THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF MBEYA

AT MBEYA

MISC. LAND APPLICATION NO. 86 OF 2019.

(From Land Appeal No. 33 of 2015, in the High Court of Tanzania, at Mbeya, Originating in Application No. 130 of 2012, in the District Land and Housing Tribunal for Mbeya, at Mbeya).

ELESI MAJINGE (As Administratrix of Majinge Matusela Daud.....APPLICANT

VERSUS

1. NDIGWAKE KAJEBA.....1ST RESPONDENT

2. EMANUEL MATHIAS (As Legal Representative of the Estate of Mathias Matusela Majinge).....2ND RESPONDENT

3. PIUS MWAITUKA.....3RD RESPONDENT

4. NGWISA MWAKYANJALA .....4TH RESPONDENT

RULING

25/02 & 19/05/2021.

UTAMWA, J:

The applicant in this application, ELESI MAJINGE (As Administratrix of Majinge Matusela Daud) applied for leave to appeal to the Court of Appeal of Tanzania (CAT) and any other relief this court would deem just to grant.

The application is preferred against one NDIGWAKE KAJEBA, EMANUEL MATHIAS (As Legal Representative of the Estate of Mathias Matusela Majinge), PIUS MWAITUKA and NGWISA MWAKYANJALA (henceforth the first, second, third and fourth respondent respectively).

The applicant intends to appeal against th judgement of this court (Levira, J. as she then was) dated 17th December, 2018 (hereinafter called the impugned judgement), in Land Appeal No. 33 of 2015. The matter originated in the District Land and Housing Tribunal for Mbeya, at Mbeya (the DLHT). The application is preferred under section 47 (2) of what the applicant termed as the Court (Land Disputes Settlements) Cap. 216 R. E. 2002 (Now R. E. 2019). It was supported by an affidavit sworn by Mr. Justinian Mushokorwa, learned counsel for the applicant.

The first and second respondents objected the application through their joint counter affidavit. The other two respondents did not object it. The court thus, ordered the application to proceed against the first and second applicants only.

The application was argued by way of written submissions. The applicant's submissions were signed by their counsel. On the other hand the first and second respondents were not legally represented, they thus, signed their own submissions.

In the affidavit supporting the application the learned counsel for the applicant deponned that, previously the applicant filed Application No. 111 of 2018 for *inter alia*, extension of time to file the notice of appeal and to apply for leave to appeal to the CAT against the impugned judgment out of

time. On the 16th October, 2019 this court (Mambi, J.) granted the application, hence the application at hand. The same counsel represented the applicant in that application and has already filed the notice of appeal. Indeed, a similar application (No. 75 of 2017) had been struck out by this court (Levira, J. as she then was) on the 17th December, 2018.

The affidavit further stated that, the applicant intends to appeal against the impugned judgment on the grounds related to the following issues:

a) Whether a dully appointed administratrix is precluded at law to dispose of part or the whole of the estate before the elapse of four months.
b) Whether the land the applicant disposed of as adminitratrix to the 3rd and 4th respondents was part or beyond the land allegedly gifted to Mathias Matusela Majinge by his late father Majinge Matusela Daud.
c) Whether the late Maginge Matusela Daud irrevocably gifted the land to one of this children, Mathias vis-à-vis the interests of his other beneficiaries.

In their joint counter affidavit, the first and second respondents disputed the issues related to the grounds of appeal on the reasons that, the same were properly decided by the DLHT and the High Court through the impugned judgement. The applicant had also no mandate to dispose of the suit land to the third and fourth respondents since it was part of the estate of the late Mathias Mutasela Majinge.

In his written submissions in chief supporting the application, the learned counsel for the applicant submitted that, the first and second respondents challenged the applicant before the DLHT for selling to the third and fourth respondents a piece of land from the estate of their late father, Majinge Matusela Daud. The DLHT declared the sale invalid. The applicant appealed to this court. This court, through the impugned judgment dismissed the appeal, hence this application for leave to appeal to the CAT against it.

The applicant's counsel further argued that, in law an applicant for leave must demonstrate that there are some contentious legal or factual issues that are worthy consideration by the CAT. He cited the case of **Said Manyanga v. Abdalah Salehe [1996] TLR. 74** to support his contention. The affidavit proposed the contentious issues which were not properly addressed by the DLHT and the High Court (as shown earlier). This was because, thought the first and second respondents disputed the applicant's powers to dispose of the suit land to the third and fourth respondents, they did not dispute her capacity as administratrix for the estate of their late father.

