

IN THE COURT OF APPEAL OF TANZANIA

AT ZANZIBAR

(CORAM: MWARIJA, J.A., NDIKA, J.A., And KEREFU, J.A.)

CIVIL APPEAL NO. 60 OF 2019

KIJAKAZI AME HAJI APPELLANT

VERSUS

MEMBERS CULTURE MUSICAL

CLUB ZANZIBAR RESPONDENT

**(Appeal from the Judgment and Decree of the High Court of Zanzibar at
Vuga)
(Issa, J.)**

dated the 3rd day of October, 2012

in

Civil Appeal No. 19 of 2012

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JUDGMENT OF THE COURT

10th & 13th December, 2019

NDIKA, J.A.:

Kijakazi Ame Haji, the appellant herein, has preferred an appeal to this Court against the decision of the High Court of Zanzibar at Vuga (Issa, J.) dated 3rd October, 2012 dismissing her appeal (Civil Appeal No. 19 of 2012) against Members Culture Musical Club, the respondent, on the ground that it was time-barred.

In so far as is relevant for our determination, this appeal arises as follows: The respondent sued the appellant in the Regional Court for Zanzibar at Vuga in Civil Case No 34 of 2010 mainly for following three reliefs: first, a declaration that the respondent was the sole owner of a "House with Assessment No. 2312 as provided under the Conveyance of 14th June, 1990" (the property in dispute); secondly, vacant possession of the property in dispute; and finally, general damages in the sum of TZS. 10,000,000.00. Upon the appellant's default, the Regional Court (Hon. Nassor Ali Salim, Regional Magistrate) on 5th December, 2011 entered judgment in the respondent's favour, as prayed in the plaint, pursuant to the provisions of Order VIII, rule 10 of the Civil Procedure Decree, Cap. 8 of the Laws of Zanzibar (the CPD).

Being aggrieved, the appellant appealed to the High Court vide Civil Appeal No. 19 of 2012, fronting four grounds of complaint. In its decision on the appeal, the High Court (Issa, J.) sustained a point of law raised by the respondent as a preliminary objection that the

appeal was hopelessly time-barred. The relevant passage in the said decision at page 19 of the record of appeal speaks for itself thus:

*"In this case, the decision which is the subject of this appeal was delivered on 5/12/2011 and this appeal was filed on 8/6/2012 which is more than six months from the date on which the decision was delivered. Hence, without explanation for this delay **the appeal is well out of time and this court has no option but to dismiss this appeal with costs.** This being the case, the court sees no reason to discuss the grounds of appeal. **The appeal is dismissed with costs.** It is so ordered."*

[Emphasis added]

Being aggrieved by the above-mentioned dismissal, the appellant has lodged this appeal on six grounds raising several complaints whose gravamen is that the learned Judge wrongly held that the appeal was time-barred.

At the hearing of the appeal before us on 10th December, 2019, Mr. Salim Hassan Bakari Mnkonje, learned counsel, appeared for the

respondent. One Mohamed Ali Hassan, a son of the appellant, appeared holding an instrument identifying himself as a duly authorized agent of the appellant. On the strength of that instrument, he prayed to be allowed to appear for the appellant saying that she was too infirm to enter personal appearance on account of old age and persistent illness. There was no objection from the adversary side.

In considering the uncontested prayer by Mr. Hassan, we also took into account the fact that this appeal had come up twice for hearing before the Court, on 11th December, 2017 and 28th November, 2018. On both occasions the Court adjourned the hearing on account of the appellant's non-appearance due to her infirmity. On the last occasion, the Court directed the said Mr. Hassan to formalize his appointment in accordance with the law to enable him represent the appellant at the next hearing. The intention was to avoid further delay in the hearing and disposal of the matter. In view of these special extenuating circumstances, in terms of Rule 4 (2) (a) of the Tanzania Court of Appeal Rules, 2009, we granted the requested leave to Mr. Hassan.

When we invited Mr. Hassan to address us on the grounds of appeal, he took pains to revisit the background to the dispute and in doing so he rehashed the tale about the appellant's enduring infirmity, blaming it for the appellant's failure to lodge her appeal to the High Court within the prescribed time. He conceded, on being probed by the Court, that the appeal to the High Court was, in point of fact, lodged out of time and that no leave for lodging it out of time had been sought and obtained.

While embracing Mr. Hassan's concession, Mr. Mnkonje elaborated that the appeal from the Regional Court to the High Court ought to have been instituted within the prescribed period of ninety (90) days after the delivery of the decision by the Regional Court but it was filed more than one hundred and eighty (180) days after the default judgment was entered. He thus urged us to dismiss the appeal on the reason that the High Court's decision was unblemished.

What is common ground between the parties herein is that the appeal by the appellant to the High Court from the decree rendered by the Regional Court was rightly adjudged time-barred. Indeed, while in

terms of section 72 (1) of the CPD the appellant was entitled to appeal to the High Court against the aforesaid decree, she had to lodge her appeal within the period of ninety (90) days from the date of the decree as prescribed by Item 1 of Part I of the First Schedule to the CPD. Certainly, since the decree was made on 5th December, 2011 but the appeal was lodged in the High Court on 8th June, 2012, more than three months after the aforesaid prescribed limitation period had elapsed on or about 7th March, 2012, we agree with the parties that the appeal was hopelessly out of time. In the premises, the High Court rightly dismissed the appeal with costs having invoked the provisions of section 92 of the CPD which read as follows:

"Subject to the other provisions of this Decree every appeal preferred, and application made, after the period of limitation prescribed by the First Schedule shall be dismissed although limitation has not been set up as a defence: [Emphasis added]"

Based on the above provisions, the court had no option but to dismiss the appeal since the appellant's right of appeal had been extinguished by effluxion of time.

In the premises, we find that the appeal is bereft of merit. We dismiss it with costs.

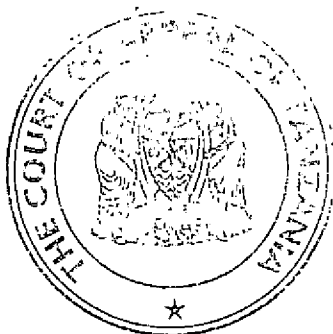
DATED at **ZANZIBAR** this 13th day of December, 2019.

A. G. MWARIJA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Judgment delivered this 13th day of December, 2019 in the absence of the Appellant who was dully served and in the presence of Mr. Abdulkhaliq Mohamed Aley, Counsel for the respondent is hereby certified as a true copy of the original.




A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL