IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: JUMA, CJ., MWARIJA, J.A. And MUGASHA, J.A.)

CIVIL APPEAL NO. 162 OF 2016

ICHOBE KERONGWE .....APPELLANT

VERSUS

MASARANGE MOREMI .....RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania at Mwanza)

(De Mello, J.)

dated the 30th January, 2014
in
HC Civil Appeal No. 18 of 2010

RULING OF THE COURT

27th September & 3rd October, 2018

MWARIJA, JA.:

The appellant, Ichobe Kerongwe and other two persons, Maro Gebironge and Julius Mahende (the appellant's co-defendants) were sued by the respondent, Masarange Moremi in the Urban Primary Court of Mugumu in Civil Case No. 42 of 2007. The appellant's co-defendants were at the material time of the suit, the members of the Traditional Council, Nyamatoke village where the parties resided.

In the suit, the respondent claimed from the appellant and his co-defendants, 16 herd of cattle and 6 goats which were allegedly seized by

them while he was in prison serving a jail term of five years. According to the record, he was convicted of the offence of stealing one herd of cattle from the appellant.

During the trial in the Primary Court, the main dispute revolved around the number of the livestock claimed to have been seized by the appellant and his co-defendants. The trial court found that a total of 5 herd of cattle and 3 goats were seized from the respondent. It therefore ordered restitution of four herd of cattle and three goats. One of the cattle out of five was to remain with the appellant as compensation for the one which the respondent was found guilty of having stolen it. The trial court apportioned the liability whereby the appellant was ordered to return to the respondent two herd of cattle out of the three which he was found to have unlawfully taken. His co-defendants were to return two herd of cattle and three goats which were found to have been unlawfully taken by them.

The appellant and his co-defendants were aggrieved by the decision of the trial court. They thus appealed to the District Court of Serengeti. In its decision dated 15/9/2009, the court overturned the trial court's decision. The learned appellate resident magistrate found that the respondent did

not prove its case. He was of the view that in seizing the livestock, the appellant and his co-defendants were executing the order of the Village Traditional Council and could not therefore, have been held personally liable. Their appeal was thus allowed.

The respondent was aggrieved by the decision of the District Court. He unsuccessfully appealed to the High Court. That court (De-Mello, J.) concurred with the finding of the District Court. She however, went ahead to disapprove the manner in which the village traditional council involved itself in the purported execution of the decision which arose from court proceeding. She ordered that the execution be conducted in accordance with the law.

The appellant was further aggrieved by the decision of the High Court. As a result, he preferred this appeal raising the following six grounds of his dissatisfaction:

> *"1. That the learned Appellate Court Judge erred in law and infact, when she failed suo motu to take into consideration that the suit was hopelessly time barred, its cause of action having accrued on 16-10-1999 when respondent's cattle were seized by traditional soldiers vis*

avis 2007 when the respondent instituted this case before the Mugumu urban Primary Court after a period of 8 years and yet without leave of the Court to file it out of time.

2. That the decision of the High Court contravened the Statutory provision of sections 2(1) (2) (a), and 4 and para 6 1st schedule of law of limitation cap 89 RE 2002 read together with primary courts rules of Court, the customary law (Limitation of proceedings) rules 2, and para 3 of the schedule,. G.N. 311/1964.

3. That the learned Appellate Court Judge, erred in law to order return of a herd of cattle and goats allegedly wrongfully taken whose number is uncertain.

4. That the learned Appellate judge, erred in law and in fact to enhance and reward richly a confirmed cattle thief/rustler, by ordering return to him uncertain number of head of cattle.

5. That the learned appellate judge erred in law and on fact, for having entertained the respondent hearsay and contradictory evidence whose witness gave different stories/evidence regarding the seizure of cattle i.e. on 16/10/1999 16 head of cattle and 6 goats were seized and whereas on 18/10/1999 11 head of cattle 3 goats were attached and respondent himself did not witness the said

cattle seizure as by then he was in jail facing consequences of his cattle rustling.

