

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

MISC. LAND APPLICATION NO. 305 OF 2022

(Originating from Misc Land Application No. 382 of 2021 and Land Case No. 94 of 2021)

RECEIVER & MANAGER

SKY DEVELOPERS LIMITED.....1ST APPLICANT

I & M BANK (T) LIMITED.....2ND APPLICANT

VERSUS

LILIAN STEPHEN IHEMA (the Executrix of the Estate of the

Late STEPHEN ERNEST IHEMA).....**RESPONDENT**

Date of Last Order: 22.08.2022

Date of Ruling: 14.09.2022

RULING

V.L. MAKANI, J

This is an application for review by the applicants against the Order of this court in Misc. Land Application No. 382 of 2021 dated 121 October, 2021. The application has been made under Order XLII Rules 1(a) and (b) and 3 of the Civil Procedure Code CAP 33 RE 2022. In the said order, the application was dismissed with costs after the applicants herein conceded to the preliminary objection raised by the respondent on limitation of time.

The applicants have filed this application seeking the court to review its order on the following grounds:

- 1. That there is a discovery of new and important matter, which was not discovered by the applicants before, which led to the dismissal of the above application on 21st October, 2021 on assumption that the above application was time barred. There are apparent errors on the face of the record which have been discovered by the applicants which led to dismissal of the above application which did not come into the attention of the applicants at the time the dismissal order was made and which occasions injustice to the applicant who timely filed the above application for leave to appear and defend Land Case No. 94 of 2021.*
- 2. That since the applicants were served with summons and a plaint for Land Case No. 945 of 2021 on 9th July 2021, the above application for leave to appear and defend the suit was filed within the required twenty one (21) days because the exchequer receipt for filing this application was issued by this Honourable court on 29th July 2021 upon payment of the filing fees of Tshs. 50,000.00, the Registrar signed and sealed the Chamber summons on 29th July 2021 and the affidavit in support of the application was signed as presented for filing on 29th July 2021.*
- 3. That the chamber summons was erroneously marked by the court clerk as presented for filing on 10th August, 2021 instead of 29th August 2021 when the filing fees were paid and this is the basis upon which the preliminary objection which led to the dismissal of the application with costs on 21st October, 2021 was based.*
- 4. That the analysis of the summons and plaint served on the applicants in respect of Land Case No. 94 of 2021 will show that the same were served on 9th July 2021 and the exchequer receipt in the court file will also show that the above application was filed on 29th July 2021*

and not 10th August 2021 as previously assumed hence dismissal of this application which was properly filed within time which is unfair to the applicants.

The applicants prayed for the following orders:

- a) That the court review its dismissal order in respect to the above application made on 21 October 2021 and grant this application.*
- b) For the court to proceed with the hearing of the above application for leave to appear and defend Land Case No. 94 of 2021 which is a summary suit filed by the respondent in this court against the applicants.*
- c) Any other or further reliefs that the honourable court may deem fit to grant.*

The application was argued by way of written submissions. Mr. John Laswai, Advocate drew and filed submissions on behalf of the applicants. He consolidated the grounds of review and argued them together. He said there is a discovery of a new and important matter which was not discovered by the applicants before which led to the dismissal of the application on 21st October, 2021. He further said they have discovered errors apparent on the face of the record and review is the only option so that the court can correct the error for the records to remain correct. He said the error which attributed to the dismissal of Misc. Land Application No. 382 of 2021 (which was

timely filed) would tarnish the records of the court because the application was filed within time.

