IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

(CORAM: LILA, J.A., KITUSI, J.A. And FIKIRINI, J.A.)

CIVIL APPEAL NO. 132 OF 2021

DAR EXPRESS CO. LTD.....APPELLANT

VERSUS

MATHEW PAULO MBARUKU.....RESPONDENT

(Appeal from the Ruling and Drawn Order of the High Court of Tanzania at Tanga)

(Masoud, J.)

dated 10th day of July, 2017
in
DC Civil Appeal No. 7 of 2017

.....

JUDGMENT OF THE COURT

25th April & 2nd May, 2023

KITUSI, J.A.:

There are mainly two issues for our determination in this appeal whose background is as follows: Mathew Paulo Mbaruku, the respondent successfully sued the appellant, a limited liability company that mainly deals in public transport, along with Leonce Kamili, for tort allegedly committed by the said Leonce Kamili, its driver who was then the second defendant. The District Court of Handeni accepted the plaintiff's case that the said driver negligently and recklessly drove the

appellant's motor vehicle Registration No. T. 844 BDR a Scania Bus and consequently knocked the respondent's motor vehicle Registration No. T. 315 BPP, a Toyota Hiace, causing injury to the respondent and damage to his motor vehicle. The court held the appellant vicariously liable and awarded against it general and special damages in favour of the respondent.

The appellant was dissatisfied and preferred an appeal to the High Court which however, was dismissed for being time barred, the learned judge upholding the respondent's point of preliminary objection to that effect. The respondent's contention was that since the decision of the District Court is dated 29/11/2016, the appeal filed on 10/03/2017 was time barred because it was beyond the 90 days stipulated under section 40 of the Magistrates' Courts Act 1984 and item I of Part II of the Schedule to the Law of Limitation Act, (the Act).

On the other hand, the appellant sought to rely on section 19 (2) of the Act which provides that the period between delivery of the judgment and supply of the documents necessary for appeal, shall be excluded. It was therefore argued that the appeal was within time

because the requisite documents were supplied on 14/02/2017 making the appeal filed on 10/03/2017 to be well within the prescribed 90 days.

The learned High Court judge overruled the appellant on two grounds. One, he took the view that section 19 (2) of the Act does not provide for automatic exclusion of time and agreed with the position taken by the High Court in some of its decisions including, **Rajabu Ibrahim v. Cosmas Lubuva**, Land Appeal No. 8 of 2011, HC, Arusha Registry and **Star System International Co. Ltd. v. Agatha Cyril Nangawe,** Civil Appeal No. 10 of 2015 HC, Tabora Registry (both unreported). The learned judge was aware of the other school of thought that maintains that exclusion of the days under section 19 (2) of the Act is automatic, but disagreed with it. He held that the appellant ought to have applied for extension of time. The second reason cited by the judge was lack of evidence. The learned judge observed that there is no evidence on the record that the appellant made a written request for the documents and thereafter made efforts to get them.

The first reason for the dismissal is the subject of complaints in the first and second grounds of appeal which are twin grounds:

(i) *That the honourable trial Judge erred both in law and in fact in holding that the appellant before lodging an appeal ought to have lodged an application accounting for reasons for the delay in filing the appeal.*

(ii) *That the honourable trial Judge erred both in law and in fact in failure to hold that the appellant could apply the provision of section 19 (2) of the Law of Limitation Act, Cap. 89 R.E. 2019 to exclude time required for obtaining a copy of judgment and decree appealed from without making an application to court for extension of time.*

The thrust of the above grounds of appeal is that the learned judge should not have found the appeal time barred on the ground that the appellant did not make an application for extension of time to explain away the period referred to under in section 19 (2) of the Act.

Hearing of the appeal before us proceeded as against one respondent, because Mr. Karoli Valerian Tarimo, learned advocate representing the appellant had earlier presented a notice of withdrawal of the appeal in respect of Leonce Kamili, who was formerly the second defendant during the trial and second respondent before the High Court.

In arguing the appeal, the learned advocate cited two decisions of the Court which settle the apparent dust on the issue whether time is automatically excluded under section 19 (2) of the Act, or not. These are; **Mohamed Salim v. Jumanne Omary Mapesa**, Civil Appeal No. 345 of 2019 and **Alex Senkoro & 3 Others v. Eliambuya Lyimo (as administrator of the Estate of Fredreck Lyimo, Deceased),** Civil Appeal No. 16 of 2017 (both unreported). In the former case it was held: -

> *"The above fact should be taken together with the fact that it is undisputed that under section 19 (2) of the LLA, the time used to obtain a copy of the decree has to be excluded in computing time used to appeal".*

Mr. Edward Ogunde, learned advocate who acted for the respondent agrees with Mr. Tarimo on the position of the law stated above, but he argues that although the exclusion is automatic, there are factors to be established for section 19 (2) of the Act to apply.

Since grounds one and two are intertwined and considering Mr. Ogunde's tacit concession, we grant those two grounds and conclude that the learned judge erred in holding that for section 19 (2) of the Act

to apply, one has to make an application for extension of time. As we intimated earlier, the learned judge referred to two schools of thought maintained by the High Court on whether exclusion under section 19 (2) of the Act is automatic or not, and subscribed to the latter. With respect, the position is settled as per the decisions of the Court in the two cases cited by the appellant's counsel.

We turn to the third ground. As already alluded to earlier, the second reason for the judge holding the appeal time barred was that there is no evidence that the appellant made a written request for the documents and also there is no evidence of efforts made to follow up. The third ground of appeal attacks that finding: -

> "(iii) That the *honourable trial Judge erred both in law and fact in holding that there were no efforts made by the appellant and his counsel to obtain the certified copies of judgment and decree on the 29th November, 2016 and thereafter and as soon as the copies were ready for collection on the 22nd day of December, 2016".*

Before the High Court it was submitted for the appellant that it wrote a letter to request for documents on the same date of delivery of

judgment, that is on 29/11/2016 but they were supplied with it on 14/02/2017. In his ruling the learned judge rejected the appellant's submission for there was nothing on the record to substantiate it. He further observed that copies of the documents were ready for collection as early as 22/12/2016.

Mr. Ogunde for the respondent drew our attention to a paragraph in **Alex Senkoro & 3 Others** (supra) which runs thus. "*We need to stress what we stated in the above case that the exclusion is automatic as long as there is proof on the record of the dates of the critical events for the reckoning of the prescribed limitation period. For the purpose of section 19 (2) and (3) of the LLA, these are the date on which a copy of the decree or judgment was requested and the date of the supply of the requested documents*".

There is no dispute that the documents were collected on 14/02/2017. However, the learned judge maintained that the appellant could have collected them much earlier as the said documents were ready as of 22nd December, 2016. Without ado, we think the learned judge slipped into an error on this point because the appellant would not have known the fact that the documents were ready for collection

bearing in mind that the procedure obtaining in the High Court is different from that in the Court of Appeal. In the Court, rule 90 (1) of the Court of Appeal Rules, 2009 requires the Registrar to notify an intending appellant that documents are ready for collection.

Anyhow, the appellant's counsel has cited **The Registered Trustees of the Mariam Faith Healing Centre @ Wanamaombi v. The Registered Trustees of the Catholic Church Sumbawanga Diocese**, Civil Appeal No. 64 of 2007 (unreported), to argue that once an intending appellant makes a written request, he is not legally obliged to make follow ups. We uphold the appellant on that and take note that it has also been argued that the appellant made follow ups as a result of which he got supplied with the documents on 14/02/2017.

There has been considerable dispute on whether the appellant requested for the copies or not. In the written submissions before the High Court, the appellant addressed this fact as follows: -

> "Your *Lordship, the judgment of Handeni District Court subject to appeal was delivered on 29/11/2016. The appellant requested to be supplied with the copies of proceedings, judgment and decree on 29/11/2016 and were supplied on 14/02/2017. Copies of a letter*

requesting proceedings judgment and decree and exchequer receipt for collection attached".

According to the schedule of presentation of written submissions found on page 250 of the record, the respondent had the right to rejoin by 28/06/2017 if he wished to. However, no rejoinder was made to raise issue with the fact that a written request had been made by the appellant. This amounts to making the facts in the reproduced paragraph to be uncontested.

Even the Memorandum of Appeal filed in the High Court has a similar assertion: -

> "*Attached: Judgment and Decree of the District Court of Handeni,* ***a letter requesting proceedings, judgment and decree*** *and the exchequer receipt for collection of the same". [Emphasis ours].*

The appellant's counsel referred us to a letter at page 171 of the record bearing the official stamp of Handeni District Court and the date of receipt as 02/12/2016. In view of the submissions made by the appellant if the learned judge discovered later that the letter was missing from the record and aware that it was a critical point for the

decision, he ought to have brought the partie's attention to that fact so as to have it addressed. This is because it is not uncommon for a document to go missing from the record despite having been earlier filed or lodged. In our view it was not enough for the learned judge to proceed on discoveries made by him in the course of composing his ruling as shown in this excerpt: -

> *"It is also worth noting that while it was submitted by the counsel for the appellant that the appellant requested for the said copies on 29/11/2016, the record runs short of any such request. There is nothing on the record suggesting that Mr. Rwegasira filed a written request or made an oral request for the copies of judgment and decree before or after the judgment was delivered on that material day".*

In our view, had the appellant's attention been drawn to the fact that the letter was missing, it might have substantiated that it wrote one. This is because the appellant's contention that the letter was written has been consistently made and, under the circumstances, we are of the view that the mere fact that the letter was not in the court record does not mean it was not written and presented.

Therefore, although extension of time is in the discretion of the Court, that discretion was not exercised judicially in this case because the appellant ought to be heard on the missing letter or ought to have been given the benefit of doubt more so as the respondent did not raise issue with that matter. In addition, courts should be more inclined to have cases heard and finalized on merits when the law permits such a course, in line with the overriding objective or oxygen principle. Even before the coming into being of that principle this Court discouraged over reliance on technicalities at the expense of substantive justice. In **Elias Tibendelana v. The Inspector General of Police & The Attorney General** [2013] T.L.R 157, the Court cited with approval the case of **Microsoft Corporation v. Mitsumi Computer Garage Ltd.,** (2001) 2 EAR 467 and reproduced the following passage from it: -

> *"Rules of procedure are the handmaidens and not the mistresses of justice. They should not be elevated to a fetish... Theirs is to facilitate the administration of justice in a fair, orderly and predictable manner, not to fetter or choke it..."*

In that case, the Court took into consideration the provisions of the Constitution of the United Republic of Tanzania, 1977, which we are also mindful of in the instant case.

Thus, for the foregoing reasons, the appeal is allowed. We quash the ruling of the High Court and set aside the order of dismissal. We order the appeal to be heard by the High Court on merits.

Costs to be in the main cause.

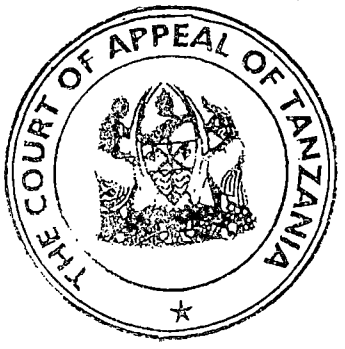
DATED at **TANGA** this 28th day of April, 2023.

S. A. LILA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The Judgment delivered this 02nd day of May, 2023 in the presence of Mr. Christopher Wantora, learned counsel holding brief of Mr. Karoli Valerian Tarimo, learned counsel for the Appellant and Mr. Philemon Raulencio, learned counsel holding brief of Mr. Wilson Edward Ogunde, learned counsel for the Respondent, is hereby certified as a true copy of the original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL