

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

PC. CIVIL APPEAL NO. 33 OF 2005.

RAJAB A. RAJAB APPELLANT

VERSUS

HAMIDI M. TULI & ANOTHER RESPONDENT

Date of last Order: 10/05/2006

Date of Judgment : 27/07/2006

JUDGEMENT.

Mlay, J.

The appellant RAJAB ADAM RAJAB, was aggrieved by the decision of the Temeke Primary Court in MIRATHI No. 250/2004 of appointing the 1st Respondent HAMID MEDHEBI TULI to be the administrator of the estate of the late ADAM RAJAB. He appealed to the District Court of Temeke in CIVIL APPEAL NO. 77/2004. The District Court found that the appeal was time barred under section 20 (3) of the Magistrate Court Act, 1984 for having not been filed within 30 days from the date of judgment. The court held that the appeal was void *ab initio* due to lapse of time.

Being further aggrieved the appellant through his advocate KASHUMBUGU/ SEKIRASA AND COMPANY, has appealed to this court on the following grounds:-

1. The honourable District Magistrate erred in law in Holding that the appellants appeal was time barred when actually the Primary Court judgment was delivered on 6/7/2004, a copy of the same applied for on 21/07/2004 and the copy of judgment was received on 28/7/2004 and appeal was presented in the court on 10/8/2004 and payment thereof made on 18/8/2004.
2. The Honourable District Magistrate misdirected himself when he held that the appellants appeal was void abinitio as time lapsed when actually 30 days started running against the appellant on 28/7/2004 the day he received copy of judgment.
3. The Honourable District Magistrate failed to put into considerate in S.19 (2) of the law of limitation Act, 1971 when he relied on Section 20 (3) of the Magistrates Court Act, 1984.
4. The Honourable Magistrate erred in law and fact in concluding that there was no appeal filed due to time barr when it is crystal clear that the appeal was in time.

With leave of this court both parties to this appeal filed written submissions. Mr. Kashumbugu advocate for the appellant conceded that the judgment in the Primary Court was delivered on 6/7/2004 while the appeal to the District Court was received on 10/8/2004 and paid for on 18/8/2004. He however argued that the appellant wrote a letter applying for the copy of judgment on 21/7/2004 and the said copy supplied on 28/7/2005 and the appeal presented on 18/8/2004. He submitted that in view of the fact that the copy of judgment was supplied to the appellant on 28/7/2004, the time of appeal began to run against him on 28/7/2004 and therefore the appeal which was filed on 10/8/2004 was not time bared. He cited the case of MARY KIMARO VS KHALFANI MOHAMED (1995) TLR 2002 to buttress his submission that the time of appeal began to run from the time the copy of judgment was supplied. This took care of the first ground of appeal.

On the second ground Mr. Kishumbugu raised the same argument as for the first ground, that the appeal was not void *ab initio* because time started to run not from the date of judgment but from the date the copy of judgment was received by the appellant. He cited the decision of the Court of Appeal of Tanzania in TANZANIA ELECTRIC SUPPLY CO LTD VS KASSIM KAMBAYA CIVIL APPEAL NO. 19/9999 (Unreported).

On the 3rd ground of appeal Mr. Kashumbugu contended that the District Magistrate failed to put into consideration section 19 (2) of the Law of Limitation Act, 1971 when he relied on section 20 (3) of the Magistrate Courts Act, 1984. He argued that although section 20 (3) requires that the appeal should be done within 30 days from the day of the judgment, section 19 (2) of the law of limitation provides that in computing the period of limitation prescribed for an appeal, the period requisite for obtaining a copy of decree or order appealed from as well **as the time requisite for obtaining a copy of the judgment on which it is found must be excluded** (emphasis his) Mr. Kashumbugu submitted that the period between the delivery of the judgment and the date of receiving the copy of judgment be excluded as the period for presenting the appeal began to run on 28/7/2004, the date he paid for and obtained a copy of judgment.

On the fourth ground Mr. Kashumbugu made the same argument as for the 1st and second grounds that the appeal was not barred when the appellant presented it.

The respondent through submissions filed by RUTABINGWA AND COMPANY advocates, opposed the appeal. The respondents advocate relying on the appellants own submissions, made his own computation of time. He

contended that the judgment of the Primary Court was pronounced on 6/7/2004 and certified on the same day. Considering the date of judgment and 21/7/2004 when the appellant applied for copy of the judgment and the date the judgment was received on 28/7/2004, the respondents counsel contended that time started to run against the appellant on 7/7/2004 and stopped on 21/7/2004, and again started to run on 29/7/2004 and therefore the appellant was supposed to file the appeal on or before 12/8/2004, "**when the other 15 days were expiring, making an aggregate of 30 days provided under the law**". He submitted that filing an appeal is completed by effecting payment of the filing fees and in so far as the appellant paid fees on 18/8/2004, the appeal was filed out of time after thirty days had already lapsed.

Secondly, the respondent counsel considered the provisions of subsections (3) and (4) of section 30 of the Magistrates courts Act, 1984 and submitted that, assuming the appellants account is correct, then reasonably he should have sought an extension of time on grounds like receiving a certified copy of judgment late and delay in admission of the appeal lodged. He however contended that in insofar as the respondent was concerned, there was a possibility that when this appellant sent his letter on 21/7/2004, he might have been short of money to pay for a copy of judgment which by then had been

certified and came back on 28/7/2004. He gave an example of the appeal to the District Court which was admitted in advance [10/8/2004] but fees paid on 18/8/2004.