The learned counsel also contended that, in law, an administratrix has all powers to dispose of any part of the deceased estate without consulting other beneficiaries, especially when they do not see eye to eye. He cited the case of **Mohamed Hassan v. Manyas Msee [1994] TLR. 225** to fortify the argument. He added that, the evidence on record did not show that the deceased had irrevocably gifted the land so as to believe that it was not part of the estate.

In their replying submissions, the first and second respondents firstly challenged the competence of the application. They argued that, the applicants moved this court under wrong provisions of law cited as section 47 (2) of the Court (Land Disputes Settlements) Cap. 216 R. E. 2002. This law does not exist. What exists is the Land Disputes Courts Act, Cap. 216 R.E 2019. Again, the applicant indicated in the chamber summons that he was seeking leave to appeal to the CAT, but instead, he is now seeking for a certificate of point of law. The application was thus, incompetent.

The first and second respondent also argued that, there are no sufficient reasons for the prayed leave to appeal. The applicant only intends to delay justice. This was because, the DLHT and the High Court had rightly decided that the land in disputed had been irrevocably gifted before the deceased died. It was therefore, not part of the estate under the administration of the applicant. The sale of the land to the third and fourth respondents by the applicant was thus, illegal. There was thus, no any contentious issue fitting the consideration of the CAT.

In his rejoinder submissions, the applicant's counsel contended that, the respondents' challenges against the competence of the application are untenable. This is because, before the amendments, the law at issue was known as cited by the applicant in the chamber summons. He also argued that, the wrong citation may thus, be ignored by this court under the auspices of the principle of overriding objective. He also reiterated the contents of the affidavit and the submissions in chief.

I have considered the affidavit, the counter affidavit, the arguments by the parties and the law. Now, since the first and second respondents

raised a concern that amounted to a preliminary objection against this application, I am obliged by the law to firstly resolve it, as I hereby do.

In the first place the two respondents contended that, the application was preferred under a wrong law. The issue here is therefore, *whether or not the application at hand is incompetent for wrong citation of the law*. In my view, and as rightly contended by the applicant's counsel, though the applicant in fact erroneously cited the enabling provisions of the law in the chamber summons as shown above, the contemporary approach in our legal practice does not render the blunder fatal. Indeed, this is the result of the advent of the principle of overriding objective. It follows thus, that, currently, wrong or non-citation of the enabling provisions of law in an application is no longer fatal to it as long as the court has the requisite jurisdiction to entertain the prayers made before it. This was the stance I underlined in the case of **Maran-atha Engineering and Trading Co. LTD v. TPB (Mbeya Brach), Misc. Land Application No. 39 of 2020, High Court of Tanzania (HCT) at Mbeya** dated 22/5/2020, (Unreported) following the case of **Alliance One Tobacco Tanzania LTD and Another v. Mwajuma Hamisi, Misc. Civil application No. 803 of 2018, HCT at Dar es Salaam,** (Unreported, by Mlyambina, J).

The principle of overriding objective has been recently underlined in our laws by amending some statutes. The statutes included the Civil Procedure Code, Cap. 33 R. E. 2019 (the CPC) which applies to this court and subordinate courts including the DLHT in some circumstances. The amendments of this legislation were effected through the Written Laws (Miscellaneous Amendments Act) (No. 3) Act, No. 8 of 2018. The amending

Act added new sections 3A and 3B to the CPC for the purposes. The principle essentially requires courts to deal with cases before them justly, speedily and to have regard to substantive justice. The principle was underlined by the CAT in the case of **Yakobo Magoiga Kichere v. Peninah Yusuph, Civil Appeal No. 55 of 2017, CAT at Mwanza** (unreported Judgment dated 10 October, 2018).

The change on the stance of the law regarding the legal effect of wrong or non-citation of enabling provisions of law in applications, was also demonstrated by the CAT in the case of **Beatrice Mbilinyi v. Mabukhut Shabiby, Civil Application No. 475/01 of 2020, CAT, at Dar Es Salaam** (unreported ruling dated 8th March, 2021), at page 16 of the typed version of the ruling. In that precedents, having noted a wrongly cited enabling provisions of law in the application before it, the CAT ordered for an insertion of the proper enabling provisions of the law and proceeded to consider the application on merits. The CAT acted the same way in another occasion when deciding the case of **Mohamed Iqbal v. Esrom M. Maryogo, Civil Application No. 141/01 of 2017, CAT at Dar Es Salaam** (unreported ruling dated 20th October, 2020) at page 2-3 of the typed version. Though in deciding these two precedents the CAT did not expressly show that it so acted by virtue of the principle of overriding objective (which had already been underlined in the amendment Act of 2018 mentioned above), the course it took in both precedents demonstrated how the slip under discussion is no longer a serious issue in the process of justice dispensation.

