IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM

MISC. LAND APPLICATION NO 79 OF 2020

RICHARD NICHOLAUS MATIKU..............................APPLICANT

VERSUS

BARNEY I.S. LASEKO .... RESPONDENT

RULING

S.M. MAGHIMBI, J:

The application beforehand was filed under the provisions of Order XLII Rule 1(1) (b) of the Civil Procedure Code, Cap. 33 R.E 2019 ("the CPC"), the applicant being aggrieved by the decision of the high court in Misc. Land Application No. 603/2018 is hereby applying for the review of the said decision on the following grounds;

1. That there is an error on the face of the record in that the parties were not given chance to be heard on the issue raised by the court during the composition of the ruling regarding the non-attachment of the applicant's medical chit in the annexures to the affidavit and a finding that the applicant's allegation that he was not supported, the serious illegality of omission contrary to the natural justice.
2. That, the presiding Judge misdirected herself in failing to consider the relevancy of item No. 21 of part III of the Schedule of the Law of Limitation Act Cap. 89 R.E 2019 after finding that the application for extension of was filed after the lapse of 52 days

after obtaining the copies of the documents to be appealed against.

3. That, there is discovery of a new and an important evidence that could not be produced by the applicant when the order was passed in that the applicant's advocate had earlier presented a memorandum of appeal on the 13th July 2017 well in time but was not admitted on the advice that it was subject to application for extension of time.

Wherefore, the applicant prays the court that;

a.) Review its own decision on dismissing the application and allow the application for extension of time to file an appeal.

b.) Grant the costs of this application to the applicant.

In this court, the applicant was represented by Mr. Protace G. Kato Zake, Advocate while the respondent was represented by Mr. Godfrey Martin Silayo, Advocate. With leave of the court the application proceeded by way of written submissions.

In his submissions to support the application, Mr. Zake submitted that the applicant had two reasons for the delay to file the appeal. These include the delay of the trial Tribunal to supply necessary documents within time and the other reason is that the applicant's sickness which led to home bed rest. That while considering the reasons advanced by the applicant at page 4 of the ruling, Hon Makuru J (as she then was), held that;

"*the documents were made available to the parties on the 30th May 2017 after they were certified. Now counting from 30th May, 2018(sic) to 20th July 2017 when the present application was filed is 52 days. The applicant did not account for delay.*"

He continued to submit that at page 5, first paragraph Hon. Judge Makuru doubted the contents in the applicant's affidavit and held that;

> *"He (the applicant) averred further a copy of the medical chit is attached to the affidavit as annexure 'H'. However, upon a thorough perusal of the record what is referred to as annexure 'H' happens to be a document titled Memorandum of Appeal. There is no medical chit in the annexure attached to the affidavit. From the foregoing it follows that, the applicant's allegation that he was sick is not supported by the evidence."*

Mr. Zake continued to submit that Hon. Judge Makuru concluded her decision that the reasons advanced by the applicant for the delay were not sufficient to convince the court to grant the extension of time to file the intended appeal.

Mr. Zake then submitted that after the application was served to the respondent, he filed the counter affidavit through Mr. Silayo his advocate disputing the content of paragraph 15 of the applicant's affidavit. He argued that general denials are always considered to be admissions adding that there was no specific denial averred or anything to do with not attaching medical chit marked "H".

Further that the respondent's reply to the applicant's written submission had no complaint concerning the missing medical chit. That the issue of the missing medical chit was raised by the court *suo motto* and that the court never called the parties to address the court on the matter. That had the court called the parties for that matter, the court would have reached at a different conclusion as the purported missing annexure marked "H" was later found loosely located in the court file. That the making and arranging of annexure's submitted cannot be the mistake of

the applicant but the drawer and therefore the applicant cannot be punished for the mistake which is not his.

On the 2nd ground of review of regarding the delay of 52 days, Mr. Zake submitted that the provision of Section 19(2) of the Law of Limitation Act Cap 89 R.E 2019 ("the Limitation Act") exclude the period of time requisite for obtaining copies required for the instituting an appeal in computing the period of limitation. That the learned Judge properly computed the time counting from when the applicant filed the application for extension of time to file an appeal, however, if the provisions of item 21 of Part III of the schedule of the Limitation Act were considered, the she could not have dismissed the application. To support his argument, he cited the case of **Japan International Co-operation Agency (JICA) vs. Kyaki Compolex Limited 2006 2EA 101 (CAT).**

On the 3rd ground of review, Mr. Zake submitted that the filing of appeal from the District Land and Housing Tribunal is 45 days counting from the day after obtaining the necessary documents, that is 30/5/2017. That there is evidence on record that on the 13th July 2017, 44 days after he collected the necessary documents, the applicant presented the memorandum of appeal against the judgment and decree of the trial Tribunal dated 28/4/2017 in Land Application No. 91 of 2017, which was accepted for admission and it was stamped and dated 15/7/2017. That had this document been put before Hon. Judge Makuru, the court would have reached a different conclusion. Mr. Zake finalized his submission by praying that the allow the application with cost.

When replying on the 1st ground of review, Mr. Silayo submitted that the reason that there was a serious error on the face of records as the

parties were not given chance to be heard regarding on the non-attachment of the medical chit exhibit as an evidence for the delay is irrelevant and the same do not hold water. The fact that the applicant was given sufficient time to present his case through written submission and rejoinder means his right to be heard was adhered.

