

**IN THE UNITED REPUBLIC OF TANZANIA  
JUDICIARY  
IN THE HIGH COURT OF TANZANIA  
MOSHI SUB- REGISTRY  
AT MOSHI  
LAND APPLICATION NO. 41 OF 2023**

**SILYVESTRY FRANCIS KOKA..... APPLICANT**

**VERSUS**

**1. TANGANYIKA COFFEE CURING COMPANY LTD**

**2. MATHIAS CHUWA T/A KILL CRAAL SAFARIS**

**& COURT BROKER**

**3. RAYMOND MMBANDO @ GUSTAV**

**4. VICTOR TESHA**

**.....RESPONDENTS**

**RULING**

Date of Last Order: 14.05.2024  
Date of Ruling : 13.06.2024

**MONGELLA, J.**

The applicant has preferred this application under **Section 95 and Rule O.XXI Rule 88 of the Civil Procedure Code** [Cap 33 RE 2019]. He is seeking for this court to set aside the sale of landed property situated at Plot No. 17 Block B with CT 12254 located at Moshi Municipality (hereinafter, the suit property) held on 30.12.2022. The application was supported by his own sworn affidavit.

The respondents vehemently opposed the application as reflected in the counter affidavits sworn by one, Peter Haygaru, the managing director for 1<sup>st</sup> respondent and the 4<sup>th</sup> respondent. Further, the respondents raised preliminary objections. The 1<sup>st</sup> respondent raised three points of preliminary objection, to wit;

- 1. That, the Application is fatally defective due to wrong citation.*
- 2. That, the Application is fatally incompetent as it is based on defective affidavit.*
- 3. That the Application is fatally defective for non-joinder of necessary parties*

On the Other hand, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents raised 5 points of objection, to wit;

- 1) The Application is hopelessly time barred in light of the Law of Limitation Act,*
- 2) That the application is res judicata to Land Case Number 2 of 2023, Misc. Land Application Number 1 of 2023, Misc. Labour Application Number 5 of 2023, Misc. Labour Application Number 9 of 2023 and Pending Civil Application before the Court of Appeal of Tanzania, filed by the Applicant.*
- 3) That the application has been overtaken by events.*

*4) That the application is misconceived as the Application was neither a decree holder nor a judgement debtor to the original execution application.*

*5) That the application is abuse of court process.*

The applicant was represented by Mr. Emmanuel Anthony. The 1<sup>st</sup> respondent by Mr. Elikunda Kipoko and the 4<sup>th</sup> respondent by Mr. Wilbard John Massawe, all learned Advocates. There were no submissions made by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.

On the 1<sup>st</sup> point of objection, among those raised by the 1<sup>st</sup> respondent, Mr. Kipoko averred that the application was made under **Section 95 and Rule 88 of Order XXI of the Civil Procedure Code**. However, he said, the applicant was unable to demonstrate in his pleadings that he was entitled to share in rateable distribution of assets or that his interests have been affected by the sale. In that respect, he considered the law cited being irrelevant to the facts pleaded by the applicant.

Arguing on the 2<sup>nd</sup> ground, the counsel contended that in the jurat, Mr. Anthony is the one noted to have introduced the deponent to the commissioner for oaths. In the premises, he contended that the act of introducing the deponent to the commissioner for oaths amounted to him being part of the evidence or witness to the affidavit. He claimed that since an advocate cannot be a witness to a matter he is prosecuting, the affidavit is vitiated.

Mr. Kipoko dropped the 3<sup>rd</sup> point of objection and prayed for the Court to strike out the application with costs.

Mr. Massawe commenced his submission in chief by providing a detailed background of this matter which I shall not reproduce for purposes of saving time. Addressing the 1<sup>st</sup> point of objection, Mr. Massawe averred that since this application is preferred under **Order XXI Rule 88 of the Civil Procedure Code**, the time limitation for the application is regulated under **Item 7 of Part III of the Schedule to the Law of Limitation Act** [Cap 89 R.E 2019]. He said that the said provision has set time for an application to set aside the sale on execution of decree to be within 30 days from the date of sale. However, this application was filed on 23.08.2023 while the impugned sale was conducted on 30.12.2022. He contended that the sale was confirmed and became absolute in March 2023.

The counsel further alleged that the applicant attended the auction where the sale was made. That, he as well filed a series of claims from December 2022 to February 2022 with respect to the suit property, but did not file this application on time. Making reference to page 992 of a book by **Sir. John Woodroffe and Ameer Ali (2023), titled: Law of Execution of Decrees and Orders (5<sup>th</sup> ed), Delhi Law House**, he argued that in the referred page, the authors deliberated on **Order XXI (90) of the Indian Civil Procedure Code** which is *pari materia* to **Order XXI Rule 88** of our **Civil Procedure Code**. He said that, in the book, it was noted that when a person impeaches a sale under said provision, he cannot escape the period of limitation. He further cited the case of **John Cornel vs. A Grevo (T) Limited**, Civil Case No. 70 of 1998 (HC) (unreported) to cement his argument that the law of Limitation has neither

sympathy nor equity. He concluded on this point of objection by calling for the court to impose **Section 3 of the Law of Limitation Act** to dismiss the application.

With regard to the 2<sup>nd</sup> and 5<sup>th</sup> grounds, Mr. Massawe contended that the numerous remedies being sought by the applicant in multiple frontiers amount to judicial gambling. He considered the same an abuse of the court process wasting both, the court's and litigants' time. Persuading this court to take note of the abuse, he made reference to the case of **JV Tangerm Construction Co. Limited and Technocombine Construction Limited vs. Tanzania Ports Authority and Another** (Commercial 117 of 2015) [2021] TZHCComD 3362 (1 October 2021) TANZLII. He further referred to the definition of abuse of court process as offered in the **Black's Law Dictionary Continental Edition (1981-1991), (6<sup>th</sup> Edition page 990)**.

Arguing further, he alleged that this matter was a *res judicata* and *res sub judice* to multiple cases and the court is thus prohibited from trying the same. In support of his stance, he referred **Section 8 and 9 of the Civil Procedure Code**. In his view, the applicant was using the judiciary machinery to assault the 4<sup>th</sup> respondent who was a bona fide purchaser. He added that the applicant was also riding more than two horses and all matters had similar fate. He termed this a forum shopping, while supporting his claim with the case of **Registered Trustees of Kanisa La Pentekoste Mbeya vs. Lamson Sikazwe & Others** (Civil Appeal 210 of 2020) [2021] TZCA 713 (2 December 2021) TANZLII; and that of **East African Development**

**Bank vs. Blueline Enterprises Limited** (Civil Appeal 110 of 2009) [2011] TZCA 52 (28 December 2011) TANZLII.

He alleged further that in **Silyvester Francis Koka vs. Tanganyika Coffee Curing Co. Ltd and 3 Others** (Misc. Land Application No. 01 of 2023) 2023 TZHC 244, the applicant sought for the sale and auction to be nullified. The application was struck out for non-joinder of the Attorney General considering the agreement entered between the applicant and government of the United Republic of Tanzania whereby the applicant agreed to surrender the suit property to the government. That, the suit property was eventually sold to the 4<sup>th</sup> respondent.

The learned counsel added that the applicant has already lodged a revision in the Court of Appeal and if allowed enlargement of time, the application shall be rendered superfluous. He argued that the mentioned application is *res sub judice* to the one at hand. In that regard, he argued, if this court entertains this matter, the same questions on need to involve the Attorney General and the Registrar would be raised.

Mr. Massawe further pointed out that Land Case No. 03 of 2023 between the parties; **Silyvestery Francis Koka vs. Tanganyika Coffee Curing Co. Ltd and Three Others** (Land Case No. 2 of 2023) [2023] TZHC 20327 (23 August 2023) TANZLII, suffered the same fate as the mentioned application. That, the same was also struck out for non-joinder of the Attorney General and Registrar of Titles. That, the applicant was further advised to seek remedy under **Order XXI Rules 57 and 58 of the Civil Procedure Code or Rule 64** of the same

Order. That, in the application, the applicant also sought for declaration that the auction conducted on 30.12.2022 was unlawful. In the matter at hand, the applicant is also seeking to set aside the sale in auction. In his view, the applicant has intentionally by-passed the directives issued by this court by filing multiple actions.

He had the stance that this court is *functus officio* considering its directives in the rulings that disposed the miscellaneous applications. He supported his argument with the case of **Bibi Kisoko Medard vs. Minister for Lands, Housing and Urban Developments and Another** [1983] TLR 250 and **Kamundi vs. Republic** [1973] EA 540.

The learned counsel also pointed out that the applicant had also sought to be joined as a necessary party in Misc. Labour Application No. 05 of 2023 whereby the 4<sup>th</sup> respondent is seeking vacant possession of the suit property. In his stance, the labour application is also *sub judice* to Misc. Labour Application No. 10 of 2023.

Expounding the 3<sup>rd</sup> point of objection, Mr. Massawe contended that the application is overtaken by events. He argued so on the ground that the sale has already been conducted and certificate of sale was issued by the Deputy Registrar on 25.01.2023. In the premises, he had the view that the sale was absolute e according to **Section 52, Order XXI Rule 75 (2), XXI Rule 90(2) of the Civil Procedure Code**. He further supported his stance with the case of **Mohamed Kanji vs. MAC Croup Ltd** (Civil Appeal 391 of 2022) [2023]

TZCA 17263 (22 May 2023) TANZLII, in which Court stated that a sale remains absolute unless an application is preferred under **Rule 87, 88 and 89 of the Civil Procedure Code**, is made or if made, is disallowed. In those bases, he contended that since the applicant had not filed any application within 30 days of the sale, the sale remained absolute rendering this application overtaken by events.

As to the 4<sup>th</sup> point of objection, Mr. Massawe claimed that the application was misconceived. That since it was preferred under **Section 88 of the Civil Procedure Code**, the applicant ought to have demonstrated within his affidavit the said irregularities and how they affected him. However, he said, the applicant merely made allegations that the auction sum was not deposited, a fact disapproved by the certificate of sale and proof of payments attached on the 4<sup>th</sup> respondent's counter affidavit. He quoted a passage by **Sir. John Woodroffe and Ameer Ali (2023) Law of Execution of Decrees and Orders (5<sup>th</sup> ed), Delhi Law House** page 1007, on the import of **Order XXI Rule 90** to emphasize his averment.

Mr. Massawe finalized his submission by praying for the application to be dismissed with costs.

Mr. Anthony, replying in opposition to the points of objection. He started addressing the submissions the by 1<sup>st</sup> respondent. Addressing the 1<sup>st</sup> point of objection, he averred that the same was not a pure point of law and that the cited provision does not support facts within the affidavit.



With regard to the 2<sup>nd</sup> point of objection, the learned counsel averred that the same was not backed by any law. In that respect, he had the view that the point was misconceived as his act of introducing the applicant to the commissioner for oaths, as seen on the jurat, was not prohibited by any law. Instead, he said, such act is in line with **Section 10 of the Oaths and Statutory Declarations Act** [Cap 34 RE 2019], which requires the Jurat of attestation to comply with the schedule to the Act. He said he was merely introducing his client before a commissioner for oaths.

With respect to the submissions by the 4<sup>th</sup> respondent, Mr. Anthony commenced with pointing out that preliminary objections arise from facts pleaded. He supported this averment with the case of **Ali Shabani & Others vs. Tanzania National Roads Agency (TANROADS) & Another** (Civil Appeal No. 261 of 2020) [2021] TZCA 243 (10 June 2021) TANZLII. He alleged that although affidavits are not pleadings, it is the facts in the affidavit that make parties capable of contesting certain issues. He thus challenged that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents had not yet filed their counter affidavits.