Mr. Laswai pointed out that the said application was for leave to defend which the limitation period is 21 days according to section 3 of the Law of Limitation Act CAP 89 RE 2019 read together with Item 1 of Part III of the Schedule to the said Act. He said it is on record that the applicants were served with the plaint in Land Case No. 94 of 2021 on 09/07/2021 and so 21 days were supposed to expire on 30/07/2021. He said the fees were paid on 29/07/2021. He said a document is said to have been filed when fees are paid in terms of the case of **Msasani Peninsular Hotels Limited & 6 Others vs. Barclays Bank Tanzania Limited & 2 Others, Civil Application No. 192 of 2006 (CAT)** (unreported) and **Suzan Roase Senga vs. Mussa Seleman Mbwana, Civil Appeal No. 296 of 2020 (HC-DSM)** (unreported). He observed in these cases it was stated that a document is deemed to be filed in court when payment of court fees is done, and the proof of payment is exhibited by the exchequer receipt. He said in view of the discovery of the error in the court records, it is the right opportunity for the court to review the order which it inadvertently entered while the application was filed within

time. He cited the case of **Flora Venance Mwingira vs. George P. Kachenje, Misc. Land Application No. 350 of 2020 (HC-Land Division)** (unreported) where it was stated that review is mainly for the purpose of correcting an error on the face of the record. He also cited the case of **Abdiel Reginald Mengi & Another vs. Jacquieline Ntuyabaliwe Mengi & 6 Others, Civil Application No. 618/01 of 2021**. Mr. Lasway concluded by saying that if the court was aware that the application for leave and defend was filed on 29/07/2021 as shown in the exchequer receipt and not 10/08/2021 it would not have made the decision of dismissing the application for leave to appear and defend. He prayed for the application for review to be granted with no order as to costs.

In reply, Ms. Judith Dickson Ulomi, Advocate on behalf of the respondent drew and filed submissions on behalf of the respondent. She said the application for review originates from a point of preliminary objection raised by the respondent in the application for leave to defend. She said the court ordered the objection to be argued by way of written submissions, but they are no submissions filed to date to rebut the arguments filed by the respondent. She said when the matter came on 21/10/2021, Counsel for the applicants one Ms.

Hamisa Nkya conceded to the preliminary objection and the matter was dismissed.

Ms. Ulomi went on saying that the applicants are seeking for review on the order from which they conceded after deliberating the submissions advanced by the respondent on the preliminary objection. Ms. Ulomi said the receipt of payment is not the evidence which has been discovered or which was not within their disposal or knowledge. She said the arguments by the applicants are an afterthought as the applicants were given time to construe the objection and argue the same and they have not advanced reasons why they failed to present the receipt during hearing. She said there is no affidavit to prove the alleged confusion of the receipt and date of filing by the Registry Clerk. She said the principle in the case of **Msasani Peninsular Hotels Limited** (supra) should not be used as a shield to cover negligence because the applicant had time to deliberate and consider the arguments by the respondent and they decided not to file submissions in reply but conceded to the objections.

As for the point on error apparent on the face of record, Ms. Ulomi said it is debatable because what fits to be as such was stated in the case of **Chandrakant Joshubai Patel vs. Republic [2004] TLR 218** and discussed in the case of **Melkizedeck Fanuel Kileo vs. Janeth Joseph Kileo, Misc. Land Application No. 735 of 2020 (HC-Land Division)** (unreported) where an error apparent on the fact of record was said to be an obvious and patent mistake which does not require a long drawn process of reasoning on points which may conceivably be two opinions. Ms. Ulomi said the arguments by the applicants cannot fit the principle in the cited case. She said the records will show that the Chamber Application was received in court on the 10/08/2021 which is 10 days after the lapse of the limitation to file the application for leave to defend. She pointed out that the delay was deliberately caused because on several occasions when parties entered appearance for the main suit the court reminded the applicants the need to file the said application. Ms. Ulomi called upon the court to be guided by the case of **Tanzania Tanscontinental Co. Limited vs. Design Partnership Limited, Civil Application No. 762 of 1996** (unreported) where the court was cautioned to exercise the power of review sparingly and in most deserving cases. She said the applicants are inviting this court to reopen the determination of

the application while the court is already *functus officio*. She prayed for the application to be dismissed with costs.

In rejoinder Mr. Laswai reiterated the main submissions and emphasized that the error is apparent on the face of record that the application was filed within time, and it does not require a critical analysis to grasp the point from the record. He said the case of **Melkizedeck Fanuel Kileo** (supra) supports the applicants' argument that the applicant did not exercise the right of appeal because the error is so apparent on the face of the record and such circumstances are cured by an application for review and not appeal as portrayed by Counsel for the respondent. He said the circumstances in the application are fit situation for this court to exercise its powers under Order XLII Rules 1(a)(b) and Rule 3 of the CPC. He prayed for the court to vacate its order of 21/10/2021 and make a finding that the application was filed within time and make necessary orders for hearing and determination of the application for leave to appear and defend Land Case No. 94 of 2021.

I have gone through the grounds for review and the subsequent submissions by Counsel. The main issue for consideration is whether this application has merit.

Applications for review are governed by Order XLII of the CPC. And Rule 1(1) (a) and (b) of the said Order states:

1(1) Any person considering himself aggrieved:

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the court which passed the decree or made the order.

The record in Misc. Land Application No. 382 of 2021 shows that the respondents had raised a preliminary objection and an order to file written submissions was given by the court. The respondents filed their submissions, but the applicants did not do so according to the court's schedule and they never sought for an extension of time to file their submissions in reply. Instead, the applicant's Advocate, Ms.

Hamisa Nkya, on 21/10/2021 conceded to the preliminary objections that were raised. The matter was dismissed as a result of the said prayer. It should be noted that the dismissal was not on account of the respondent or the court but it was the applicant's prayer that moved the court to dismiss the application.

Mr. Lasway is telling this court that there is an error as the application was filed in time according to the exchequer receipt dated 29/07/2021. The main error which is pointed out by Mr. Laswai is the date appearing on exchequer receipt which according to him was a discovery of new evidence because it was issued on 29/07/2021 well within the time for filing application for leave to defend. The argument by Mr. Lasway is misconceived. The arguments put forward by learned Counsel are a response to the preliminary objection which the applicants did not find it necessary to respond. They were given a schedule to file written submissions, but they failed or found it unnecessary to file their submissions in reply. The conduct by applicants' advocate of conceding to the preliminary objection meant that a thorough research was conducted resulting to such course of action. Since there was a preliminary objection which was on the issue of time and the applicants conceded to it, now they cannot turn

around and say they had discovered new evidence. In fact, the prayers by Mr. Lasway are questionable. While in the submissions he is asking the court to make a finding that the application was filed within time and make necessary orders for hearing and determination of the application for leave to appear and defend Land Case No. 94 of 2021. In the Memorandum for appeal, he is asking the court to review its dismissal order made on 21/10/2021 and grant the application and proceed to hear and defend Land Case No 94 of 2021.

Firstly, this suggests that this present application is also a hearing of the preliminary objection, but with due respect the issue of preliminary objection was concluded when Ms. Nkya Advocate for the same applicants conceded to the said objection. Subsequently this application cannot be used as a camouflage to re-open the hearing of the preliminary objection. In essence Mr. Laswai is arguing the preliminary objection through the backdoor. As correctly said by Ms. Ulomi this court is *functus officio* as a decision on the preliminary objection has already been given by this very court and was moved by the prayers of the applicants. Secondly, though the prayers in the Memorandum of Review reflects the reviewing of the dismissal order but the subsequent prayer to proceed to hearing of the application

for leave to appear and defend leaves a lot of questions as to what would be the status of the preliminary objection.

In my considered view there is no error apparent on the record, and what Mr. Lasway is suggesting does not qualify as such, the circumstances in this present case requires a long drawn process which includes evidence both orally and documentary. I subscribe to the cases of **Chandarakant Joshubai Patel** and **Melkizeddeck Fanuel Kileo** (supra). If at all there is an error the applicants were supposed to have noted the same during the preparation in reply of the preliminary objection as the objection raised was on the same issue of time limitation. The fact that the applicant's advocate willingly conceded to the preliminary objection meant that, and I repeat, a thorough research was conducted, and the question of discovery is, in my considered view, an afterthought.

For the reasons above, this application has no merit, and it is hereby dismissed with costs. It is so ordered.



V.L. Makani
V.L. MAKANI
JUDGE
14/09/2022