

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**AT SUMBAWANGA DISTRICT REGISTRY**

**MISCELLANEOUS LAND APPLICATION NO. 18 OF 2020**

*(Originating from Land Application No. 35 of 2015 of the District Land and Housing Tribunal for Rukwa)*

**ASAYILE PAUL MASAKU.....APPLICANT**

**VERSUS**

**REVIVAL CHURCH SACCOS.....RESPONDENT**

***Date of last order: 18/05/2021***

***Date of Ruling: 16/08/2021***

**RULING**

**C.P. MKEHA,J**

The applicant has through Mr.Chambi learned advocate moved the court for two orders namely, an order for extension of time to appeal to this court out of time and an order staying execution of the decree of the trial tribunal pending determination of the intended appeal. On the other hand, the respondent is resisting the application through Mr. Sanga learned advocate.

In terms of paragraph 5 of the affidavit supporting the application, delay in filing of appeal was because of subsistence of former appeal which had been timely filed up to its withdrawal on 28/07/2020. According to paragraph 7 of the said affidavit, execution of the trial tribunal`s decree before determination of the intended appeal would expose the applicant

to irreparable loss, hence, a prayer for stay of execution is made in the chamber summons.

Despite filing of counter affidavit by the respondent, she also opted to raise and argue three preliminary points of objection. The following preliminary points of objection were raised: (i) ***That, this application is untenable in law for being preferred contrary to the provisions of Order XXIII Rule 3 of the Civil Procedure Code, Cap 33, R.E 2019;*** (ii) ***That, the application is supported with a defective affidavit*** and (iii) ***That, the application is time barred.*** Only relevant arguments of the learned counsel for the parties, in respect of the said points of preliminary objection, are brought forward. Arguments of the learned counsel for the parties were made by the learned advocates by way of written submissions.

It was Mr. Sanga's submissions in respect of the first point of preliminary objection that, an order of this court dated: 03/09/2020, allowing the applicant's prayer to withdraw his former application did not allow the applicant to refile the same. The learned advocate was of firm view that, in terms of Order XXIII Rule 3 of the Civil Procedure Code, in the absence of leave for refiling the withdrawn application, the applicant had no automatic right to refile the same as he did.

He also argued in respect of the third ground of appeal that, the sixty days rule ought to apply to the present application whose time of limitation is not provided under the law of limitation Act. To strengthen his argument, the case of **TANZANIA RENT CAR LIMITED Vs. PETER KIMUHU, CIVIL APPLICATION NO. 226/01 OF 2017, CAT AT DSM** was cited.

Submitting in respect of the second point of preliminary objection, the learned advocate argued that, whereas the affidavit accompanying the application consists of nine (9) paragraphs, the deponent verified in respect of only three (3) paragraphs i.e; paragraphs 1, 2 and 3. In view of the learned advocate, the verification clause contravened mandatory requirements of the law under Order VI rule 15(2) of the Civil Procedure Code which insists that, a person verifying should specify by reference to specific number of paragraph what he verifies. According to the learned advocate, failure to verify six (6) paragraphs of the affidavit supporting the application, renders the affidavit defective.

In rebuttal, Mr. Chambi learned advocate submitted in respect of the first point of objection that, when a prayer was made for withdrawal of the application which preceded the application now under consideration, a request for refiling the same was also made and that, the court agreed to the request without any resistance. In view of the learned advocate, leave for refiling the withdrawn application was also granted.

In what appears to be a concession to the 2<sup>nd</sup> point of objection, the learned advocate submitted that, it was an omission that six paragraphs were not verified. He however maintained that the omission was not fatal. He pressed for an order allowing the applicant to amend his defective affidavit. To strengthen his argument, the learned advocate cited the decision in **SANYOU SERVICE STATION LTD VS. BP TANZANIA LTD (NOW PUMA ENERGY(T) LTD, CIVIL APPLICATION NO. 185/17 OF 2018.**

As to the 3<sup>rd</sup> point of objection, the learned advocate submitted in reply that the sixty days rule ought not apply in applications for extension of time. The decision in **TANZANIA RENT CAR LTD VS. PETER KIMUHU, CIVIL APPLICATION NO. 226/1 OF 2017** was recited. In that case, the Court of Appeal of Tanzania held that, ***the sixty days rule should apply in filing of all other applications for which no time limit is prescribed except in applications for extension of time.***

To be able to resolve the contest between the parties, one has to respond to the following questions:(i) ***Whether this court`s order marking the former application withdrawn, was accompanied with leave for refiling the same.***(ii)***Whether the affidavit supporting the application is defective to the extent attracting being struck out and*** (iii) ***Whether the sixty days rule applies in applications for extension of time.***

An answer to the first question is obtainable in the court`s proceedings of the day i.e; Miscellaneous Land Application No. 12 of 2020 at page 2. The record indicates the following:

**Mr. Baltazar Chambi-Advocate:** Hon. Judge, I pray to withdraw this application so as to file proper application.

**Order:** The application is marked withdrawn at the instant (sic) of Mr. Baltazar Chambi learned advocate for the applicant.

Sgd: Judge

03/09/2020

The proceedings hereinabove tells it all. That, there was no specific order giving leave to the applicant to refile the application which he voluntarily withdrawn on 03/09/2020. Therefore, had this been an ordinary application other than the one seeking extension of time, the applicant would have no automatic right of refiling the same. The first point of objection is sustained to such limited extent.

An answer to the third question is without hesitation in the negative. That, the very fact that this application seeks extension of time for doing what the applicant failed to do within time prescribed by the law puts it outside the purview of the sixty days rule. **See: TANZANIA RENT CAR LIMITED VS. PETER KIMUHU (supra)**. The application is therefore not time barred. The third point of objection is overruled.

The learned advocate for the applicant conceded that the affidavit supporting the application is wanting for failure to verify six out of nine paragraphs. The only question is whether the same should be struck out. Relying on the decision in **SANYOU SERVICE STATION LTD VS. BP TANZANIA LTD (supra)**, the answer is in the negative. I thus allow the applicant to amend his affidavit. Fourteen days' time is given to the applicant to amend the said affidavit. Time to start running on delivery of this ruling. Therefore, although the second point of objection is sustained, prayer for striking out the application is refused.

For the foregoing reasons, the objections are partly sustained and partly overruled to the extent explained hereinabove. Prayer for striking out the application is refused.



*C.P. Mkeha*

**C.P. MKEHA**

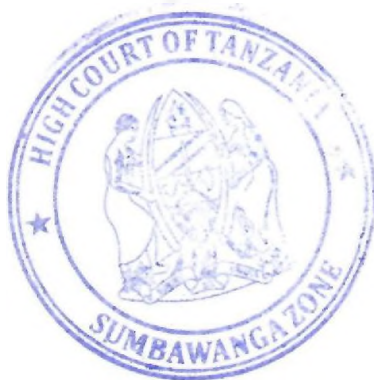
**JUDGE**

**16/08/2021**



Date - 16/8/2021  
Coram - Hon. W.M. Mutaki – DR  
For Applicant - Absent  
Applicant -  
For Respondent - Mr. M. Lwila – Advocate  
Respondent  
B/C - Zuhura

**Court:** Ruling delivered in the presence of Advocate for Respondent one Mussa Lwila in the absence of the Applicant.



**W.M. MUTAKI**

**DEPUTY REGISTRAR**

**16/08/2021**