Having observed as above, I overrule the PO raised by the two respondents based on wrong or non-citation of the enabling provisions of the law.

The two respondents also challenged the competence of the application at hand on the ground that, the applicant had shown in the chamber summons that he was applying for the leave to appeal to the CAT, but latter, at the hearing he indicated that he was applying for a certificate of point of law. I hasten to dismiss this argument since the record and arguments by the learned counsel for the applicant do not demonstrate that trend. I thus, also overrule this limb of preliminary objection.

Now, before I proceed to examine the merits of the application, I have to consider one serious legal point here. In his affidavit, the applicant's counsel deponed that, his client had been granted extension of time by this court (Mambi, J.) to file the notice of appeal and the application at hand out of time. Indeed, this implies that, this application was filed on 25th October, 2019 out of the time prescribed by the law. This was because, the impugned judgment had been delivered way back on 18th May, 2016 according to the record. By simple arithmetic, this application was filed after a lapse of a period of about 17 months from the date when the impugned judgment was delivered.

The applicant however, did not disclose in the affidavit the date when he filed the notice appeal. He also attached the copies of neither the notice of appeal nor of the order that granted him the extension of time. The applicant did not thus, prove a very material fact related to the application

at hand. It is more so considering the requirement of the law that, were an application for a certificate or for leave is necessary, it shall be made after the notice of appeal is lodged; see rule 46(1) of the Court of Appeal Rules (the CAT rules), made under the Appellate Jurisdiction Act, Cap. 141 R. E. 2019. This Revised Edition envelopes all the amendments of the CAT Rules including the ones made through the GN. No. 344 of 2019. It follows thus, that, in an application of this nature, proof that the applicant had filed the notice of appeal is significant. In the application at hand therefore, the omission by the applicant to disclose as to when he filed the notice of appeal and his omission to attach it to the affidavit creates doubts on the fact that she complied with the provisions of the CAT rules cited above.

The doubts that the applicant did not comply with the law cited above are enhanced by the fact that, she did not attach the order of this court (Mambi, J.) extending time to her to file the notice of appeal and the application at hand. Mere assertion that this court made that order does not suffice. This is irrespective of the fact that, the first and second respondents did not object to the fact that there was an order extending time for the applicant. This court thus, expected the applicant's counsel to attach a copy of that order for a proof to this court that, the order in fact, exists. Actually, it is our law that a court order is not merely assumed, instead, its existence must be proved by producing it.

The doubts regarding the non-existence of the order extending time to the applicant to file the notice of appeal and the present application for leave to appeal out of time, led this court to inquire from the record. It discovered the following facts: that, in fact the order of this court (Mambi,

J.) in the said Application No. 111 of 2018 which the applicant's counsel alleged gave his client the extension of time under discussion, does not support him.

Actually, though the record shows that the applicant applied for extension of time to file the notice of appeal and to apply for leave out of time, the court did not grant him such orders. My brother Judge took the application before him as an application for extension of time to file an appeal to the CAT out of time. This fact is lucid in the first paragraph of the first page of his typed ruling (dated 16th October, 2019). I will quote the paragraph verbatim for a readymade reference, it reads thus:

> "This ruling emanates from an application filed by the applicant (**ELESI MAJINGE** as *Administratrix* of **MAJINGE MATISELA DAUD)** for an extension of time to file an appeal to the Court of Appeal out of time. The applicant in his application (MISC. LAND APPLICATION NO. 111 OF 2018), has prayed to this court to allow him to file appeal to the Court of Appeal against the decision made by this court. The application is supported by an affidavit where the applicant has stated his reasons for his delay."

My learned brother Judge, at page 5 of his ruling, made an order in the following words, which I also quote verbatim for the sake of a quick reference:

> "Now, since the applicant has advanced and presented sufficient reasons for delay and the extent of such delay in his application, I have no reason to dis-grant his application. I am of the considered view that this application has merit and this court finds proper the applicant to be granted an application of time to appeal out of time. The applicant shall file his appeal within fourteen days from the date of this ruling. Right to appeal explained."

The record also clearly shows that, a drawn order extracted (on 8th February, 2020) from the ruling under discussion, reflects the prayers made by the applicant before this court. They include a prayer for

extension of time to lodge the notice of appeal and to apply for leave to appeal to the CAT out of time. Nonetheless, the granted orders in the said drawn order, are the same as those granted in the ruling itself. The granted orders in the drawn order include these: (i) the application has merit (ii) the applicant granted an extension of time to appeal out of time, and (iii) the applicant shall file his appeal within fourteen days from the date of this ruling.