6. That the learn Appellate judge erred in law and in fact for having failed to take into consideration the evidence on record that out of the heads of cattle and goats which were attached from Respondents home by Traditional leaders, the Appellant only got one head of cattle as compensation for the cattle, which the Respondent had stolen from Appellant and as such Appellant had nothing to return to respondent. "

At the hearing of the appeal, both the appellant and the respondent appeared in person, unrepresented. Before they could proceed to argue the appeal, the Court wanted to satisfy itself as to the competence or otherwise of the appeal. We raised *suo motu* the issue whether or not the appeal was filed within the prescribed time. The parties were, as a result, required to address the Court on the issue.

The appellant appeared to be uncertain as to whether or not he instituted his appeal within time. According to him, he remembered that he filed it within time. He said that, to his recollection, he filed it within the prescribed time. He maintained that stance despite being referred to the

certificate of delay issued by the Registrar of the High Court (the Registrar) and after being shown the receipt evidencing payment of the filing fee.

On his part, the respondent submitted that, in view of the facts pointed out by the Court as reflected by the record, the appeal is time barred. He prayed that the same be dismissed and the appellant be ordered to return to him (respondent) his properties which were unlawfully seized from him.

It is plain from the record that, whereas the decision of the High Court against which the appeal has been preferred, was handed down on 30/1/2014, the appellant instituted the notice of appeal on 3/2/2014. Under Rule 90(1) of the Tanzania Court of Appeals Rules, 2009, (the Rules), an appeal must be instituted within sixty days from the date of lodgment of a notice of appeal.

Where however, the intended appellant applies for copies of proceedings, judgment and decree (the copies) within 30 days from the date of the decision sought to be appealed against, subject to the conditions laid down under the proviso to Rule 90(1) of the Rules, the time

spent in the preparation of the copies, as may be certified by the Registrar, has to be excluded.

In this case, the Registrar issued a certificate of delay on 24/11/2015 excluding the period between 3/2/2014 when the appellant applied for the copies and 15/10/2015 when the same were ready for collection. According to the record, the appellant was informed on the same date that the copies were ready for collection. He had also at that time, already obtained a certificate from the High Court under S.5 (2) (c) of the Appellate Jurisdiction Act, [Cap. 141 R.E. 2002] (the AJA), that there are points of law which are involved in the appeal.

Now therefore, since the appeal was instituted on 20/1/2016, it is obvious that the same is out of time. It ought to have been filed within sixty days from the date of the certificate of delay (15/10/2015), the latest date being 14/12/2016. The appellant was as a result, late for a period of one month and seven days.

The effect of instituting an appeal out the prescribed period of limitation is to render it incompetent. The consequence is that the same is liable to be struck out - See the cases of **Mwanaasia Sahaye v.**

Tanzania Posts Corporation, Civil Appeal No. 37 of 2003, **Juma Mtungirehe v. The Board of Trustees of Tanganyika National Parks t/a Tanzania National Parks**, Civil Appeal No. 66 of 2011 and **Joseph Mtatiro v. Modest Sinda,** Civil Appeal No. 77 of 2014 (all unreported). In the first case, the Court held as follows:

> *"The appeal was instituted outside the prescribed period of sixty (60) days after the notice of appeal was lodged. We accordingly strike it out with costs."*

Having found that the present appeal was filed out of time, we hold that the same is incompetent. Consequently therefore, exercising the powers of revision vested in the Court by S.4 (2) of the AJA, we hereby strike out the appeal for being time barred.

The respondent had urged us to order that the disputed livestock be returned to him by the appellant. In our considered view, that prayer is untenable. Since the appeal has been found to be incompetent we cannot make any consequential orders touching on the substance of the decision which was intended to be appealed against.

As to costs, because the issue upon which the appeal has been disposed of was raised by the Court *suo motu,* we make no order to that effect.

DATED at **MWANZA** this 2nd day of October, 2018.

I. H. JUMA
CHIEF JUSTICE

A. G. MWARIJA
JUSTICE OF APPEAL

S. E. MUGASHA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

S. J. Kainda
DEPUTY REGISTRAR
COURT OF APPEAL