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

LAND CASE APPEAL NO. 99 OF 2011
(From the Decision of the District Land and Housing Tribunal of Kinondoni District at Magomeni in Land Case No. 390 of 2005)

MWANAISHA MOHAMED NGOCHELE.....APPELANT/APPLICANT

VERSUS

MOHAMED SALUM..... 1st RESPONDENT

LUTUFI MWAKAJUKA..... 2nd RESPONDENT

HADIJA OMARY..... 3rd RESPONDENT

RULING

MWAMBEGELE, J.:

In my maiden ruling dated 11.07.2012, I dismissed the appellant's appeal for want of prosecution under the provisions of Order XXXIX Rule 17 (1) of the Civil Procedure Code, Cap 33 of the Laws of Tanzania (henceforth Cap 33). Mwanaisha Mohamed Ngochele; the Appellant/Applicant (henceforth the Applicant) whose appeal was dismissed was not happy with the dismissal order. She has thus filed this application for review. The application has been

made under Order XLII Rule 1 of Cap 33 and any other enabling provision of the law. It is supported by an affidavit of the Applicant. The application was filed on 14.09.2012.

On 07.10.2012, the Respondents, through the services of Amicus Attorneys, filed two points of preliminary objection. First, that the application is hopelessly time barred and second, that the decision is not subject to review. This ruling is in respect of these two preliminary points of objection. The application was argued before on 27.11.2012 during which Mr. Mukirya Daudi and Abel Otaru, learned Advocates joined forces to argue the application for the Applicant while the Respondents were ably represented by Mr. Onesmo Michael Kyauke, learned Counsel.

On the first point of objection, Mr. Onesmo submitted that the application is time barred as the ruling sought to be reviewed was handed down on 11.07.2012 while the application was filed on 14.09.2012. Mr. Onesmo submitted that under para 3 of Part III of the Law of Limitation Act, Cap 89 (henceforth Cap 89), the time limit for filing an application of this nature is thirty days. In casting his net wide, Mr. Onesmo submitted that should the

Applicant bring forward a defence to the effect that she was waiting for a copy of the ruling sought to be reviewed, he would submit that the same is not a legal requirement; it need not be appended with an application for review at the time of filing. Mr. Onesmo elucidated that it is only in appeals in which a copy of the ruling, judgment or order appealed against must be appended with the memorandum or petition of appeal.

On the second preliminary point of objection, Mr. Onesmo submitted that the ruling is not subject to review in that the appeal was dismissed under Order XXXIX Rule 17 (1) of Cap 33, its remedy lies in Rule 19 of the same Order – to apply for readmission of the appeal. Mr. Onesmo submitted further that according to Order XLII Rule 1 (1) (b) of Cap 33, an application for review could be apposite if there was new evidence or an error on the face of record. He thus submitted that the application is incompetent and thus should be dismissed with costs.

On the other hand; for the Appellant, Mr. Mukirya and Mr. Otaru, learned Advocates vehemently resisted the preliminary points of objection. It was Mr. Mukirya who came first. He submitted that the application was filed within

time as the copy of the ruling was supplied to the Applicant on 21.08.2012. Mr. Mukirya submitted that eight days after delivery of the ruling intended to be reviewed; that is on 19.07.2012, the Applicant applied for a copy of the ruling which was supplied to her on 21.08.2012 as evidenced by Exchequer Receipt Voucher No. 95-1001-106 for Tshs. 2,000/=. He submitted further that as per Section 19 (1) of Cap 89, in computing the time of limitation, the time used to follow up copies of the ruling should be excluded. In the premises, it was submitted by Mr. Mukirya, the application was filed 21 days after receipt of a copy of the ruling which was well within 30 days as required by Cap 89.

On the second point, Mr. Mukirya submitted that it is true that the appeal was dismissed for want of prosecution but the court went a step further to determine on the question of limitation. That is the reason why the application has been made under Order XLII Rule 1 of Cap 33 so that the limitation part of the ruling is also accommodated in the remedy. Mr. Mukirya submitted further that the applicant is a lay person. As such, she could not consider re-admission under Order XXXIX Rule 19 of Cap 33 as distinct from an application for review. To buttress this argument, Mr. Mukirya referred me to the provisions of Article 107A of the Constitution of the United Republic of

Tanzania, 1977 which requires that strict principles and technicalities should not be used to thwart justice.

Mr. Otaru, to bolster the last point argued by his learned brother, submitted that the Applicant sought assistance from the Tanganyika Law Society which assigned the case to him. He prayed the court to apply its inherent powers under the provisions of Section 95 of Cap 33.

