

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: WAMBALI, J.A., KEREFU, J.A. And MAIGE, J.A.)

CIVIL APPEAL NO. 364 OF 2019

**FAW AFRICA INVESTMENT CO. LIMITED APPELLANT
VERSUS**

MOHAMED ENTERPRISES (T) LIMITED RESPONDENT

**(Appeal from the Ruling and Drawn Order of the High Court of Tanzania,
Commercial Division at Dar es salaam)**

(Phillip, J.)

**Dated the 7th day of June, 2019
in**

Consolidated Miscellaneous Commercial Causes No. 126 and 176 of 2017

RULING OF THE COURT

15th & 21st February, 2023

WAMBALI, J.A.:

On 3rd February, 2023, the respondent, through the services of Ms. Regina Anthony Kiumba of Trustmark Attorneys, lodged a notice of preliminary objection in court, in terms of rule 107 (1) of the Tanzania Court of Appeal Rules, 2009 which was served upon the appellant's advocate, M/S. REX ATTORNEYS. The said notice is premised on the point that the appeal before the Court is time barred.

On 15th February, 2023, when the appeal was called on for hearing before us, Mr. Sinare Zaharan assisted by Ms. Jacqueline Kapinga, both learned advocates, appeared for the appellant and readily conceded to the raised point of preliminary objection. Though, Mr. Zaharan acknowledged that the time barred appeal is liable to be struck out, he urged us not to do so. On the contrary, he implored us to remain seized with the record of appeal and thereby invoke the provisions of section 4(3) of the Appellate Jurisdiction Act, Cap 141 R.E. 2019 (the AJA) to revise the proceedings of the High Court, Commercial Division in Consolidated Miscellaneous Commercial Causes No. 129 and 176 of 2017 on the alleged illegality in the decision. He asserted that the illegality concerns the propriety of the holding by the High Court Judge on the issue of res sub-judice owing to the existence of Civil Case No. 155 of 2014 between the parties at the High Court Dar es Salaam District Registry. To support his submission, he made reference to the decision in **Tryphone Elias @ Ryphone Elias and Prisca Elias v. Majaliwa Daudi Mayaya**, Civil Appeal No. 186 of 2017 (unreported), and pressed us to be inspired by it, remain seized with the record of appeal and revise the proceedings of the High Court. It is

noteworthy that the alleged illegality is the thrust of the appellant's complaints in her grounds of appeal in the present appeal.

On the adversary side, Mr. Elisa Abel Msuya assisted by Ms. Regina Anthony Kiumba, both learned advocates for the respondent, graciously welcomed the concession by Mr. Zahran to the preliminary point of objection that the appeal is time barred. However, Mr. Msuya who addressed us, strenuously contested the prayer for the Court to revise the High Court proceedings *suo motu* instead of striking out the appeal. He submitted that though the Court is empowered to revise the decision of the High Court *suo motu*, the circumstances that necessitated the Court to do so in the decision relied upon by Mr. Zahran are distinguishable with the present matter. This is because, he stated, in the former, the Court raised the matter *suo motu* in the process of hearing the appeal while in the present, it is the party (appellant) who raised it after conceding to the point of objection that the appeal is time barred.

In the circumstances, Mr. Msuya beseeched the Court to strike out the incompetent appeal with costs for being time barred as conceded by the appellant's counsel.

For our part, having considered the submissions of the counsel for the parties, firstly, we have no hesitation to hold that the appeal before us is incompetent for being time barred. In the event, we sustain the preliminary objection raised by the respondent.

The next issue for our determination concerns the fate of the appeal. We have carefully reviewed and considered the contending submissions of the counsel for both sides. In the end, we entertain no doubt that the circumstances obtaining in the case of **Tryphone Elias @ Ryphone Elias and Prisca Elias** (supra) relied upon by Mr. Zaharan to support his argument for *suo motu* revision by the Court under section 4(3) of the AJA are distinguishable with the present matter. It is plain that in the former case, the incompetence of the appeal was attributed to the incomplete record of appeal and not time limit as is the case in the present appeal which touches on the jurisdiction of the Court.

In the result, we respectfully decline the appellant's counsel invitation to exercise the revisionary power of the Court on the time barred appeal. We agree with the submission by the respondent's counsel that the consequences which should befall the instant appeal is to be struck out.

Consequently, we strike out the incompetent appeal with costs for being time barred.

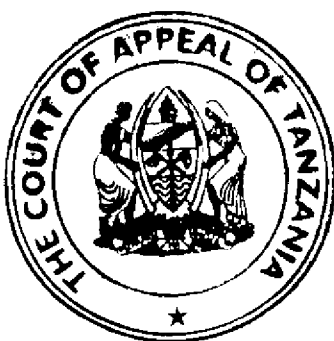
DATED at DAR ES SALAAM this 20th day of February, 2023.

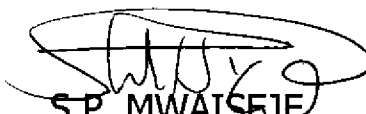
F. L. K. WAMBALI
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Ruling delivered this 21st day of February, 2023 in the presence of Mr. Deves Alois Kwembe, learned advocate for the Appellant, and Ms. Regina Anthony Kiumba, learned advocate for the Respondent is hereby certified as a true copy of the original.




S.P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL