

**IN THE HIGH COURT OF TANZANIA**

**(MOROGORO SUB-REGISTRY)**

**AT MOROGORO**

**MISC. CRIMINAL APPLICATION NO. 38 OF 2023**

*(Originating from Criminal Case No. 203 of 2020; In the District Court of  
Kilombero, at Ifakara)*

**BAKARI ABDUL MWAKILACHILE..... APPLICANT**

**VERSUS**

**THE REPUBLIC..... RESPONDENT**

**RULING**

**24<sup>th</sup> August, 2023**

**M. J. CHABA, J.**

This is an application for enlargement of time within which the applicant herein can be allowed to channel an appeal against the decision of the District Court of Kilombero, at Ifakara in Criminal Case No. 203 of 2020 out of time. The application has been preferred under Sections 363 and 392A of the Criminal Procedure Act, [CAP. 20 R. E, 2019], Now [R. E, 2022] and section 14 (1) of the Law of Limitation Act, [CAP. 89 R. E, 2019] (the LLA) through Chamber Summons, supported by an affidavit deposed by the applicant, Bakari Abdul Mwakilachile.

In this application, the applicant appeared in person, and unrepresented remotely, linked via video conferencing from Kiberege Prisons, whilst Mr.



Shaban Abdallah Kabelwa, Learned State Attorney, entered appearance for the Respondent / Republic.

Upon being afforded the chance to submit first, outrightly Mr. Kabelwa objected the application by raising two main grounds on points of law to the effect that, this application is defective and incompetent before the Court and hence cannot be heard on merits because the application has been preferred under wrong enabling provision of the law, i.e., Section 363 of the Criminal Procedure Act [CAP. 20 R. E, 2022] and that the jurat of attestation in the affidavit supporting the chamber summons contravened the provision of section 10 of the Oath and Statutory Declaration Act [CAP. 34 R. E, 2019]. To support and strengthen his contention, Mr. Kabelwa referred this Court to the case of **Mandorosi Village Council & Two Others vs. Tanzania Breweries Ltd and 4 Others**, Civil Appeal No. 66 of 2017, and **Tanzania Railway Corporation & Another vs. Reuben Kyengu**, Misc Labour Application No. 4 of 2021 (All unreported).

Due to the above noted defects, Mr. Kabelwa prayed the application be struck out.

Responding to Mr. Kabelwa's submission the applicant first acceded to his submission and secondly, prayed the Court to struck out his application but with the leave to re-file the same. He averred that, being a lay person and not knowledgeable in law, should not be punished to the extent of prevented to access justice to file an application for extending time to challenge the

impugned decision from the District Court of Kilombero, at Ifakara. He further submitted that, since he was assisted by the legal officers from Prisons Authority at Kiberege Prisons to prepare the instant application, the Court should not deny him with the second chance to refile the same.

I have impassively considered the submission from both sides and after going through the applicant's application / chamber summons and the supporting affidavit, the issue for consideration and determination is whether or not the preliminary objections raised by Mr. Kabelwa, learned State Attorney on behalf of the Respondent / Republic have merits.

At the outset, I must state that this a straight forward matter and I see no reason to dwell on much discussing the merits of the application. In the course of determining the same, I will point out the defects and elaborate in detail for the benefits of the applicant and inmates. Starting with the first limb of preliminary objection regarding the issue of citing wrong provision of law, I am in agreement with both parties that, the applicant brought the instant application under a wrong enabling provision of the law which cannot move this Court to exercise its powers to extend the time within which the applicant can lodge his appeal out of time against the decision of the District Court of Kilombero, at Ifakara. The provision of section 363 of the CPA cited by the applicant reads thus:

*"Where the appellant is in prison, he may present his petition of appeal and the copies accompanying the same*



*to the officer in charge of the prison, who shall thereupon forward the petition and copies to the Registrar of the High Court."*

The correct provision of law ought to have been cited by the applicant is section 361 (2) of the CPA (supra) which states that: -

*"The High Court may, for good cause, admit an appeal notwithstanding that the period of limitation prescribed in this section has elapsed."*

It is from the above observation against the applicant's chamber summons that I am constrained to agree with the objection raised by the State Attorney who asserted that, the applicant has indeed cited a wrong provision of the law which cannot in any way move the Court to extend time for filing an appeal out of time. It therefore goes without saying that, the application is incompetent before this Court and hence liable to be struck out as it was underscored by the Court of Appeal of Tanzania in the case of **Godfrey Kimbe vs. Peter Nganyani**, Civil Appeal No. 41 of 2014, Court of Appeal of Tanzania sitting at Dar Es Salaam in July, 2017 (unreported), where it was held that: -

*"It is trite law that wrong citation of the provisions under which an application is made makes that application incompetent and must be strike out."*



At this juncture, I wish to put it clear that, in a normal circumstance, I would have struck out the application and pen off here without testing the remaining point of preliminary objection regarding the anomaly in the jurat of attestation. But for the purpose of understanding and clarity to the applicant who is a lay person, I find it apt and duty bound to deliberate on the same so that, other inmates may refrain from repeating the same procedural mistakes in case they want or wish to access justice before this Court on alike application(s).

