

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 19 OF 2018

(Arise from Land Appeal No. 294 of 2015 form the District Land and Housing Tribunal for Ilala at Mwalimu House which its Judgement delivered on 23rd October, 2017 before M. Mgulambwa.)

SHAFIKI ALLY.....APPLICANT

VERSUS

MARTH SAMWEL MPULULE.....RESPONDENT

Date of last Order: 11/4/2018

Date of Judgement: 22/6/2018

RULING

MGONYA, J.

The Applicant herein have filed this Application under the provisions of **Section 38(1) of the Land Disputes Courts Act No. 2 of 2002, Section 14 (1) of the Law of Limitation of Act Cap. 89 of R. E. 2002 and Section 95 of the Civil Procedure Code Cap 33 of [R.E. 2002]** praying to be granted an extension of the time with which to file the Petition of Appeal out of time. The Application was supported by the Affidavit of **SHARIKI ALLY.**

On the first day of hearing, the Respondent raised the preliminary objections on the point of law that:

1. That the Application is incompetent for non –citation of the relevant provision of law;

2. The Affidavit is incurable defective for containing a defective jurat; and

3. That the Application is incompetent for containing defective verification.

4. Upon parties request and with leave of this Court, the point of Preliminary Objection were disposed by way of Written Submissions;

In support of preliminary objection, The Respondent submitted that, the Court was not moved at all as the Applicant failed to cite the relevant provision of law, and the omission was fatal and the remedy available was striking out the Application with costs.

Further, the Respondent submitted that, the Applicant cited a wrong provision of law which was not applicable to the prayers sought in the Chamber Summons hence the court was not moved at all.

Respondent proceeded that, the cited provisions did not apply to the Application for extension of time to file an Appeal out of time; Hence the Land Disputes Courts Act was amended to cater the Application for extension of time to file Appeal out of time; under **Section 41 (2) of Cap. 216**

The Respondent invited the court to see a case of ***M/S ILABILA INDUSTRIES LTD & 2 OTHER VERSUS TANZANIA INVESTMENT BANK & ANOTHER, Civil Application No. 159 of 2004 (Unreported)***, Court of Appeal of Tanzania by Munuo J.A; where it was held that *Non Citation of relevant provision of law is fatal rendering the Application incompetent.*

Therefore, the Respondent contended that, since the Applicant has failed to cite relevant provision of law, then the Application be struck out with costs.

Regarding the second point of preliminary Objection that, the Affidavit incurable defective for containing a defective jurat; the Respondent argued that, the jurat of attestation was not dated and in which it was mandatory that lack of the date on the jurat of attestation rendered the affidavit incurable defective.

The Respondent emphasized that, it is trite law that the jurat of attestation should state the **place where it was made, the name of deponent and the date when the same was signed.** Therefore the Respondent prayed that the Application be dismissed with costs.

Responding on the 3rd point of preliminary objection, that ***"The Application is incompetent for containing defective verification,"*** The Respondent submitted that, under paragraph 7 of the Affidavit, the Applicant stated that he was advised by the Court about the new law which he alleged that it reduced the time to Appeal. However the paragraph was not stated in the verification clause that the same was based on advice because the Applicant admitted to have been advised by the Court.

From the same, it is Respondent's prayer that, the Application should be dismissed in its entirety with costs.

On the other hand, the Applicant when replying to the submissions regarding the preliminary objection raised stated that, the objection had no merits at all as he correctly cited the relevant provision of the law that, **Section 38 (1) of the Land Disputes Courts Act No. 2 of 2002, Section 14 (1) of the Law of Limitation Act Cap. 89 of R. E. 2002] and Section 95 of the Civil Procedure Code Cap. 33 of [R. E. 2002]** to enable the court to cut on his Application.

Regarding the 2nd & 3rd Preliminary Objection the Applicant submitted that, it was omission by the Commissioner of Oath to insert the date in jurat and slip of pen on the verification

clause. Consequently the applicant concedes with the two objection and prayed to withdraw the Application without costs and be allowed to lodge a fresh Application.

Having gone through the submission by both parties, let me start by determining the 1st point of Preliminary Objection. The same is on the non/wrong citation of the law which was used to forward the Application for extension of time before this Honourable Court; in which the same was brought under **Section 38 (1) of the Land Disputes Court Act, No. 2 of 2002, Section 14 (1) of Law of Limitation Act, Cap. 89 and Section 95 of the Civil Procedure Code, Cap. 33 [R. E. 2002]**.

I have to state that, previously, these kind of Applications, I mean for extension of time used to be clothed by **Section 14(1) of Cap. 89** since there was no specific time under the Law (that is Cap 126); which provided for the specific period to Appeal to the Court of Appeal for the matters originated from the District Land and Housing Tribunal.

However, since the Amendment of the **Land Disputes Courts Act Cap. 216 in the year 2016, by the Written Laws (Miscellaneous Amendments) (No. 2) Act of 2016, Section 41 (2) of** the same provides for the Appeal to the High

Court from the District Land and Housing Tribunal to be lodged within **forty five days after the date of decision**. Further, in the proviso of the same section, the High Court is improved extend the time for filing an Appeal before or after such period of forty five days, upon showing good cause.

It is from the above, the section required to move the Court for this Application of extension of time is **Section 41(2) of Cap. 216** and not otherwise, since it is already in force since **8th of July, 2016**. The 1st point of Preliminary Objection then is upheld accordingly.

It is for this single reason, that this Court has not been moved to entertain the instant Application; in which the remedy of the same is to **STRUCK OUT the Application**.

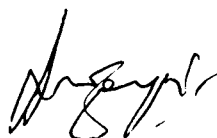
On the other hand, I would like to comment on the Applicant's counsel prayer to withdraw the instant Application with leave to refile after he has consented to the 2nd and 3rd points of preliminary objections. Indeed, I cannot hesitate showing any surprise to such a prayer from the Learned Counsel; since the said prayer at this particular time is not tenable. The reason behind being that, if the said prayer for withdraw by the Applicant could have been brought before the Court after the detection of the legal shortcomings, and before the preliminary

Objection were raised, the same could have been granted. Currently, the same cannot be entertained after the Respondent have raised point of preliminary objection to the Application. It is a normal that, if the preliminary objection is already filed before the Court, withdrawing the Application could be to pre-empt the said points of preliminary Objection.

Since the 1st point of Preliminary objection has been sustained, it is obvious that the Court cannot **WITHDRAW** something which is already incompetent.

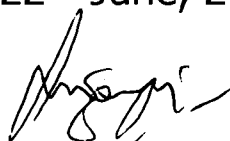
In the event, the Applicant is hereby **STRUCK OUT WITH COSTS.**

It is so ordered.



L. E. MGONYA
JUDGE
11/6/2018

COURT: Ruling delivered in the presence of both parties and Ms. Emmy B/C in my chamber today 22nd June, 2018.



L. E. MGONYA
JUDGE
11/6/2018