

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 673 OF 2021

(Arising from Misc. Land Application No. 382 of 2021)

RECEIVER & MANAGER OF SKY DEVELOPERS LIMITED...1ST APPLICANT

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

VERSUS

LILIAN STEPHEN IHEMA (*the executrix of the Estate of*

STEPHEN ERNEST IHEMA.....RESPONDENT

Date of last order: 20/4/2022

Date of ruling: 10/5/2022

RULING

A. MSAFIRI, J.

On the 26th day of November 2021, the applicant lodged an application in this Court by way of chamber summons under Sections 93 and 95 of the Civil Procedure Code [CAP 33 R.E 2019 (the CPC), for the following orders;

- i. That this Honourable Court be pleased to grant the applicant an extension of time within which to lodge a memorandum of review*

Alle

in respect of order to dismiss Misc. Land Application No. 382 of 2021.

- ii. *Any other relief that this Honourable Court may deem fit to grant.*
- iii. *Costs of this application*

The application has been taken at the instance of Locus Attorneys and it is supported by an affidavit affirmed by Miss Mariam Ismail learned counsel for the applicant herein.

The respondent contested the application by lodging counter affidavit as well as notice of preliminary objection on points of law to the effect that;

- i. *The application is bad in law for being preferred under the wrong provision of the law.*
- ii. *The application is incompetent for not citing a relevant provision of the law.*

On 16th March 2022, this Court ordered the preliminary objections together with the application be simultaneously disposed of by way of written submissions the order which was duly complied with by the parties hence this ruling. The applicants and the respondent were represented by Hamisa Nkya and Judith Ulomi learned advocates respectively. *Alle*

I propose to begin with the preliminary objections raised. It is the respondent's contention that the present application has been preferred under the wrong provisions of the law as Sections 93 and 95 of the CPC are inapplicable to the present application. The respondent submits that the proper provision ought to be Section 14(1) of the Law of Limitation Act [CAP 89 R.E 2019]. To fortify his stance, the respondent has cited several decisions one of them being the case of **Christine Harieth Mulokozi & Another v David Carol Nchimbi**, Misc. Land Application No. 487 of 2021 in which this Court held that non citation or wrong citation of the law renders the application incompetent before the Court.

The respondent has also referred the decision of the Court of Appeal in **China Henan International Cooperation Group v Salvand K. A Rwegasira** [2006] TLR 220 on page 226, in which it was held that the omission in citing the proper provision of the rule relating to a reference is an error which goes to the root of the matter.

The respondent therefore prays for the application be struck out with costs.

In reply submission, the applicants submit that the provisions of the law used to move the Court in the present application are proper because

Alls.

under section 93 of the CPC, the Court can extend time when the prescribed time frame has lapsed whereas under section 95 of the CPC, the Court has inherent powers to make orders as may be necessary for the ends of justice and prevent abuse of the process of the Court.

On the other hand, the applicant has cited the decision of the Court of Appeal in the case of **The Director General of LAPF Pension Fund v Pascal Ngalo** Civil Application No. 76/08 of 2018 in which the Court of Appeal held that that;

“Provided that where an application omits to cite any specific provision of the law or cites a wrong provision but the jurisdiction to grant the order sought exists, the irregularity or omission can be ignored and the Court may order that the correct law inserted.

The applicant has also resorted to the overriding objective which urges courts to deal with cases justly, speedily while having regard to substantive justice without being overwhelmed by procedural technicalities.

On the rejoinder submission the respondent has submitted that overriding objective or the oxygen principle cannot be resorted to cure the omission to cite correct provision of the law. The respondent has referred

Allg.

the decision of **SGS Societe Generale De Surveillance SA and Another v VIP Engineering & Marketing Limited and TRA**, Civil Appeal No. 124 of 2017 in which it was held that the introduction of the oxygen principle was not meant to enable parties to circumvent the mandatory rules of the Court or to turn blind to the mandatory provisions of procedural law which go to the foundation of the case.

Having gone through the submission of the parties in support and rival to the preliminary objection raised by the respondent, the points for my determination is whether the present application has been preferred under wrong citation of the enabling provisions of the law and what are the consequences for such omission to cite proper provisions of the law.

The present application has been preferred under Section 93 and 95 of the CPC. I agree with the respondent that the said provisions are not applicable to the present application. Section 93 of the CPC gives powers to the Court to extend time to do a certain act, where it was the court that ordered a certain act to be done within a particular period. For instance if the Court ordered submissions to be lodged within a particular period and a party omits to comply with the order then he can move the Court to extend

Alle.

time under section 93. Suffice it to say that section 93 is applicable for extension of time only where such time was prescribed by the Court.

In the present application, the applicants are seeking for extension of time to file review but as there was no previous order issued by the Court for the applicants to lodge the review within a specified period of time, then the present application could not have been preferred under section 93 of the CPC.