Mr. Silayo continued to submit that the alleged fact that the counter affidavit had a general denial is incorrect. Further that the respondent's silence on the missing medical chit cannot sustain an excuse to date ad that the said discovery of the medical chit was done by the court and it was the reason that made the court dismiss the application as it was devoid of merits on sufficient cause of delay.

On the 2nd ground of review Mr. Silayo submitted that the sixty days limit is not applicable because time limit to file appeal from the District Land and Housing Tribunal is 45 days. He added that the applicant cannot be shielded by the law of limitation without accounting a sufficient cause for the delay as well as without showing how diligent he acted in filing the case in time.

On the 3rd ground of review he replied that going through the applicant's submission, the main allegation is that the missing attachment of the medical chit should not be a reason to punish him. That the applicant was not prejudiced as the application for the extension time was fairly heard on merit and at last sufficient cause to establish the case was not made by the applicant. He further submitted that there are several decisions of the Court of Appeal regarding reasons for granting review including the case of **Tanzania Transcontinental Trading Company V. Design Partnership LTD [1999] T.L.R 258.** Where the court held inter alia that;

"where review is sought it must be established as a condition precedent that a wrong has been committed or an error has been made and the review is being sought in order to redress the same"

He added that if the court decides to focus on the grounds which the application of review is sought, it shall not get any reason which shows that an error was committed by the court when giving its ruling regarding the application for extension of time to appeal. Mr. Silayo finalized his submission by praying for the court to dismiss this application with cost. In his rejoinder Mr. Zake reiterated what he submitted in his submission in chief.

Having considered the memorandum of review and the parties submissions thereto, my findings are elaborated. On the first ground of review, the appellant attempts to establish a ground of ana error on the face of records regarding non-attachment of appllicant's medical chit to the affidavit. An error apparent on face of record was well elaborated in the case of **Oswald Masatu Mwizarubi V. Tanzania Fish Processors Limited, Civil Review Application No. 05 of 2013** where it was held that:

"An error apparent on the face of record must be such as can be seen by one who writes and reads, that is, an obvious and patent mistake and not something which can be established by a long-drawn process of reasoning on points on which there may conceivably be two opinions."

As for the ground of medical chit, the applicant was supposed to prove that he was actually sick and the proof was to be medical chit which in his affidavit, he alleged to have attached. Therefore an error apparent would have been for the applicant to point to this court a medical chit

attached in the affidavit that was overlooked. To the contrary, this is what happened, when constructing the ruling the court found that what was termed as medical chit (annexure H to the affidavit) was not it, it was rather a document titled "Memorandum of Appeal", that is why the court concluded that the allegations of sickness were not supported by evidence. The court could not stop constructing a ruling and come to pamper the applicant so that he can bring the medical chit. He had his chance and he blew it by attaching a different document. That cannot therefore form a ground of review.

As for the second ground of review that the court reached at its decision by using the wrong provision as it failed to consider the provision of item 21 of part III of the Limitation Act which allows the time limit of 60 days for the application which its limitation period is not provided for in the Act or any other written law. The question is if this is a ground for review. The Court of Appeal in the case of **Halmashsuri ya Kijiji cha cha Vilima Vitatu and another vs. udaghwengaBayay and others, Civil Application No. 16 of 2013, CAT** cited with approval the case of **National Bank of Kenya Ltd V.Ndungu Njau [1997] eK.L.R** where it was held that on incorrect exposition of the law where it was held:

> *"It will not be a sufficient ground for a review that another judge could have taken a different view of the matter. Nor can it be a ground for review that* ***the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of the law.*** *Misconstruing a statute or other provision of law cannot be a ground of review"*

Looking at the way the ground is crafted, the applicant attempts to establish that the court proceeded on an incorrect exposition of the law

and reached an erroneous conclusion. In the case of **Charles Barnabas Vs. Republic, Criminal Application No. 13 Of 2009 (Unreported)** the Court of Appeal held that:

> *"Review is not to challenge the merits of a decision. A review is intended to address irregularities of a decision or proceedings which have caused injustice to a party..."*

As for the second ground of review on the interpretation of the Limitation Act, that cannot form a ground of review, it is rather a ground of appeal calling for a higher jurisdiction to re-evaluate the finding of the court. This ground is therefore dismissed.

On the discovery of new and important evidence, the applicant's argument was that the advocate had earlier presented a memorandum of appeal on 13/07/2017 well in time but was not admitted on the advise that it was subject to application for extension of time. On this point, a line of difference must be drawn between what constitute a discovery of new and important evidence and what is an afterthought. In considering a discovery of new and important evidence, the court must be convinced that at the time of hearing of the case, that evidence could not be procured by a party without any undue delay or could not be procured at all. The evidence must then have been procured after the matter was concluded and it is important that this evidence is heard as it will have a direct impact on the findings of the court. With respect, the prior filing of an appeal does not amount to evidence not within applicant's reach or knowledge that could not be procured without unnecessary delay. To the contrary, what Mr. Zake is attempting to present is an afterthought. What I see here is that the applicant is now playing trial and error game. Since he could not convince the court then, he has now, as an afterthought, come back with a new issue which

there is no explanation whatsoever why it could not be tabled to the court during hearing of the application for extension of time. This ground is also dismissed.

Having made the above observations and findings, I find this application to be lacking merits and it is hereby dismissed with costs.

Application Dismissed.

Dated at Dar es Salaam this 13th day of March, 2021.

S.M MAGHIMBI.

JUDGE.