filled and determined by this court in Miscellaneous Land Application No. 58 of 2021 and Miscellaneous*

Land Application No.52 of 2022, hence the present application is incompetent for being res judicata.

2) That the Court is functus officio to hear and determine this application.

3) That the application is fatally defective for wrong citation of enabling provision of the law.

4) The application is bad in law for being frivolous and vexatious hence abuse of court process for being preferred in contravention of courts' order, in Misc. Application No. 52 of 2022.

On his part the second respondent also raised a preliminary point of objection, which is;

"The, application had already been granted vide the Application No. 58 of 2021 of which the same applicant has failed to pursue his rights as held in the Misc. Land Application No. 52 of 2022."

During the hearing of this application, the applicant was represented by Mr. Victor Blasio, learned counsel while the 1st respondent was represented by Mr. Dickson Ngowi learned counsel. On the other hand, the 2nd respondent hired the legal services from Mr. Geoffrey Rugarabamu learned counsel.

When invited to submit in respect of the preliminary points of objection, Mr. Ngowi opted to merge the 1st, 2nd and 4th preliminary points of objection together while the 3rd point of objection was dealt with separately. In his submissions Mr. Ngowi, while making reference to paragraph 8 of the applicant's affidavit submitted that in Misc. Land Application No. 58 of 2021 the court granted leave to appeal within 21 days. However, the appellant failed to appeal in time hence he filed another application for extension of time Misc. Land Application No. 52 of 2022 which was struck out for being incompetent due to wrong citation of the section 41(2) of the Land Dispute Courts Act [CAP 216 R.E 2019] as enabling provision. The learned counsel stressed that the court reached to that conclusion as the applicant had already been granted extension of time.

The learned counsel went further to submitting that the filing of the present application (i.e. Misc. Land Application No. 98 of 2022) by the applicant while praying to be granted extension of time is an abuse of court process. According to him this court has become functus officio to discuss this matter since it was already determined and ruled out (by this court) in term of section 41(2) of the Land Dispute Court Act. The learned counsel added in that since this matter was determined on merits on the same parties it is then res judicata. To support this argument, he cited the cases of ZEBRONE MHUMHA VS SYBEGELE AYUBU, MISC. LAND APPLICATION NO. 155 OF 2020, BENHARDARD MBARUKU TITO AND ANOTHER VS REPUBLIC, MISC. ECONOMIC CAUSE NO. 9 OF 2018, TTCL

AND THREE OTHERS VS TRI TELECOMINATION ON TANZANIA LTD CIVIL REVISION NO. 62 OF 2006 and PILI KISENYA VS MISC. CIVIL CAUSE NO. 15 OF 2021.

In his submission in respect of the 3rd preliminary point of objection, the learned counsel for the 1st respondent averred that since section 41 (2) of the Land Dispute Court Act was ruled out by this court to be a wrong enabling provision then in the present application section 95 of the Civil Procedure Code [CAP 33 R.E 2019] cannot be applied as an enabling provision. The learned counsel was of the view that once there is a specific provision of law which gives the court jurisdiction to grant an order sought, then section 95 of Civil Procedure Code cannot be applied. While praying for dismissal of this application the learned counsel for the 1st respondent cited the case of EXIM BANK (T) LTD VS NURU BENDET SENGE, MISC. APPLICATION NO.5 OF 2018 and ALLY MWANRI VS HALIMA ALLY ENZIMBULI, MISC. CIVIL APPLICATION NO. 600 OF 2020.

Further to that, the learned counsel for the 1st respondent submitted that since the learned counsel for the applicant failed to act diligently but negligently by filling incompetent application then the cost of the matter be borne by the learned counsel personally. He was of the said view because the learned counsel for the applicant was the one who litigated the original case before the District Land and Housing Tribunal in Application No. 14 of 2020 but failed to lodge an appeal within 45 days. On top of that, he added to the effect that, the same advocate was granted 21 days leave to appeal out of time but failed to

comply with the said order. In his conclusion, the learned counsel for the 1st respondent submitted that since the applicant's advocate is using the pro bono umbrella to cause unnecessary costs to the respondents, he should then be condemned to pay costs personally. To support this argument, he cited the case of CHRISTINA KALIGI VS PAUL NGWEMBE, MISC. LAND APPLICATION NO. 20 OF 2022.

On his part Mr. Geoffrey Rugarabamu, learned counsel for the 2nd respondent opted to support the grounds of objection and submissions by the counsel for 1st respondent on the ground that the 2nd respondent's point of objection is similar to the first, 1st respondent's preliminary point of objection. In his brief submissions, Mr. Geoffrey submitted that he supports the submissions by the learned counsel for the first respondent. According to him this application is res judicata to Misc. Land Application No. 58 of 2021. He thus prayed this application to be dismissed with costs.