In a short rejoinder, Mr. Onesmo submitted that the court dealt with the question of limitation as *obiter dicta*. This being the case, Mr. Onesmo submitted, if the applicant was not satisfied with the same, the remedy lies in an appeal. On the question of the Applicant being a lay person, Mr. Onesmo submitted that ignorance of law in not a defence. He submitted that the Applicant cannot read and write; she used to thumb print to sign documents in respect of the present case. In the premises, he submitted, all the documents have been prepared by a lawyer and the said lawyer should be the one to blame. On inherent powers of the court and Article 107A of the Constitution, Mr. Onesmo submitted that there is a string of authorities to the effect that the court cannot use Section 95 of Cap 33 or Article 107A of the Constitution to

cure an incompetent application. He however did not cite any, despite being required to so cite by the court.

Having summarised the rival arguments by the counsel for the parties, the ball is now on my court. I have given due consideration to both rival arguments. Like the advocates, I will start with the first point of objection; that is whether this application is time barred. The pertinent issue that goes with the determination of this point of objection is whether or not attachment of a ruling intended to be reviewed is to be attached with an application. Mr. Onesmo thinks it must not while Mr. Mukirya and Mr. Otaru think it must. Mr. Onesmo told this court that it is only in appeals in which attachment of judgment, ruling or decree is required but not in an application for review. With respect, I beg to differ with Mr. Onesmo. The provisions of Order XLII Rule 3 of Cap 33 provide for the form of application for review. This provision reads:

> *"The provisions as to the form of preferring appeal shall apply, mutatis mutandis, to applications for review".* [See also Mulla Code of Civil Procedure (Abridged), 14th Edition at page 1743]

And Order XXIX Rule 1 (1) provides for the form of appeal as follows:

> *"Every appeal shall be preferred in the form of a memorandum signed by the appellant or his advocate and presented to the High Court (hereinafter in this Order referred to as "the Court") or to such officer as it appoints in this behalf and the* ***memorandum shall be accompanied by a copy of the decree appealed from and (unless the Court dispenses therewith) of the judgment on which it is founded****".* [Bold supplied].

And to argue this point a little bit further, I have had an opportunity to read Mulla Code of Civil Procedure (Abridged). At page 1747 of the Fourteenth Edition, in respect of this point, referring to the decision in ***Fazal Vs Umar*** (1925) 7 Lah LJ 129, 88 IC 1029, AIR 1925 Lah 377, it is provided:

> *"The period of limitation is 30 days under art 124 of the Limitation Act 1963, and the applicant is entitled under s 12 of the Limitation Act to deduct the time spent in obtaining a copy of the decree"*

Like in India, the limitation period for filing an application for review in our jurisdiction is 30 days. For the avoidance of doubt, section 12 of the Indian Limitation Act, 1963 is *in pari materia* with our Section 19 (1) of Cap 89. It follows therefore that an application for review, in as much as the form applicable to appeals applies to review *mutatis mutandis*, must be accompanied by a copy of a decree, ruling or judgment intended to be reviewed. The period of limitation is 30 days as provided for by para 3 of Part III of the Law of Limitation Act, Cap 89, and in computation of the limitation period, the applicant is entitled under Section 19 (1) of the Law of Limitation Act, Cap 89 to deduct the time spent in obtaining a copy of the ruling, judgment or decree intended to be reviewed. I therefore find and hold that this application, it being filed on 14.09.2012; about 24 days after receipt of the ruling intended to be reviewed, was filed within time. Time started to run against the applicant the moment she received a copy of the ruling. This takes care of the first preliminary point of objection. The first point of preliminary objection is therefore overruled.

The second preliminary point is on whether or not the ruling is subject to review. The appeal was dismissed under Order XXXIX Rule 17 (1) of Cap 33.

Mr. Onesmo thinks its remedy lies in Order XXXIX Rule 19. Rule 19 of Order XXXIX provides for re-admission of appeal dismissed, inter alia, for want of prosecution as happened in the instant case. For easiness of reference, this provision is reproduced hereunder:

> *"Where an appeal is dismissed under subrule (2), of rule 11 or rule 17 or rule 18, the appellant may apply to the Court for the re-admission of the appeal; and, where it is proved that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing or from depositing the sum so required, the Court shall re-admit the appeal on such terms as to costs or otherwise as it thinks fit"*

This is the immediate remedy that comes across one's mind when his appeal has been dismissed for want of prosecution. The law allows one to file an application to have such appeal re-admitted and the appeal will indeed be re-admitted upon satisfying the court that the nonappearance was caused by sufficient causes. But the applicant opted to take a different course: to file an application for review. I must state at this stage that the dismissal order is subject to review. I am disinclined to share Mr. Onesmo's view that it is not.

But was this course apposite in the circumstances of this case? This is the question to which I now turn.

Circumstances upon which an application for review can be entertained were well articulated in ***Chandrakant Joshubhai Patel Vs The Republic*** Criminal Application No. 8 of 2002 (CAT - unreported) in which, referring to the decision of a Full Bench consisting of seven justices, the Court of Appeal in ***Transport Equipment Ltd Vs Devram P. Valambhia***, Civil Application No. 18 of 1993 *(unreported)* held:

> *"After making reference to various authorities in and outside East Africa, the Full Bench held that the court had the inherent jurisdiction to review its decisions and that it will do so in any of the following circumstances: where there is a manifest error on the face of the record which resulted in miscarriage of justice; where the decision was obtained by fraud; or where a party was wrongly deprived of the opportunity to be heard"*

The Court of Appeal, referring to ***Tanzania Transcontinental Co. Ltd v. Design Partnership Ltd***, Civil Application No. 62 of 1996 (unreported), among other

cases, made it clear that this list is not exhaustive. I am afraid, the present application is not grounded in any of the above categories. Neither is it grounded on the categories akin to those.

Mr. Onesmo submitted further that according to Order XLII Rule 1 (1) (b) of Cap 33, an application for review could be apposite if there was new evidence or an error on the face of record. Mr. Mukirya and Mr. Otaru learned advocates find an error on the face of record in the *obiter dicta* of the ruling. Mr. Onesmo thinks this could better be argued on appeal. I agree with Mr. Onesmo. As was held in ***Abasi Balinda v Frederick Kangwamu and*** another [1963] 1 EA 557 (HCU)

> *"A point which may be a good ground of appeal may not be a ground for an application for review and an erroneous view of evidence or of law is not a ground for review though it may be a good ground for an appeal"*

In our neighbouring jurisdiction, it was held in ***Muyodi v Industrial and Commercial Development Corporation and another*** [2006] 1 EA 243 (CAK) as follows:

> *"For an application for review ... to succeed, the applicant was obliged to show that there had been discovery of new and important matter or evidence which, after due diligence, was not within his knowledge or could not be produced at that time. Alternatively, he had to show that there was some mistake or error apparent on the face of the record or some other sufficient reason ..."*

This is not the case in the instant application. I, for one, find no error or errors apparent on the face of the record such as would have entitle me to grant the applicant an order for review. I think, with respect to Mr. Mukirya and Mr. Otaru, learned Advocates, the arguments put forward in respect of the second preliminary point of objection, would have been property advanced at the hearing of an appeal. As rightly put in the ***Chandrakant Joshubhai Patel*** case (supra), to advance arguments in an application for review which would otherwise appropriately be raised in an appeal, is to misconceive seriously the purpose of review. For these reasons, I will uphold the second preliminary point of objection. I find and hold that the Applicant should have filed an

application to have the appeal re-admitted under the provisions of Order XXXIX Rule 19 of Cap 33 into play if she was dissatisfied, as it seems she was, by the dismissal order. A challenge of the *obiter dicta*, as already alluded to hereinabove, can appositely be made on appeal. There could be an error in the *obiter dicta* of my ruling. However, an erroneous decision does constitute an error on the face of the record sufficient to permit review – see ***Nyamogo and Nyamogo Advocates Vs Kogo*** [2001] 1 EA 173 (CAK). This court cannot quash its own decision however much it might be erroneous - see ***Mapalala Vs British Broadcasting Corporation*** [2002] 1 EA 132 (CAT). The doors are not closed for the Applicant to challenge any of the above. The second preliminary point of objection has merit and is therefore sustained.

But before I conclude my ruling, let me make an observation on the use of the phrase "plus any other enabling provisions of the law" in support applications as used in this application. This court has, on several occasions, held that the use of the phrase "any other enabling provisions of the law" is an unnecessary embellishment. In ***Janeth Mmari Vs International School of Tanganyika and Another***, Miscellaneous Civil Cause No. 50 of 2005, Mihayo, J. (as he then was) had this to say:

> *"This song, '**any other enabling provisions of the law**' is meaningless, outdated and irrelevant. The court cannot be moved by unknown provisions of the law conferring that jurisdiction. That law must therefore be known. Blanket embellishments have no relevance to the law nor do they add any value to the prayers to the court".* (Bold not mine).

Mihayo, J. (as he then was) had another opportunity to comment on the phrase in ***Elizabeth Steven and Another Vs Attorney General***, Miscellaneous Civil Cause No. 82 of 2005, in which His Lordship held:

> *"The phrase any other provision of law is now useless embellishment, the law is now settled"*

The Applicant made the application under Order XLII Rule 1 of the Civil Procedure Code, Cap 33 of the Laws. That was enough. Adding the phrase "plus any other enabling provisions of the law" was an unnecessary decoration which has added no value to the application. It is now settled law that it is incumbent upon the hand that is drafting the application, more especially if that hand is learned, to cite proper provisions of the law under which the

.application is made so as to properly move the court. The court cannot be moved by unknown provisions of the law to act on an application.

For the reasons that I have already stated hereinabove, this application is struck out with costs.

DATED at DAR ES SALAAM this 11th day of December, 2012.

J. C. M. MWAMBEGELE

JUDGE