The learned counsel further pointed out that a party's failure to file a counter affidavit does not preclude him from submitting on issues of law. He contended that since the issues discussed rely on facts, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents' objections, as submitted in by Mr. Massawe, lack legs to stand on.

Without prejudice however, he went ahead to address the 4<sup>th</sup> respondent's arguments on the points of objection. Concerning the 1<sup>st</sup> limb of objection, Mr. Anthony averred that this application was

filed electronically on 28.02.2023. According to **Rule 21(1) of the Judicature and Application of Laws (Electronic Filing) Rules, 2018** GN NO. 148 of 2018, a document is considered filed if submitted through electronic form before midnight, East African Time. He contended that on 29.08.2023, the physical documents were presented for filing. Considering Mr. Massawe's argument that the sale became absolute in March 2023, he argued that this application being filed on 28.02.2023, was well within time.

The learned counsel further contended that if this court considers 29.08.2023 as the date of filing, the period the applicant spent prosecuting other causes is excluded. He made reference to **Section 21(2) of the Law of Limitation Act** to that effect. Seeking for the court to exclude such time the applicant spent in those causes, he alleged that the causes were prosecuted in good faith so that the applicant could protect his interests. That, Miscellaneous Application No. 34 of 2022 was instituted to halt the auction so that the applicant could get ample time to file his plaint or take proper course. That, he withdrew the application when he learnt of the sale and thereafter filed Land Case No. 02 of 2023 and Miscellaneous Application No. 01 of 2023 to restrain any transfer of ownership from being made and nullifying the auction. That, Land Case No. 03 of 2023 and Misc. Application No. 01 of 2023 were both struck out for non-joinder of parties.

He alleged the fact that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents did not raise an objection on non-joinder of necessary party, shows they are in agreement that the Registrar of titles or the government are

not involved in the present application. In his view, this serves as further proof that the suit was prosecuted in good faith.

Mr. Anthony further pleaded fraud on part of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents concerning the sale conducted on 30.12.2022. He alleged that initially, the 3<sup>rd</sup> respondent was declared to be the highest bidder however, later on, the 4<sup>th</sup> respondent was declared the winner of the auction. He challenged that arguing that there was however, no fresh proclamation for sale from the court and such mistake or fraud led the court to issue certificate of sale on 25.01.2023. He contended that the applicant learned about the 4<sup>th</sup> respondent being the highest bidder on 30.01.2023 when the 2<sup>nd</sup> respondent pleaded such fact in her affidavit in Miscellaneous Land Application No 01 of 2023.

In the circumstances, the counsel had the stance that time should be reckoned from 30.01.2023 when the applicant learnt of the mistake or fraud thereby rendering his application, which was filed on 28.02.2023, well within time. He supported his averment with **Section 26 of the Law of Limitation Act**. Further, he justified late submission of the document by averring that he was awaiting the fate of Land Case No. 02 of 2023.

As to the 2<sup>nd</sup> point of objection by Mr. Massawe, Mr. Anthony disputed the assertion that this application was *res judicata* and *sub judice*. He contended that for allegations of *res judicata* to stand, the matter ought to have been determined on merit. He supported that stance with the case of **Zuberi Paul Msangi vs. Mary Machui** (Civil Appeal 316 of 2019) [2022] TZCA 653 (27 October 2022) and

**Maria Chrysostom Lwekamwa vs. Palcid Richard Lekamwa & Another** (Civil Application 549/17 of 2019) [2022] TZCA 563 (16 September 2022) TANZLII. He further cited a passage from the book by **Chipeta B.D, titled, Civil Procedure in Tanzania; A student Manual, Law Africa, (Revised edition 2013) Dar es Salaam University Press**, which explain circumstances under which a matter can be considered *res judicata* or *sub judice*.

Still disputing the matter being *res judicata*, Mr. Anthony added that Land Case No. 02 of 2023 and Miscellaneous Application No. 01 of 2023 were not determined on merit.

On the argument that the matter is *res sub judice*, he as well denied the claim. While admitting that the applicant sought for revision of Miscellaneous Application No. 01 of 2023 in the Court of Appeal, he argued that that was done while the land case stood. However, he argued, since the same was struck out, he sought withdrawal on 06.10.2023. He added that on 22.04.2024, the Court of Appeal issued an order for withdrawal vide Civil Application No. 799/05 of 2023.

With respect to Misc. Labour Application No. 10 of 2023, he contended that the same was filed by the applicant to be joined as a necessary party in Misc. Labour Application No. 05 of 2023 in which the 4<sup>th</sup> respondent is seeking vacant possession. In that respect, he held the view that the two are not *sub judice* to the application at hand since the applications are on diverse subject matters to the one at hand.

On the 3<sup>rd</sup> point of objection, Mr. Anthony averred that although the certificate of sale was issued by this court, there is no law forbidding an applicant from making this application. He further pointed out that since the sale was finalized on 30.12.2022, the applicant had until 29.01.2023 to file an application to set the sale aside. However, he argued, the certificate of sale was issued on 25.01.2023, which was four days prior to the expiry of 30 days and there was a pending case admitted in this court in which one of the reliefs sought was to declare the sale unlawful. He believed the certificate ought to have been issued after expiration of 30 days. On the other hand, he challenged the sale arguing that the same was also made prior to the lapse of 30 days required by the law.

In addition, the learned counsel averred that there was no law barring the applicant from bringing this application. Referring to **Section 52 of the Civil Procedure Code**, he submitted that the provision provides assumptions as to what time a property would be vested to the purchaser. However, he argued, the 2<sup>nd</sup> and 4<sup>th</sup> respondents failed to prove that the purchase price had been paid in full as provided under **Order XXI Rule 75(2) of the Civil Procedure Code**. Further, he reiterated his claim that the 4<sup>th</sup> respondent was fraudulently involved in the sale as proper procedure was not followed. He had the view that the mentioned defects vitiated the sale thereby giving the applicant the right to file this claim under **Section 53(2) of the Civil Procedure Code**.

Addressing the 4<sup>th</sup> point of objection, Mr. Anthony challenged the same for not being founded on a pure point of law. He contended

that the point requires some facts to be proved or for this court to examine the affidavits as to whether the applicant was impacted by the irregularities of the auction.

Prior to concluding his submissions, he pointed out that Mr. Massawe had annexed evidence on his submissions. Pinpointing the alleged evidence, he mentioned; the plaint in Land Case No. 02 of 2023; summons in Labour Application No. 05 and 10 of 2023, contract to surrender property and others. He further challenged the mentioned pieces of evidence for not being annexed on the 4<sup>th</sup> respondent's counter affidavit. He considered the act an improper practice and prayed for the same to be disregarded.

Mr. Anthony concluded his submissions by praying for all the points of preliminary objection to be dismissed with costs.

I have keenly considered the submissions by both parties on the points of objection raised. Before deliberating on the same, I wish to point out a few details in relation to what I have observed in the record. The record shows that indeed the 2<sup>nd</sup> and 3<sup>rd</sup> respondents did not file any counter affidavit. However, the record also shows that there are two notices of preliminary objection filed before this court; one by the 1<sup>st</sup> respondent and the other by 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents. Still, the submissions in support of their points objection were only filed on behalf of 4<sup>th</sup> respondent. This shows that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents impliedly forfeited their right to argue the objections.

After the above remarks, I prefer to start by addressing the 1<sup>st</sup> point of objection raised by the 4<sup>th</sup> appellant to the effect that this matter is time barred. This is because time limitation is a matter of jurisdiction, thus courts are barred from entertaining matters where time has lapsed. In **NBC Limited & Another vs. Bruno Vitus Swalo** (Civil Appeal 331 of 2019) [2021] TZCA 122 TANZLII, the Court briefly explained:

“It is that courts are enjoined not to entertain matters which are time barred. Limitation period has an impact on jurisdiction. Courts lack jurisdiction to entertain matters for which litigation period has expired”

This argument on time limitation is borne out of this application being preferred under **Section 95 and Rule Order XXI Rule 88 of the Civil Procedure Code. Order XXI Rule 88**, states:

“(1) Where any immovable property has been sold in execution of a decree, the decree-holder, or any person entitled to share in rateable distribution of assets, or whose interests are affected by the sale, may apply to the court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it:

Provided that, no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.

Time limitation for an application to set aside a sale in execution of decree is explicitly settled under **Item 7 of Part II to the Schedule to the Law of Limitation Act**. The provision provides for 30 days' time

limit. As sworn by the applicant in his affidavit under paragraphs 7, 12 and 16, the auction and sale of the suit property was effected on 30.12.2022. It is also sworn under paragraph 23 that the certificate of sale was issued by this court on 25.01.2023. The controversial questions between the parties are centred on three issues related to computation of time being; **first**, when was the sale made final between 30.12.2022 and 25.01.2023; **second**, whether computation of time can be made in respect of **Section 26 of the Law of Limitation Act** and; **third**, whether the applicant can enjoy the exclusion set under **Section 21(2) of the Law of Limitation Act**.

Concerning the 1<sup>st</sup> issue, it is important to note that this application is supposed to be made within 30 days after the sale is made. This concern does not require the sale being made absolute. This position is expressly settled under **Section 52 of the Civil Procedure Code**, which states:

“Where immovable property is sold in execution of a decree and such sale has become absolute, the property shall be deemed to have vested in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute.”

Details on when a sale is made absolute can be seen in the wording of **Rule 90(1) of the Civil Procedure Code**. The same states:

“Where no application is made under rule 87, rule 88 or rule 89, or where such application is made and disallowed, the court shall make an order confirming the sale and thereupon the sale shall become absolute:”



This serves to show that the application to set aside the sale under **Rule 88 of Order XXI of the Civil Procedure Code** can be made and is commonly made prior to a certificate of sale being issued. Such application is reason enough to bar the sale from being made absolute. Where there is no application challenging the sale, the court will then issue a certificate of sale as it would be marked absolute. Such details on certificate of sale are found in **Order XXI Rule 92 of the Civil Procedure Code**, which states:

“Where a sale of immovable property has become absolute, the court shall grant a certificate specifying the property sold and the name of the person who at the time of sale is declared to be the purchaser and the certificate shall bear the date and the day on which the sale became absolute.”

The certificate, of course, does not operate as a bar to an application to set aside the sale as the applicant was not a party to which the execution was sought against and or initially filed such application. This position was well expounded in **Mohamed Kanji vs. MAC Croup Ltd** (supra) whereby the Court stated:

“We agree with Mr. Mbamba that, under O. XXI R. 90(1) of the CPC, a sale pursuant to a court order in execution of a decree becomes absolute where no application under rules 87, 88 and 89 is made or if made, where the same is disallowed and the sale confirmed...”

In our view, for a bar under the above rule to apply, two conditions must be established. First, the suit in question must be a suit to set aside an order under rule 90 of O. XXI of the CPC. Two, the suit should have been filed by a person against whom such order is made.”

In consideration of the above authority, I find it clear that an application to set aside a sale in execution of a decree is to be filed within 30 days from the sale being conducted and not after the respective sale is declared absolute. This serves to show that the 30 days reckoned from 30.12.2022 and would thus end on 29.01.2023. To this point, I find the application, for, being filed on 28.02.2023, being hopelessly time barred.

Mr. Anthony further endeavoured to save the application by arguing that there were involved matters of fraud rendering the applicant entitled to exclusion under **Section 26 of the Law of Limitation Act**. Indeed, fraud has the effect in computation of time since the same will reckon from the date the alleged fraud was discovered. In this case however, I do not buy Mr. Anthony's argument that the applicant only learnt of the alleged fraud on the sale after January 2023. This is because it appears that the applicant knew of the fraud way before the 30 days expired. As per paragraph 9 of his affidavit, the applicant learnt of the 4<sup>th</sup> respondent being the highest bidder on 02.01.2023 vide the 2<sup>nd</sup> respondent's counter affidavit in Misc. Land Application No. 34 of 2022, which he well annexed to his affidavit. Further, details on appearance of the 3<sup>rd</sup> respondent which disclosed details on him not being the highest bidder are seen on paragraphs 10 and 11 of the applicant's affidavit.

In addition, other details on irregularities on proclamation of sale, him not being involved in the sale, the 3<sup>rd</sup> respondent's failure to pay the initial 25% after the auction, the 4<sup>th</sup> respondent not being

among the bidders in the auction, and defects in certificate of sale, were all matters related to the sale that took effect on 30.12.2022. These circumstances, clearly demonstrate that the applicant was in the position to learn of such details given that he had filed Land Case No. 02 of 2023 and Misc. Application No. 01 of 2023 before this court over the same issues. He had also formerly instituted Miscellaneous Land Application No. 34 of 2022 seeking for Mareva injunction to stop the sale which he chose to withdraw on 03.01.2023 for being overtaken by events.

As to the exclusion under **Section 21(2) of the Law of Limitation Act**, first I wish to reproduce the provision, for ease of reference, as hereunder:

"21 (2) In computing the period of limitation prescribed for any application, the time during which the applicant has been prosecuting, with due diligence, another civil proceeding, whether in a court of first instance or in a court of appeal, against the same party, for the same relief, shall be excluded where such proceeding is prosecuted in good faith, in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it."

Mr. Anthony claimed that the applicant has been prosecuting other civil proceedings before this court. He specifically mentioned Land Case No. 02 of 2023 and Miscellenaous Application No. 01 of 2023. He as well admitted that both matters were struck out for failure to join necessary parties. The above quoted provision provides for three conditions that ought to be fulfilled where a party claims to have been prosecuting some other proceedings. **First**,

such proceeding must be prosecuted diligently and in good faith; **second**, must be in a court which from defect of jurisdiction or similar cause, is unable to entertain it; and **three**, proceeding(s) must be on a matter arising from the same cause of action. These three conditions were well noted in the case of **Salim Lakhani & Others vs. Ishfaq Shabir Yusufali** (Civil Appeal 237 of 2019) [2022] TZCA 504 (11 August 2022) whereby the Court stated:

“Interpreting the application of the quoted provision vis a vis the matter at hand, it is clear that, before the respondent can press into service the applicability of the said provision, he has to satisfy the following conditions among others:- one; the earlier proceeding from which the respondent is seeking to exempt the time spent prosecuting the same was rejected for want of jurisdiction or other cause of a like nature, two; that the earlier proceeding and the latter proceeding are founded upon the same cause of action or matters at issue, and three; he was prosecuting High Court Civil Revision No. 105 of 2002 with due diligence and in good faith.”

Evidently, this court did not dismiss any of the applications because it was incompetent to deal with the same. This court struck out the application and the suit because the applicant did not join necessary parties. In that respect, the applicant's counsel's arguments are found to lack merit.

In my considered view, the applicant has displayed lack of diligence on his part to act within time limit. This is seen in his failure to file this application on time while he had all necessary details to support the same. Lack of diligence is further seen on the

applicant's choice to file this application electronically on 28.02.2023 and abandoning the same up to 23.08.2023 whereby necessary fees and physical documents were then filed. I find this a clear and intentional abuse of the court process.

In consideration of my observation as hereinabove, I find the application time barred and sustain this point of objection accordingly. Since this finding has the effect of dismissing the matter as I hereby do, I find it irrelevant and rather an unnecessary academic exercise to address the rest of the points of objection. Costs are hereby awarded to the 4<sup>th</sup> respondent alone.

Dated and delivered at Moshi on this 13<sup>th</sup> day of June, 2024.



X

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L. M. MONGELLA  
JUDGE  
Signed by: L. M. MONGELLA