Equally, section 95 of the CPC provides for general powers of the Court and it is applicable where there is no specific provision but in the present matter there is a specific provision that provides for extension of time as correctly submitted by the respondent, the correct provision ought to be section 14 of the Law of Limitation Act [CAP 89 R.E 2019].

It follows therefore that the present application has been preferred under wrong and inapplicable provisions of the law. The next issue is what are the consequences for non citation of correct provisions of the law? Whereas the applicants have submitted that such omission is not fatal and can be cured with the introduction of the overriding objective, the respondent is of the view that such omission is fatal and the overriding objective cannot cure the omission. *Alle.*

application. In the present matter this Court has jurisdiction to entertain the application as the applicants are seeking for extension of time to file review against the order of this Court.

Therefore, I am of the settled mind that no injustice has been occasioned by merely citing Sections 93 and 95 of the CPC because that alone does not take away the jurisdiction of this Court to entertain the application hence the preliminary objections raised by the respondent are hereby overruled.

Back to the application itself, as stated before, the applicants are seeking for extension of time to file review. In their submission the applicants urged the Court to grant the prayer sought because there are sufficient reasons for the Court to exercise its discretionary powers for extension of time.

The applicants have cited the decision of the Court of Appeal in the case of **Lyamuya Construction Company Limited v Board of Trsustees of Young Women's Christian Association of Tanzania** Civil Application No. 2 of 2010, Court of Appeal of Tanzania (unreported) in which factors to be taken into consideration for the Court to exercise its discretionary powers of extension of time are; the applicant must account

Alle

of all the period of delay, the delay should not be inordinate, the applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take, and if there is existence of a point of law of sufficient importance such as the illegality of the decision sought to be challenged.

The applicants maintains that they have accounted for each day of the delay as demonstrated on paragraphs 8, 9 and 10 of the affidavit. Similarly, the delay was not inordinate because the order sought to be reviewed was obtained on 22nd November while the present application was lodged on 26th November. The applicants submit that there is a sufficient point of law intended to be pursued by the applicant based on illegality.

The applicants have cited the decision of the Court of Appeal of Tanzania in **Principal Secretary, Ministry of Defence and National Service v Devram Valambia** [1992] TLR 387 in which it was held that, where a point at issue is one alleging illegality of the decision being challenged the Court has a duty of extending time. *Alls.*

In the present matter the applicants allege that the application for leave to appear and defend was timely filed within 21 days hence by dismissing it for being time barred was irregular and illegal.

On the reply submission, the respondent has referred to several decisions regarding the factors to be taken into consideration in application for extension of time like the present one. The respondent submitted that the applicants have not been able to account on each day of the delay from 21st October 2021 when the Misc. Application No. 328 of 2021 was dismissed to 26th November 2021 when the present application was lodged which is a total number of 35 days.

The respondent has cited the decision of the Court of Appeal in **Tanzania Fish Processing Limited v Eusto K. Ntagalinda** Civil Application No. 41/08 of 2018 in which it was held that in application for extension of time, the applicant should account for each day of the delay. The respondent contended further that there was inordinate delay as the order requested was supplied to the applicant on 22nd November 2021 and the present application was lodged on 26th November 2021 hence the three days' delay was an inordinate. *Alle*

Regarding the existence of the illegality or point of law of sufficient importance, the respondent contended that there is no illegality rather the applicants have given a general statement which has not been clearly pleaded and verified by the applicants in the affidavit in support of the application.

The respondent has referred the decision of **Principal Secretary, Ministry of Defence and National Service v Devram Valambia** [supra], in which it was held that, to constitute illegality the same should be apparent on the face of the record, such as the question of jurisdiction not that would be discovered by a long drawn argument or process. Hence the respondent prayed for the application to be dismissed.

Having gone through the submission in support and rival to the present application, the point for my consideration is whether the application has merits.

To appreciate the nature of the matter, I find it apposite to give a brief narration. The respondent instituted in this Court Land Case No. 94 of 2021 under summary procedure against the applicants herein. The applicants were served with summons on 9th July 2021, hence as required by law they lodged an application to appear and defend the suit on 29th *Allo.*

July 2021 well within 21 days. It is stated by the applicants that the Court Clerk erroneously indicated that the said application was received on 10th August 2021 instead of 29th July 2021, hence the respondent raised a preliminary objection on the point of law that the application was time barred. It appears that the advocate who represented the applicants conceded to the preliminary objection raised hence the application for leave to appear and defend the summary suit was dismissed.

The applicants therefore have preferred the present application to have the dismissal order be reviewed.

It is trite law that in an application for extension of time to do a certain act, like in present one, the applicant must show good cause for failing to do what was supposed to be done within the prescribed time.

Some of the decisions of the Court of Appeal of Tanzania which require good cause to be shown before the Court can exercise its powers for extension of time, are; **Abdallah Salanga & 63 Others v. Tanzania Harbours Authority**, Civil Reference No. 08 of 2003 and **Sebastian Ndaula v. Grace Rwamafa**, Civil Application no. 4 of 2014 (both unreported). *Asile-*