

**IN THE HIGH COURT OF THE REPUBLIC OF TANZANIA
(LAND DIVISION)**

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 756 OF 2021

REV. PETER PETER JUNIOR APPLICANT

VERSUS

BAKARI SHABANI MAKAMBA (Administrator of the late

Dickson Shabani Makamba) **1ST RESPONDENT**

TIGO TANZANIA LIMITED **2ND RESPONDENT**

AIRTEL TANZANIA LIMITED **3RD RESPONDENT**

HUSSEIN ALLY SALUM **4TH RESPONDENT**

RULING

Date of last Order: 09.03.2022

Date of Ruling: 15.03.2022

A.Z. MGEYEKWA, J

In this, the applicant is praying for extension of time to file an application to set aside the dismissal order in Land Case No. 292 of 2016 dated 7 June, 2017. Relevant fact as the instant application is that the applicant had earlier sought and obtained extension of time to file

application for leave to file an application to set aside the dismissal order in Land Case No. 292 of 2016 appeal to the Court of Appeal. The same was granted as per the ruling delivered by Hon. Maghimbi, J in Misc. Land Application No. 541 of 2019. According to the said ruling the applicant was to file notice of appeal within thirty days from the date of the ruling. The applicant filed an application to set aside the dismissal order and Hon. Makani, J struck out the applicant's application for being incompetent. Supporting the application is the affidavit deposed by the applicant himself. The application has met an opposition, lodged by the respondents, through their separate counter-affidavits and the 1st respondent lodged two points of preliminary objections to wit:

- 1. That this court is not been moved properly.*
- 2. This application was brought before this court prematurely, the same is an abuse of the court process.*

As the practice of the Court. I had to determine the preliminary objections first before going into the merits or demerits of the appeal. That is the practice of the Court founded upon prudence which I could not overlook.

When the matter was called for hearing on 3rd February, 2022 the plaintiff appeared in person, unrepresented while Mr. Rahim, learned

counsel represented the second and third respondents and Mr. Swedi Ismail represented the fourth respondent. The submissions of the preliminary objection was by way of written submission. Both parties complied with the court order.

In support of the preliminary objections, on the first limb of the objection, Mr. Adrian Mhina, counsel for the first respondent argued that the applicant has brought his application under a wrong citation of the law. Supporting his submission, he cited the case of **Iddie Mwinyi v National Bank of Commerce & MIS Ngeme Mbitu** [2001] TLR 83. He contended that the application is brought through the provision of section 14 (1) of the Law of Limitation Act, Cap.89 [R.E 2019]. He argued that as per paragraph 6 of the applicant affidavit, the applicant stated that on 26th October, 2020 through Misc. Land Application No. 541 of 2019 he was granted an extension of time to file an application to set aside the dismissal order, the same prayer, and reliefs which applicant wants into the instant application.

He went on to submit that the applicant was supposed to lodge his application under section 93 of the Civil Procedure Code, Cap. 33. He added that this section is the proper citation for this application, however, the applicant applied the Law of Limitation Act while it is irrelevant, and

the same renders the applicant's application incompetent. He added that in accordance to the case law, a wrong citation of law makes the application incompetent and the remedy is to strike out the application with costs.

As to the second limb of objection, Mr. Mhina argued that the Misc. Land Application No. 659 of 2020 was struck out as a result of the 1st respondent preliminary objection which was heard *ex parte* against the applicant. He went on to submit that the applicant had a duty to set aside the said *ex parte* order before he decided to challenge anything. To buttress his contention he cited the case of **Theobald Mangu Sabi v Willyson Francis Liwewa & 7 others**, Misc. Land Application No. 450 of 2020 HC Land Division at Dar es Salaam.

In conclusion, the learned counsel for the 1st respondent beckoned upon this court to strike out the applicant's application.

The applicant in his reply strongly objected the 1st respondent objection. He argued that the 1st respondent counsel is not aware with the facts of the previous applications. He submitted that the Misc. Application No. 639 of 2020 which was before Hon. Makani, J was for restoring the main suit, however, the same was struck out on 10th December, 2021 for want of

proper citation of the law. He went on to submit that following that order, the time of extension of time as provided by Hon. Maghimbi, J ceased thus, the applicant seeks a second bite as the former order was never implemented following an objection for proper citation.

The applicant went on to submit that section 93 of the Civil Procedure Code Cap.33 [R.E 2019] is distinguishable in the matter at hand. He insisted that the proper provision was section 14 of the Law of Limitation Act, Cap.89 as cited by the applicant in chamber summons and affidavit. To support his position he cited the case of **Steven Ngoloka (as legal representative of Charles Ngoloka) v Ponaian Nkwama**, Misc. Land Application No.8 of 2019 HC at Mbeya (unreported). He submitted that had the applicant failed to act or comply with the order of extension of time in Misc. Application No. 541 of 2019 then it could be proper for the applicant to apply section 93 of the Civil Procedure Code, Cap.33 [R.E 2019].

