

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

MISCELLANEOUS CIVIL APPEAL NO. 3 OF 2002

(Originating from Housing appeal Tribunal Ruling dated 14th January 2002 by Deputy Chairman, Hon. A.A. Nchimbi Originating from Application No. 54 of 2001 in the Regional Housing Tribunal, Dar es Salaam P.T. Mkwandi)

ADAM SADIK APPELLANT

VERSUS

MWANZANIJE MATIMBWA RESPONDENT

Date of last order - 13/2/2006
Date of Judgment - 2/3/2006

J U D G M E N T

MLAY, J.:

This is an appeal from the ruling of the HOUSING APPEALS TRIBUNAL OF TANZANIA in which the Tribunal dismissed the applicants application for leave to file a notice of appeal, out of time. Being aggrieved by the ruling, the appellant has appealed to this court on the following grounds:

1. That the learned Deputy Chairman erred in law by holding that the Honourable Appeals Tribunal had no jurisdiction to extends time for filing a notice of appeal.

2. That the learned Deputy Chairman misdirected himself by holding that the provisions of the Civil Procedure Code, 1966 were not applicable to the appellant's application.
3. That the learned Deputy Chairman erred in law and fact by refusing to take into serious account the special reasons advanced by the appellant for his delay to file on (sic) notice of appeal thereof.
4. That the learned Deputy Chairman erred in law by failing to accord sufficient weight to the appellant's right to be heard on a substantial and for reaching point of law.
5. That the learned Deputy Chairman grossly erred by ignoring the key principle of natural justice, that is the right to be heard, and the constitutional right of appeal.

With the leave of this court, both parties filed written submissions on the grounds of appeal. Although there are five grounds of appeal, the substantive grounds are only two, grounds Nos. 1 and 2. Grounds 3 and 4 will only be relevant if the first

ground of appeal succeeds or, is answered in the affirmative. The 5th ground of appeal will only be relevant, if the first ground fails or is answered in the negative and the issue then will be whether the principles of natural justice and the constitutional right to appeal to the highest court, can be applied to grant extension of time in which to file a notice of appeal, where the Housing Appeals Tribunal has not been conferred by law, the powers to grant such an extension of time.

In his written submissions on the first ground of appeal, the appellant submitted that "there is no provision in the law that prevents or restricts the discretion of the Appeals Tribunal from extending the time to file an appeal". The appellant citing REMEO LTD V MISTRY JADUA PARAT AND CO LTD AND OTHERS (2002) EA Vo. 1 at P233, argued that the court may deny a party to be heard if such party deliberately seeks, by evasion or otherwise, to obstruct or delay the course of justice. He contended that in his conduct and of his advocate the late Robert Rweyemamu, there is not even the slightest indication that the Appellant was delaying or obstructing the course of justice. The appellant then went on to explain the cause of the delay and cited the case of SEBEI DISTRICT ADMINISTRATION V GASYALI (1968) EA 300 to argue that to deny a person a hearing should always be the last resort. He submitted that the order of the Tribunal to deny the right to file the notice of appeal amounted to

unjustifiable denial of justice to the Appellant in that there was good cause for the delay.

The Respondents Advocate Odhiambo Kobas on this ground, submitted that the appellant has omitted to submit on the 1st and second grounds of appeal and proceeded to submit on the right to be heard. He submitted further that the Deputy Chairman of the Tanzania Housing Appeals Tribunal was right in holding that there was no provision in the Housing Appeals Tribunal (Appeals) Rules 1987 giving power to the tribunal to extend the time for lodging Notice of Appeal. He contended that the Application for extension of time was made under Rule 5, 6, 7 and 57 of the Housing Appeals Tribunal (Appeals) Rules 1987. He submitted that Rule 5 is for enlargement of time to file appeal, Rule 6 lays down the procedure for appealing out of time, while Rule 57 provides for the applicability of the Civil Procedure Code in matters not expressly provided by the rules. He argued that none of the rules provides for the extension of time within which to file notice of appeal and accordingly the Deputy Chairman was right in holding that there is no provision giving the tribunal power to grant extension of time to file notice of appeal. The learned counsel cited the Case of KANCHAN VEWESH PAREKESH vs AGHA KITAN EDUCATION SERVICES (1996) TLR at 104 in which Kyando J. held that:

"the Tribunal could in terms of Rule 5 extend the period of lodging the appeal, but it is nowhere provided that it could as well extend the time for lodging a notice of appeal; (iii) The Tribunal accordingly had no power to extend time for lodging notice of appeal."

He also cited the case of B.P. TANZANIA LTD vs KIBO MANAGEMENT SERVICES LTD, MISC. CIVIL APPEAL No. 6 of 1993 Dar es Salaam High Court Registry, (Unreported) per Kyando J, for which no text was provided. The learned advocate further submitted that the mere citing of Rule 57 of the Housing Appeal Tribunal (Appeals) Rules 1987 without citing the relevant provision of the Civil Procedure Code empowering the Tribunal to extend the time in which to lodge the Notice of Appeal, is insufficient to move the Tribunal to extend the time.

Mr Kobas cited the decision of the Court of Appeal of Tanzania in CITIBANK TANZANIA LTD vs TANZANIA TELECOMMUNICATION CO. LTD AND 4 OTHERS (Unreported) CIVIL APPLICATION NO. 64 OF 2003 in which the Court cited with approval the case of ALMASI IDDI MWINYI vs N.B.C. CIVIL APPLICATION NO. 88 of 1998 where it was held that: "if a wrong citation of the law renders application incompetent, I have no flicker of doubt on my mind that non citation

of the law is worse and equally renders an application incompetent.”
He further quoted NSEKELA J. in that decision where he stated:

"it hardly needs to be overemphasized that in a notice of motion, an applicant must state the specific provision of the law under which the applicant wants to move the Court to exercise its jurisdiction."

He concluded that the Deputy Chairman was right in dismissing the application as there was no provision of the law moving the tribunal to exercise its jurisdiction,

Before going into the first ground of appeal and also the remaining grounds, it is useful to state the brief facts of the case leading to the present appeal.

The respondent MWAZANIJE HUSSEIN MATWIMBA filed an application against the present Appellant in the REGIONAL HOUSING TRIBUNAL OF DAR ES SALAAM, Application No. 54 of 2001 seeking the following orders:

1. Vacant possession
2. Rent arrears up to April 2002 i.e 2,795,000/=.
3. Damages caused to the suit premises at Tshs.400,000.

4. Costs of the application.

The applicant in this appeal did not appear to defend the application and the Regional Housing Tribunal allowed the respondent to proceed ex parte by evidence and the Tribunal gave judgment to the respondent. The present appellant was late to lodge a notice of appeal to the Housing Appeals Tribunal and filed an application for extension of time in which to do so. In that application the present appellant relied on the provisions of Rules 5, 6, 7 and 57 of the Housing Appeals (Appeals) Rules 1987.

In its ruling the Housing Appeals Tribunal stated in part (page 3 of the typed ruling).

"The relevant rule of the Housing Appeals Tribunal Appeals rules 1987 should have been rule 7. The applicant did not lodge the notice of appeal within 14 days as prescribed by the law. Can this Tribunal extend time within which to file the said notice? Is this matter expressly provided for by the Rules of this Tribunal so that the provisions of rule 57 can come into play? The answer is no. There is no. There is no provision of appeals or for enlarging time

for lodging of notice of appeal. And rightly the provisional of the Civil Procedure Code for extension of time cannot be imported because there is a special provision for time to appeal.

In holding so we are very much guided by the authority of B.P. Tanzania LIMITED APPELLANT VERSUS KIBO MANAGEMENT SERVICES LIMITED RESPONDENT Miscellaneous Civil Appeal No. 6 of 1993 (High Court Registry Kyando, J.) Accordingly we dismiss the application with costs."

It is this decision which the appellant is complaining about in the present appeal.

The issue in the first ground of appeal is whether the Housing Appeals Tribunal was wrong to hold that under the rules, it had no powers to extend the time in which to lodge the appeal.

It is true as argued by the respondent's advocate that the appellant did not directly tackle this ground but concentrated on arguing that the decision of the Housing Appeals Tribunal was wrong

because it denied him the right to be heard and the right of appeal to the highest cause. These are the subject of the 5th ground of appeal but not arguments in support of the first ground of appeal. I will therefore revert to these arguments when I come to deal with the 5th ground of appeal. The procedure of appeals to the Housing Appeals Tribunal, are governed by the provisions of the Housing Appeals Tribunal (Appeals) Rules. Rule 7 deals with filing of notice of appeal. Sub rule (2) thereof states:

"(2) Every notice shall be lodged within fourteen days of the date of the decision against which it is desired to appeal"

There is no provision in rule 7 or in any other provision of the Housing Appeals Tribunal (Appeals) Rules, where the Appeals Tribunal is given powers to extend the period of filing a notice of appeal. The Housing Appeals Tribunal in its ruling made a finding that **"There is no provision in the rules granting power to this Tribunal for extending time for lodging of appeals or for enlarging time for lodging notice of appeal"**. In so far as this decision relates to the lodging of a notice of appeal, the decision of the Housing Appeals Tribunal cannot be faulted. Although I have not been able to find the decision of Kyando J. in Miscellaneous Civil Appeal No. 6 of 1993 (BP TANZANIA vs KIBO MANAGEMENT SERVICES LTD) in which the Tribunal relied to fortify its decision, the

decision of the same Judge in KANGHAN VENESH PAREKH vs AZITA KHAN EDUCATION SERVICES 1996 TLR 104, supports the Tribunals decision, and I have no doubt that, that decision is right.

In the second ground of appeal the appellant argues that the Housing Appeals Tribunal was wrong to find that if it did not have powers under the Rules, it did not also have powers under the Civil Procedure Code to grant the extension of time in which to lodge the notice. The application of the Civil Procedure Code was not directly canvassed by the Appellant in the application before the Housing Appeals Tribunal. It seems that the application of the Civil Procedure Code was imported through citing the provisions of Rule 57 of the Housing Appeals Tribunal (Appeals) Rules which provides:

"57 Without prejudice to the provisions under the Rules, where any matter in a proceeding before the Appeals Tribunal is not expressly provided for by these rules, the Civil Procedure Code shall, mutatis mutandis, apply in relation to such matter."

The Housing Appeals Tribunal did consider the provisions of the above rule and stated in its ruling:-

"And rightly the provisions of the Civil Procedure Code for extension of time cannot be imported because there is special provision for time to appeal."

This decision of the Tribunal assumes that there is a provision in the Civil Procedure Code 1966, which provides for the extension of time in which to file a Notice of Appeal but that the said provision does not apply to the Tribunal because there is a specific rule providing for the time in which to appeal or as the case may be, to lodge a Notice of Appeal. With respect, this assumption is wrong. I have not been able to find any provisions in the Civil Procedure Code, which provides for the extension of time in which to lodge a Notice of Appeal. Although in my view the provisions of the Civil Procedure Code apply to the Tribunal where the Rules do not expressly provide for the matter before the Tribunal, there is no such provision in the Civil Procedure Code which the Housing Appeals Tribunal could have applied by virtue of Rule 57, to extend the time in which to lodge a Notice of Appeal.

Secondly, the Appellant did not cite the Civil Procedure Code or any Specific Provision thereof in support of the Application in the Housing Appeals Tribunal. The tribunal was not therefore properly moved to apply the Civil Procedure Code, where no Specific Provision of the Civil Procedure Code had been cited and relied upon in the

application before the Housing Appeals Tribunal. To this extent, I agree with the learned Counsel for the Respondent in his submission that the Tribunal was not properly moved, in so far as the application of the Civil Procedure Code is concerned. Failure to cite a Specific Provision under which the Tribunal was being moved, is fatal. See the ruling of the Court of Appeal in CITIBANK LTD vs TANZANIA TELECOMMUNICATIONS Co. Ltd. AND 4 OTHERS, CIVIL APPLICATION NO. 64 of 2003 (Unreported).

From the above considerations the first and second grounds of appeal are without merit and should be dismissed.

The third ground of appeal falls by the way side, because it attacks the refusal of the Housing Appeals Tribunal to take serious account of the reasons for the delay to file the Notice of Appeal within the prescribed time. Since the Tribunal did not have the powers under the Rules to extend the time in which to file the notice and also, if the Tribunal was not properly moved to apply the Civil Procedure Code as no specific provision was cited or actually exists, the Tribunal could not consider the reasons for the delay. The reasons for the delay, however meritorious, do not confer powers on the Tribunal to grant an extension of time if the rules do not confer such powers on the Tribunal.

The reasons for rejecting the 3rd ground of appeal also applies to the fourth ground of appeal. The right to be heard on appeal, is subject to having lodged a notice of appeal within 14 days as prescribed under Rule 7 of the Housing Appeals Tribunal (Appeals) Rules. A person who fails to comply with the requirements of the law on how to exercise the right to be heard, cannot with any legitimacy complain that he was denied that right. The complaint in the 5th ground of appeal is not different from the 4th ground and the same reasons apply.

In the final analysis this appeal is without merit and it is accordingly dismissed in its entirety, with costs.


(J.I. MLAY)
JUDGE

Delivered in the presence of the Respondent and in the absence of the Appellant this 2nd day of March 2006.


(J.I. MLAY)
JUDGE
2/3/2006

2,654 Words.