In opposing the preliminary points of objection Mr. Victor Blasio, the learned counsels for the applicant submitted that there is no dispute that the applicant was granted 21 days extension of time in Misc. Land Application No 58 of 2021 and that the applicant attempted to comply but experienced admissions problems on 19th March 2022. After that, he said, they filed Misc. Land Application No.52 of 2022 which was struck out for being incompetent on the ground that there was a wrong citation of enabling provision, which was section 93 instead of section 95 of Civil Procedure Code [CAP 33 R.E 2019]. The learned

counsel for the applicants said that following their research on the matter, they found that section 95 of the Civil Procedure Code [Cap 33 R.E 2019] is the relevant provision to the present application because it vests inherent powers to the court if there is no specific enabling provision. While relying on the decision in the case of ALLIANCE ONE TOBACCO AND ONE ANOTHER VS MWAJUMA HAMIS, MISC. CIVIL APPLICATION NO. 803 OF 2018 and JOAS KAMUGISHA VS REGISTERED TRUSTEES OF BUKOBA CATHOLIC DIOCES, MISC. LAND APPLICATION NO. 85 OF 2020, the learned counsel for the applicant averred that this court may entertain this application despite wrong or non citation of the law.

With regard to submissions by the learned counsel for respondents that the present application is res judicata, the learned counsel for the applicant submitted that this matter was never dealt with on merits and it does not fall in purview of Section 9 of the Civil Procedure Code. He said that in the present matter there is a land dispute which has never been dealt with to its finality. As to a prayer by the learned counsel for respondent that the counsel for the applicant be condemned to pay costs personally, the learned counsel for the applicant submitted that this matter is assigned to him under a pro bono arrangement. On top of that he stated that they have never acted negligently thus he prayed to be exempted from paying costs.

In rejoinder Mr. Ngowi learned counsel for the 1st respondent submitted that following the striking out of Misc. Land Application No. 52 of 2022 for wrong

citation, the learned counsel for the applicant was required to file an appeal to the Court of Appeal so as to get a clear clarification on what was the correct enabling provision of the law.

As for the submissions regarding a principle in the case of ALLIANCE TOBACCO (supra) that wrong citation is curable, the learned counsel for the 1st respondent submitted that wrong citation is curable if the applicant cites a proper law but fail to cite a specific provision. The learned counsel for the 1st respondent was of the view that citing inapplicable law is not curable and should not be entertained by the court. To support this argument, he cited the case of JOSEPH WILLIAM AZINA VS SAITORE MULUO RAIZER, MISC. LAND APPLICATION NO. 11 OF 2019.

With regard to argument by Mr. Blasio that the present application is not res judicata as the dispute between the parties has never been dealt with to its finality, the learned counsel for the first respondent submitted that this application is for extension of time to file appeal out of time which was already determined in Misc. Land Application No. 58 of 2021 where the applicant was granted 21 days leave to do so. He thus concluded his submissions by stating that the only remedy available against the applicant is to seek enlargement of the court's order. He thus reiterated to his previous prayer that this application be dismissed with costs.

Having gone through the rival submissions by the learned counsels by the parties the issue for determination is whether the preliminary points of objection raised by the respondents are meritorious.

Going through the court's records (i.e. Misc. Land Application No. 58 of 2021) there is no dispute that the applicant sought and was granted 21 days leave to file an appeal out of time. He however did not comply with court's order until the expiry of the said time frame. In his submission the learned counsel for the applicant stated that they failed to appeal in time due to admission problems, the failure of which led them to file to Misc. Land Application No. 52 of 2022 praying the court to enlarge the extended time. This application was however struck out for being incompetent for wrong citation of the law. The applicant have re surfaced before this court with same application brought under the same enabling provision of the law. On his part, the learned counsel for the applicant is of the view that he is in the right track as the present application is not res judicata since the matter was not determined to its finality.

I have considered the circumstances surrounding this matter and came to a conclusion that the present application is res judicata. This is so because the applicant was once granted extension of time to lodge his appeal within 21 days but failed to so. That being the case this court is barred with the doctrine of res judicata. Faced with similar scenario this Court (Maige J) in the case of ZEBRONE MUHUMHA VS SYBEGELE AYUBU MISC. LAND APPLICATION NO. 155 OF 2020 held inter alia that,

This Court having conclusively determine the same application in Miscellaneous Application No. 659 of 2018, was barred, by the doctrine of res judicata from redetermining the same matter. If at all the earlier grant had for any reason expired, the appropriate way forward was not to bring a fresh application as it has been done in the instant case.