Arguing for the second limb of the objection, the applicant contended that this objection is not logical. He argued that in setting aside an *ex parte* order, the matter at hand must be heard on merit. The applicant argued that since the Misc. Application No. 659 of 2020 was struck out, then such an order can never be appealed nor set aside but the remedy

is for the applicant to lodge a fresh application. He argued that the applicant has adhered to the procedure and the filing of this application in accordance with the law. To bolster his contention he cited the cases of **Maslowa D. Masalu v The Attorney General & another**, Civil Appeal No. 21 of 2017, Court of Appeal of Tanzania and **Juma Ramadhan Mkuna v Alhaji Hatibu A. Kilango**, Civil Application No. 421/17 of 2018 Court of Appeal of Tanzania (both unreported). The applicant distinguished the cited case of **Theobald Mangu Sabi v Wilson Francis Liwema & 7 others** (supra) that the matter at hand was not heard on merit while the cited case the matter was heard *ex parte* on merit.

On the strength of the above submission, the applicant beckoned upon this court to dismiss the preliminary objections raised by the 1st respondent with costs.

In rejoinder, Mr. Mhina maintained his submission in chief. He added that the applicant wants to mislead the court by citing a different case of Steven Ngoloka (supra) which is irrelevant to the situation at hand. He valiantly argued that the first extension of time was granted and the same situation is prescribed and governed in the Civil Procedure Code Cap.33 [R.E 2019].

After a careful consideration of the submission from both sides regarding the two raised objections. This Court wishes to set the record straight, concerning the appropriate practice and procedure to file adopt when faced with an application for a Preliminary Objection. The learned counsel for the applicant gave heed to the proper procedure for filing an application for extension of time to file a similar application that was granted by this court.

The applicant in his affidavit supporting the present application averred that, there was two attempts to file application for leave for extension of time to file an application to set aside the dismissal order of this court. The first attempt was before Hon. Maghimbi, his application for extension of time to file an application to set aside the dismissal order of this court was granted on 26th October, 2020. Then the applicant lodged an application to set aside the dismissal order, however, the same did not sail through as they were all found to be incompetent and hence struck out on o 10th December, 2021.

The time within which the applicant was to file his application to set aside the dismissal order of this court had already expired. Therefore, the applicant filed the present application under Section 14 (1) of the Law of Limitation Act, Cap. 89 [R.E 2019], seeking once again an extension of

time within which to file an application for setting aside the dismissal order of this court in Land Case No. 292 of 2016. The applicant's affidavit which supported his application accounted for the delay in filing the application to set aside the dismissal order of this court and the applicant mentioned the application to set aside the dismissal order which was struck out. These reasons are captured and reflected in the applicant's written submissions. The respondent opposed the application by raising the two objections mentioned above.

The 1st respondent in the first objection, claims that the application is brought under a wrong citation of enabling the provision of law. On the first limb of the objection, I had to go through the applicant's application, affidavit compared with the rival submissions. It was not in dispute that the applicant had earlier sought and obtained an extension of time to set aside the dismissal order. This court granted the extension of time of thirty (30) days within which to file an application to set a dismissal order in respect to Land Case No. 292 of 2016.

Thereafter, the applicant filed an application to set aside the dismissal order. No. 659 of 2020 before Hon, Makani. However, the same did not sail through as they were all found to be incompetent and hence struck out on 10th December, 2021. The cited section 93 of the Civil Procedure

Code, Cap. 33 [R.E 2019] provides for the discretion of the court to enlarge when the time set by the court for doing a particular act expires. For ease of reference, I reproduce section 93 of the Civil Procedure Code, Cap. 33 [R.E 2019]:-

"93. Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Code, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired."

Applying the above section in relation to the application at hand, I am in accord with Mr. Mhina that section 93 of the Civil Procedure Code, Cap. 33 [R.E 2019] was a proper enabling provision for the prayers sought by the applicant in the chamber summons at hand since the applicant found himself out of time for the second time to file the said application after the expiration of the 30 days issued by Hon. Maghimbi, J in Misc. Application No. 541 of 2019.

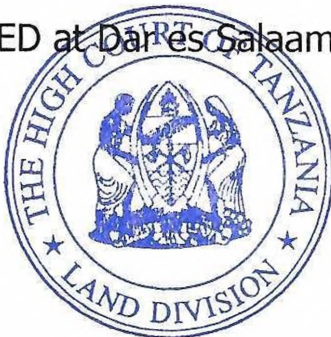
When all is said and done, the eventual result is that the application was brought under the wrong provision of law. In the case of **Almas Iddie Mwinyi v National Bank of Commerce and another** [2001] TLR. 83, the Court of Appeal of Tanzania held that, such irregularity is

fatal, it renders the application incompetent and erodes the jurisdiction of the court. The application becomes thus, liable to be struck out.

In the upshot, I proceed to strike out the instant application for being incompetent. No order as to costs.

Order accordingly.

DATED at Dar es Salaam this 15th March, 2022.




A.Z.MGEYEKWA

JUDGE

15.03.2022

Ruling delivered on 15th March, 2022 in the presence of the applicant and Mr. Swedi Ismail, counsel for the 3rd respondent also holding brief for Mr. Mhina, counsel for the 1st respondent and the 4th respondent.




A.Z.MGEYEKWA

JUDGE

15.03.2022