As correctly submitted by the learned State Attorney and upon read and carefully examined the affidavit sworn by the applicant himself, I have noticed that, the jurat of attestation does not show whether the Commissioner for Oaths knew the applicant personally or through the identification by another person and hence contravened the mandatory requirement of the provision of section 10 of the Oaths and Statutory Declaration Act [CAP. 34 R. E, 2019] which categorically provides that: -

*"Where under any law for the time being in force any person is required or is entitled to make a statutory declaration, the declaration shall be in the form prescribed in the Schedule to this Act.*

*Provided that, where under any written law a form of statutory declaration is prescribed for use for the purposes of that law such form may be used for that purpose."*

The schedule format prescribed in the Oaths and Statutory Declaration Act [CAP. 34 R. E, 2019], is illustrated hereunder: -

"I, A. B. do solemnly and sincerely declare as follows:  
(Here state the matters declared)

.....  
I, the said A. B., make this declaration conscientiously believing the same to be true and in accordance with the provisions of the Oaths and Statutory Declarations Act.

This, Declaration is made and subscribed by the  
said A. B. who is known to me personally  
(or who has been identified to me by .....; (Signature of the person taking the declaration)  
the latter being known to me personally)  
this ..... day of.....

(Signature, qualification and address of the person taking the declaration)

The above prescribed format was amplified by this Court in the case of **Thomas John Paizon vs. Khalid A. Nongwa**, Misc Land Application No. 954 of 2017, HCT Land Division, at Dar Es Salaam where it was underlined that: -

*"Under Section 10 of the Oaths and Statutory Declarations Act, Cap. 34 R. E. 2002 it is mandatory that the statutory declaration complies with the form prescribed in the schedule and it must be stated and specified in the jurat of attestation whether the deponent was known to the Commissioner for Oaths personally or whether he was identified to him by a person personally known to the Commissioner for Oaths".*

As to the consequence of non-compliance with the stated prescribed form, this Court when was confronted with much a kin situation in the case of **Waziri**

**Bukuku vs. Halima Kondo (Misc. Land Case Application 911 of 2018)**

**[2020] TZHCLandD 101 (14 April 2020)**, [Extracted from [www.tanzlii.org](http://www.tanzlii.org)],

went on stating that: -

*"The question that follows is whether the defect in the applicant's affidavit is minor or of a substantive nature. In my view, the defect is substantive because an affidavit is evidence on oath, therefore it has to be stated fully in the jurat of attestation as to whether the Commissioner for Oaths knew the deponent, or the deponent was identified to him for purposes of commitment. Failure to indicate such an important statement in the jurat of attestation renders the affidavit incurably defective for lack of disclosure of the identity of the deponent. The defect is fatal and cannot be amended as it goes to the root of the merit of the application."*

Before I pen off, I wish to take note and state though by passing that, I have in mind that the defects of the applicant's affidavit might be sound not fatal as the same can be curable by effecting the relevant amendment upon applying the principle of overriding objective. However, on this facet, I am of the opinion that, the Court cannot act blindly where the provision(s) of the law is or have clearly stipulated the procedures to be complied with. See the case of **Mondorosi Village Council & Two Others** (supra).

Consequently, guided by the principle of law and on the basis of the above cited authorities, it is my holding that all preliminary objections raised by Mr. Kabelwa, learned State Attorney have merits. Accordingly, this application is struck out for being incompetent. However, for the interests of justice, I grant leave to the applicant to refile a proper application within fourteen (14) days from the date of delivery of this ruling, if he so wishes. It is so ordered.

**DATED at MOROGORO** this 24<sup>th</sup> day of August, 2023.

  
M. J. Chaba

**Judge**

**24/8/2023**

**Court:**

Ruling delivered under my Hand and the Seal of the Court in Chamber's this 24<sup>th</sup> day of August, 2023 in the presence of Mr. Shaban Abdallah Kabelwa, learned State Attorney who appeared for the Respondent / Republic and in the presence of the Applicant who appeared in Court by remote, linked via video conferencing from Kiberege Prisons.



  
M. J. Chaba

**Judge**

**24/08/2023**