On top of that, bringing this matter before this court while the decision was already reached makes the court functus officio. Faced with a similar scenario this court (Korosso J, as she then was) in the case of BENHARDARD MBARUKU TITO & ANOTHER (SUPRA) while making reference to the case of BIBI KISOKO MERDARD VS MINISTER FOR LANDS HOUSING AND URBAN DEVELOPMENT AND ANOTHER (1983) TLR 250 had this to say, that;

"In a matter of judicial proceedings once a decision has been reached and made known to the parties, the adjudicating tribunal thereby becomes functus officio."

In the present application there is no doubt that prior to the filing of the present application, the applicant filed Misc. Land Application No. 58 of 2021 where he was granted 21 days leave to appeal out of time and later, he filed Misc. Land Application No. 52 of 2022. The record shows that both applications were determined to their finality in as far as application for extension of time is

concerned. Dealing with the present application will make the court functus officio.

With regard to citation of section 41(2) of the Land Dispute Courts Act and section 95 of the Civil Procedure Code as enabling provisions, this court has already, while dealing with Misc. Application No. 52 of 2022 ruled out that Section 41(2) of the Land Disputes Court Act [CAP 216 R.E 2019] cannot apply. Since the present application is brought under the same section i.e. 41 (2) of the Land Dispute Court Act [CAP 216 R.E 2019], this Court is of the view that the same is misdirection on the part of the applicant. As it was rightly submitted by Mr. Ngowi, learned counsel for the 1st respondent, if the applicant thinks the court erred in its findings in regard to applicability of section 41(2) of the Land Dispute Court Act [Cap 216 R.E 2019] he ought to have referred this matter before the Court of Appeal for proper guidance. Bringing the same matter before this court make the court functus officio.

In his submission the learned counsel for the applicant tried to impress that since he cited section 95 of the Civil Procedure Code as one of the enabling provisions, then the present application is properly filed in this court. I have considered the learned counsel's argument but to my view this section can not apply in this application. This is so because section 95 of the Civil Procedure Code can not be applied in the circumstances when there is a specific provision dealing with the matter at hand. In the case of KHALIFA GHALIB AND ANOTHER

VS WORLD MAP INTERNATIONAL LIMITED AND 4 OTHERS, MISC. LAND APPLICATION NO. 535 OF 2021, this court (Mgeyekwa J) held Inter alia that;

"It is worth noting that section 95 of the Civil Procedure Code [CAP 33 R.E 2019] applies only where there is no clear provision in the Civil procedure Code that inherent jurisdiction can be involved. In other words, in exercising those inherent powers, the court cannot override general principle of the law, for inherent jurisdiction gives only power of procedure and is dependent upon facts of each case."

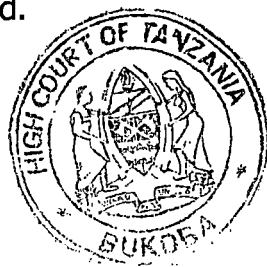
In the present matter therefore, what the applicant prays in the chamber summons does not agree with reasons advanced in the affidavit. While in the affidavit, the applicant seem to seek enlargement of courts order, his chamber summons features a prayer for extension of time, which is not the case. As it was rightly submitted by the learned counsel for the 1st respondent, the applicant have two option to deal with this issue which is either to lodge an appeal to the court of appeal or apply before the court for enlargement of courts order. That said, I find merits with the preliminary points of objection and I sustain them. This application is thus dismissed for lack of merits.

With regard to Mr. Ngowi's prayer that the learned counsel for the applicant be condemned to pay costs, I have considered it and found that it will be unjust to

grant it. This is so because Mr. Victor Blasio is handling this matter under pro bono arrangement. A letter from the pro bono committee of Tanganyika Law Society, Bukoba Chapter was annexed to the applicant's affidavit as annexure "CC" and the respondents did not bother to challenge it.

That being the case, this court is of the view that the present matter is fit for each party to bear its own costs.

It is so ordered.

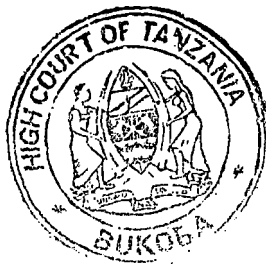



A.Y. Mwenda

Judge

31.03.2023

Ruling delivered in chamber under the seal of this court in the presence of Mr. Jaffari Mwangi Kamukulu the applicant and in the present of the 2nd respondent Mr. Cathbert Simon.




A.Y. Mwenda

Judge

31.03.2023