THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

AT MBEYA

MISC. LAND APPLICATION NO. 8 OF 2019.

(Arising from Misc. Land Application No. 21 of 2014, in the High Court of Tanzania, at Mbeya).

STEVEN NGOLOKA (As Legal

Representative of Charles Ngoloka)..... APPLICANT

VERSUS

PONSIAN NKWAMA.....RESPONDENT

RULING

27/11/2019 & 27/02/2020.

UTAMWA, J:

In this application, the applicant STEVEN NGOLOKA (As Legal Representative of Charles Ngoloka) applies for extension of time to enable the filing of a bill of costs beyond 14 days ordered by this court in Misc. Land Application No. 21 of 2014, any other orders the court may deem just to grant and for provision of costs. The application was preferred under section 93 of the Civil Procedure Code, Cap. 33 R. E. 2002. It was made by way of chamber summons supported by an affidavit. The respondent (PONSIAN

NKWAMA) objected the application. He also raised a preliminary objection (PO) on a single ground that, the application has been filed under a non-existent and repealed statute.

On the other hand, the court raised a legal issue *suo motu*. The issue was *whether or not section 93 of the Civil Procedure Code, Cap. 33 was a proper enabling provision for the prayers sought by the applicant*. It directed the parties to argue the issue along with the issue related to the PO. It was also the direction by the court that, the issues be argued by written submissions.

In his written submissions in chief, Mr. Mkumbe learned counsel for the respondent argued the issues cumulatively as follows: section 93 applies only in extending time where the court had previously fixed or granted extension of time. This court did not however, grant extension of time to the applicant before. Section 93 could not thus, apply in the matter at hand. The proper enabling provisions could have thus, been section 14 (1) of the Law of Limitation Act, Cap. 89 R. E. 2002. He added that, the Civil Procedure Code, Cap. 33 R. E. 2002 no longer exists. It was replaced by the Civil Procedure Code, Cap. 33 R. E. 2008 that replaced the said Civil Procedure Code, Cap. 33 R. E. 2002. He concluded that, the application was filed under wrong section of the law. In law, this irregularity renders the application incompetent. He supported this position of the law by a decision of the Court of Appeal of Tanzania (CAT) in the case of **Almas Iddie Mwinyi v. National Bank of Commerce and another, [2001] TLR. 83.** The learned counsel for the respondent therefore, urged this court to strike out the application with costs.

In his replying written submissions, Mr. Mushokorwa, learned advocate for the applicant countered the arguments advanced by the respondent's counsel. He contended that, the application was brought under the proper provisions of law. This is because; previously, the applicant was granted extension of time to file the bill of costs within 14 days vide the order of this court (**Makaramba, J.** as he then was) dated 6/12/2016. This order was made in Land Application No. 21 of 2014. The relevant court order was attached to the affidavit. He further argued that, Cap. 89 does not apply in this matter for the above reasons. As to the replacement of Cap. 33 R. E. 2002 by the said Cap. 33 R. E. 2008 the applicant's counsel argued that, the said Cap. 33 R. E. 2008 is not yet operative. The learned counsel for the respondent did not also cite any Government Notice (GN) that operationalized that said Cap. 33 R. E. 2008.

I have considered the application, the arguments of both sides and the law. I will firstly consider the PO raised by the respondent's counsel. The issue here is whether or not Cap. 33 R. E. 2002 was replaced by Cap. 33 R. E. 2008. I hastily agree with the applicant's counsel that, the version of the Civil Procedure Code which is currently in force is Cap. 33 R. E. 2002. This is because; my research did not discover the existence of any GN that operationalized Cap. 33 R. E. 2008. The learned counsel for the respondent did not also cite one. Besides, the provision of section 93 of the allegedly Cap. 33 R. E. 2008 quoted verbatim by the respondent's counsel in his written submissions is in *parimateria* with the provision of section 93 of Cap. 33 R. E. 2002. The same is couched thus:

> "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."

I therefore, find the issue raised above negatively and I accordingly overrule the PO raised by the respondent's counsel.

I will now proceed to consider the issue raised by the court *suo motu*. In my settled views, for a court to exercise jurisdiction in an application made under section 93 of Cap. 33 R. E. 2002 quoted above, the following four conditions must be met cumulatively and not alternatively.

i. A court of law might have previously fixed or granted time/period to the applicant for the doing of an act at issue.

ii. The applicant must have failed to comply with the directive/order of the court mentioned above.

iii. The said period/time for the doing of an act at issue must be prescribed or allowed by the Civil Procedure Code, Cap. 33.

iv. In exercising its jurisdiction under those provisions of law, the court does so discretionary. The discretion of a court is, in law, always exercisable judiciously, i. e. by giving reasons, and not arbitrarily.

The above conditions will hereinafter be referred to as the first, second, third and fourth conditions respectively.

In the matter at hand I find that, the first condition was met vide the order of this court mentioned above date 6/12/2016 (**Makaramba, J**. as he then was) and attached to the affidavit supporting the application. It surprising that the respondent's counsel did not take note of the said order. As to the second and fourth conditions, I am of the view that, they are not

disputed according to the arguments by the parties, the record of the matter at hand and the law.

The issue here is centred on the third condition. The act at issue in the matter at hand is the filing of a bill of costs. The sub-issue is thus, this; does Cap. 33 R. E. 2002 provide or allow any period for the filing of a bill of costs? In this land, matters related to bills of costs are governed by a specific law. This is the Advocates Remuneration Order, 2015 (GN. No. 264 of 2015) hence forth the ARO in short. The ARO is made under section 49 of the Advocates Act, Cap. 341 R. E. 2002. Indeed, Order 4 of the ARO guides that, a decree holder may file a bill of costs within sixty days from the date of an order awarding costs. The ARO however, does not provide for a remedy where the decree holder fails to lodge the bills of costs within the prescribed sixty days. Nonetheless, the law provides that, where a specific law does not provide for time limitation or any matter related to time limitation, resort should be made to Cap. 89 as the general rule on time limitation. This is the position of the law as per section 46 of Cap. 89 read together with section 43 (f) of the same legislation. This particular position of the law was underlined by the CAT in the case of **Hezron Nyachiya v. Tanzania Union of Industrial Commercial Workers and another, Civil Appeal No. 79 of 2001** (unreported).

Owing to the position of the law underscored above, I agree with the submissions made by the respondent's counsel, though on different reasons, that, it was the applicant's duty, upon failing to lodge the bills of costs within sixty days, to resort to Cap. 89 as the general law on time limitation. Section 14 (1) of Cap. 89 gives the court powers to extend time for doing any act

regarding all appeals and applications whatsoever. The view just underlined above, is irrespective of the fact that this court (Makaramba, J.) had already granted the applicant an order for extension of time with which he (applicant) failed to comply.

For the above reasons, the applicant could not have resorted to Cap. 33 R. E. 2002 simply because; it provides nothing related to bills of costs or for any matter on time limitation regarding bills of costs. It is thus, not clear as to why the applicant resorted to Cap. 33 R. E. 2002 though it neither guides on matters related to bills of costs nor it is the mother Act of the ARO, which said ARO guides on matters concerning bills of costs. In other words, the third condition for applying section 93 of Cap. 33 R. E 2002 was not met in the matter at hand, hence the sub-issue posed above is negatively answered.

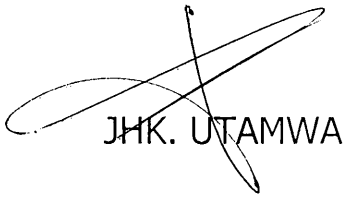
Having observed as above, I answer the issue raised by the court *suo motu* negatively that, section 93 of the Civil Procedure Code, Cap. 33 R. E. 2002 was not a proper enabling provision for the prayers sought by the applicant in the chamber summons at hand.

The effect of wrong or non-citation of enabling provisions of the law in applications is clear. Apart from the **Almas Iddie Case** (cited supra by the respondent's counsel), the CAT has religiously 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. This position was underscored in the cases of **Bahadir Sharif Rashid and 2 others v. Mansour Sharif Rashid and another, Civil Application No. 127 of 2006, CAT at Dar es Salaam** (Unreported), **Chama cha Walimu**

Tanzania vs. AG, Civil Application No. 151 of 2008, CAT at Dar es Salaam (unreported) and **Naibu Katibu Mkuu (CCM) v. Mohamed Ibrahim Versii and sons, Zanzibar Civil Application No. 3 of 2003, CAT at Dar es Salaam** (unreported).

In the case of **Chama Cha Walimu** (supra), the CAT further held that; such wrong or non-citation of the enabling law is not a procedural and technical matter within the scope of article 107A of the Constitution of the United Republic of Tanzania, Cap. 2 R. E. 2002. It is a serious omission that goes to the root of the matter. In my view, the abnormality cannot thus, be remedied under the principle of overriding objective which has been recently emphasised by the Written Laws (Miscellaneous Amendments Act) (No. 3) Act, No. 8 of 2018. This principle essentially requires courts to decide cases justly. However, the principle did not have the effect of compelling the courts to disregard procedural rules altogether.

Owing to the reasons adduced above, I hereby find the application at hand incompetent. I accordingly, strike it out. Each party shall bear his own costs since the application has been brought to an end for the issue raised by the court *suo motu* as demonstrated above. It is so ordered.



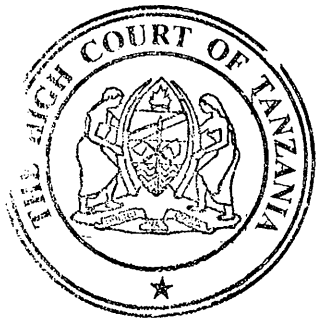
JHK. UTAMWA

JUDGE

27/02/2020.

27/02/2020.
CORAM; Hon. JHK. Utamwa, J.
Applicant; present in person and Mr. Mushokorwa, advocate.
Respondent; present and Mr. Gerald Msegeya, advocate.
BC; Mr. Patric Nundwe, RMA.

COURT: ruling delivered in the presence of the parties, Mr. Mushokorwa, learned advocate for the applicant and Mr. Gerald Msegeya, learned advocate for the respondent, in court, this 27th day of February, 2020.



JHK UTAMWA

Judge
27/02/2020.