Now, following what was granted in the ruling of this court (Mambi, J.) and what was reflected in the drawn order, and following the facts that both the ruling and the drawn order were duly signed by my brethren Judge, it cannot be said that the applicant was actually granted extension of time to file the notice of appeal and to apply for leave to appeal to the CAT out of time. This is regardless of the fact that, in fact, he had prayed for such orders in that same application. In simple language, he was granted what he had not prayed.

Indeed, I cannot speculate on the circumstances under which my brother Judge made the orders mentioned above, but what I am certain is that, I have neither the mandate to challenge the orders nor the requisite jurisdiction to correct them. If follows also that, whether my brother Judge had the requisite jurisdiction to make such orders, is not an issue which I am empowered to determine in this ruling or anywhere else. All these limitations on my part are by virtue of the doctrine of *stare decisis* under which my brother Judge and I enjoy concurrent jurisdiction. None of us, can therefore, challenge or correct a decision of the other. The law would however, permit him to correct his own orders upon being properly moved.

It was thus, the duty of the applicant to move this court (Mambi, J.) to correct his own orders if it would please him. That could probably be by way of a review. This follows the fact that, in law, once a court order is made, it remains enforceable until, and only until it is legally set aside; see the holding by the CAT in the case of **General Manager K. C. U. (1990) LTD v. Mbatama Rural Primary Cooperative Society, CAT (BKB) Civil Application No. 1 of 1999, at Mwanza** (unreported).

The applicant could not thus, presume that the orders made by my brother Judge, had granted the prayers she had applied for in the Application No. 111 of 2018. Consequently, it was not open for her to approach this court for the application at hand with the presumption that she had been granted extension of time to file the notice of appeal and to file the present application for the leave to appeal to the CAT out of time.

The issue which arises at this juncture is this; which is the way forward in this application. Indeed, I thought of re-opening the proceedings and invite the parties to address me on this issue, which is essentially in regard to the effect of the oversight committed by the applicant as discussed above. However, due to the peculiar circumstances of this matter as demonstrated above, I found it unnecessary to do so. This is because, the applicant's counsel had already addressed this court in his affidavit and submissions regarding the ruling in the application No. 111 of 2018. He indicated that, he had taken the ruling as granting him the extension of time. Nonetheless, his belief was wrong as I demonstrated earlier. Again, the record clearly demonstrates what I have narrated above. The first and second respondents were also aware of the claim by the

applicant's counsel, but they did not wish to object the facts in their counter affidavit as I hinted before.

It follows thus, that, re-opening the proceedings for the parties to re-address the court on the unproven facts in the affidavit of the applicant's counsel will amount to a needless wastage of the precious time of the court and the parties themselves. This course would thus, be against the principle of overriding objective discussed earlier. I will thus, proceed to determine the issue posed above.

In my view, the way forward is clear. This court cannot proceed to consider the merits of the application because, the applicant has not proved that time was actually extended for him to file the notice of appeal and to file the application at hand out of time due to the reasons adduced earlier. The legal status of the application at hand is thus, reduced to a mere time-barred application. This is the legal position until the applicant takes necessary steps envisaged above for correction of the orders in the ruling emanating from the application No. 111 of 2018. The applicant's act of filing the matter at hand out of the time prescribed by the law is legally fatal and touches the jurisdiction of this court. It cannot thus, be fixed by resorting to the principle of overriding objective discussed previously. This is so because, courts of law are not vested with jurisdiction to entertain time-barred matters; see the proscription set under section 3(1) of the Law of Limitation Act, Cap. 89 R. E. 2019.

The legal remedy for a matter filed out of the time prescribed by the law is none other than dismissing it. This is the position underscored under section 3(1) of Cap. 89 (supra) and the decision by the CAT in the case of

Hezron Nyachiya v. Tanzania Union of Industrial Commercial Workers and another, CAT, Civil Appeal No. 79 of 2001 (unreported).

Owing to the reasons adduced above, I hereby dismiss the application for being time barred. Each party shall bear his own costs because, the point of time limitation which has ended this matter was raised by the court *suo motu*. This reason suffices in law to base the apportionment of costs to parties as I have just done. It is so ordered.

J.H.K. Utamwa
JUDGE
19/05/2021.

19/05/2021.
CORAM; Hon. Z. Laizer, Ag. DR.
Applicant: present.
Respondent: present 4th respondent only.
BC; Ms. Patrick Nundwe, RMA.

Court: delivered in the presence of the applicant and the 4th respondent only.

Z. LAIZER.
Ag. Deputy Registrar.
19/05/2021.