

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 194 OF 2023

**HAMIS MFAUME SAID (Administrator of the Estate of
the late MFAUME SAID MWALIMU APPLICANT**

VERSUS

ALLY SULTANI MBEGU 1ST RESPONDENT

FATUMA SAID MKUMBANGE 2ND RESPONDENT

RASHID ABDALLAH KIPENGELE 3RD RESPONDENT

Date of Last order: 28/06/2023

Date of the Ruling: 13/07/2023

RULING

A. MSAFIRI, J

This is an application within which the applicant is moving this Court to set aside its decision of dismissing Land Appeal No. 193 of 2021 which was dismissed on 03.08.2022 before Hon. Msafiri, J.

The background of the matter is that the appellant who is now an applicant, had appealed to this Court in Land Appeal No. 193 of 2021, against the decision of Hon. R. Mwakibuja, Chairman, before the District Land and Housing Tribunal of Mkuranga in Land Application No. 39 of 2018 which was delivered on 29.07.2021. However, the said appeal was

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dismissed by this Court on 03.08.2022, hence the applicant filed the current application.

The Application is made under Order IX Rule 3 and Section 95 of the Civil Procedure Code, Cap 33 [R.E. 2019], by way of chamber summons supported by an affidavit of Hamis Mfaume Said.

Before the Application was set for hearing, the 1st respondent raised two preliminary objections namely: -

- i. That, the application is time barred.*
- ii. That, the Applicant's application is bad in law for being brought under a wrong citation. Hence that this application be dismissed.*

The disposal of the above preliminary objections was by way of written submissions by the order of this Court whereas, the applicant had no legal representation, the 1st respondent enjoyed the legal service from Legal & Human Rights Centre, (LHRC) while the matter was ex-parte against the 2nd and 3rd respondents after proof of service.

Supporting the preliminary objection, the 1st respondent contended that the Application is for setting aside the decision of Land Appeal No. 193 of 2021 delivered on 03.08.2022, however that the application was filed before this Court on 06.04.2023. The respondent contended that the

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application is completely out of time for 247 days contrary to Part III Column 1 Item 9 of the Schedule to the Law of Limitation Act, Cap 89 [R.E. 2019]

He further added that the proper recourse for the applicant to adopt was to go for re-admission and not filing a fresh application like the one at hand, which was to be filed within 30 days from the date of the decision. He prayed that this application be dismissed under Section 3(1) of the Law of Limitation Act, which provides: -

'3.-(1) Subject to the provisions of this Act, every proceeding described in the first column of the Schedule to this Act and which is instituted after the period of limitation prescribed therefore opposite thereto in the second column, shall be dismissed whether or not limitation has been set up as a defence.'

Regarding to the second ground of objection, the 1st respondent contended that the applicant was wrong to bring this Application under Order IX Rule 3 and Section 95 of the Civil Procedure Code. That, the proper provision of the Law as per the circumstances in this application was Order XXXIX Rule 19 of the Civil Procedure Code. He argued that the application was brought under wrong enabling provision, therefore suitable for dismissal. *Atts.*

To cement his arguments, the respondent cited the case of **China Henan International Co-Operation Group vs. Rwegasira** (Civil Reference No. 22 of 2005) [2006] TZCA where it was observed that: -

"An error to cite the correct provision is not a technical one but "a fundamental matter which goes to the root of the matter.....Once the application is based on wrong legal foundation, it is bound to collapse"

Hence, that this application is supposed to be rendered incompetent on account of wrong citation of the enabling provision.

In response, the applicant had no much to say rather than stating that this application was filed on 06.04.2023 in respect of ruling delivered on 09.03.2023. Hence that the same was filed within 30 days.

Regarding to the second objection, the applicant contended that the cited provision of the law is very correct as it was filed by his advocate, Mr Mwesiga O. Ishengoma.

After a careful scrutiny of the rival submissions of the parties, and court records, and before going into the deep thought of this Application, it appears that there was Land Appeal No. 193 of 2021 as per the applicant's pleadings, which was delivered on 03.08.2022, it is the same Appeal that the applicant prays to be set aside by this application at hand, *Alles.*

as per the chamber summons, after the same was dismissed for want of prosecution.

I will first determine the first ground of objection on *whether this Application is time barred*. In determining the same, I will be guided by the provision of the law under Item 4 of Part III of the Schedule to the Law of Limitation Act, which provides that limitation of time for Application to set aside dismissal order is 30 days.

The applicant like the 1st respondent, admits that this Application was filed before this Court on 06.04.2023.

The Land Appeal No. 193 of 2021, that is moved to be set aside, was delivered on 03.08.2022. Reckoning from 03.08.2022 when the Appeal was dismissed, to 06.04.2023 when this Application was filed it is more than 30 days period of time provided by the law above.

As a result, I subscribe to the position of the 1st respondent on the first preliminary objection that this Application is time barred.

It is therefore my finding that, in the absence of proof of leave for extension of time, this Application is incompetent for being time barred.

Having said that I should not labour much on the second ground of *Acts*.

objection because the first ground of objection is sufficient to dispose of the Application.

For the foregoing reasons, this Application is struck out for being incompetent. No order as to costs.

It is so ordered.