On the application of section 19 (2) of the law of limitation Act, 1971, the respondents counsel contended that if the period when the appellant applied for a copy of judgment and obtained it is excluded, the position is that the appeal was filed after 36 days, contrary to this provisions of section 20 (3) of the Magistrates Courts Act and for that reason, this appeal was correctly dismissed.

Lastly, commenting on the TANESCO VS KASSIM KAMBAYA'S case cited by the appellant counsel, the counsel for the respondent submitted that he thought it applies to appeals for the High Court where there are different procedures from those applicable to appeals to district courts or from District courts to the High Court.

In reply the appellants counsel submitted that he did not understand the computation by the respondents counsel but contended that the appeal was in time. As for the admission of the appeal before payment of fees, the appellants counsel contended that in practice the memorandum of appeal which comes from the Primary Court is first admitted before fees is

paid. In short, the appellants counsel reiterated the appellants position that the appeal was in time.

Having given due consideration to the grounds of appeal and the arguments contained in the written submissions filed by counsels of both parties, it is not in dispute that in terms of section 20 (3) of the Magistrate Courts Act, 1984 an appeal from the Primary Court to the District Court is required to be filed within 30 days from the date of the decision or order against which the appeal is brought. It is not further in dispute that in the present case, the decision of the Primary Court was delivered on 6/7/2004 while the appeal to the District Court, was presented on 10/8/2004 and filing fees paid on 18/8/2004.

Whichever of the two dates is taken, be it 10/8/2004 or 18/8/2004, there cannot be a dispute that counting from 6/7/2004 when the decision was made, the appeal to the district court was made after the lapse of 30 days from the date the decision being appealed, was made. So in these circumstance, the matter in dispute and which needs to be determined, is whether, the appellant having applied for a copy of the judgment of the Primary Court on 21/7/2004 and received the said copy on 28/7/2004, the period of 30 days begins to run from the date the copy of judgment was received on 28/7/2004. The second issue which is closely connected

with the first one, is whether the period required to obtain the copy of judgment is excluded, by applying the provisions of section 19 (2) Law of Limitation Act, 1971.

Before tackling the two issues, from the outset I would disagree with the computation made by the respondents counsel that the period of limitation began to run and then stopped and started to run again. I have not been able to find in any law the basis of such a computation. The period of limitation runs from a definite time when a given event takes place to the last date of the limitation period.

Secondly, I also disagree with the computation that, counting from the date the copy of judgment was received on 28/7/2004, the appeal which was received on 10/8/2004, or filed on 18/8/2004, was received or filed after the lapse of 30 days, from the date the copy of judgment was received. If this period starts to run from the date the copy of judgment was a received, an issue which is the subject of determined in this appeal, the appeal was filed to the District Court after 14 days or 21 days from the date the copy of judgment was received, depending on the date taken whether is was 10/08/2004 or 18/8/2004.

Thirdly, I would agree with the respondents counsel that both cases cited by the appellants counsel in the written

submissions, are distinguishable in that they did not deal with the question of limitation in appeals from the Primary Court to District Courts. For this reason the two decisions are not relevant to the present appeal.

Coming back to the first issue, it is necessary to set out the relevant provisions of section 20 (3) of the Magistrates Courts Act, 1984 which state:

“20 (3) every appeal to a District Court shall be by way of a Petition and shall be filed in the District Court within thirty days after the date of the decision or order against which brought”.

From the above provision, it is clear that it is mandatory that the petition of appeal be filed within thirty days after the day of the decision. Sub Section (4) of the same section provides as follows:-

- “(4) Notwithstanding the provisions of subsection (3)*
- (a) the district court may extend the time for filing on appeal either before or after the period has expired; and*
 - (b) if an application is made to the district court within the said period of thirty days, or any extension thereof granted by the*

district court, the district court may permit an appellant to state the grounds for the appeal orally and shall record the same and hear appeal accordingly”.

Although subsection (3) of section 20 of the Magistrates Courts Act requires a petition of appeal to be filed within 30 days of the decision, subsection (4) of that section gives the District court power to extend the period, if an application is made, whether after or before the period of thirty days has expired.

Appeals from Primary Courts are also governed by the CIVIL PROCEDURES (APPEALS IN PROCEEDINGS ORIGINATING IN PRIMARY COURTS) RULES GN 312 of 1964 [Cap 358 R. E 2002 (subsidiary)]. Rule 3 thereof provides as follows:

*“3. An application for leave to appeal out of time to a District court from a decision or order of a primary court to the High Court from a decision or order of a District Court in the exercise of its appellate jurisdiction shall be in writing, shall set out the reasons why a petition of Appeal **was not or could be filed within thirty days***

after date of the decision or order
against which it is desired to appeal, and shall be accompanied by the petition of appeal of shall set out the grounds of objection to the decision and order:

Provided that when the application is to a District Court, the court may permit the applicant to state his own reasons orally and shall record the same.

Looking at the provisions of section 20 (3) of the Magistrates courts Act, it is clear that the limitation period for making appeals to the district court is thirty days from the date the decision being appealed was made. It is also clear that subsection (4) of that Act and the Civil Procedure (Appeals in Proceedings Originating in Primary Courts) Rules, particularly Rule 3, make provision for extending the limitation period and the procedure to be followed. Neither the Magistrates Court Act, 1984 nor the Rules cited above, provided for the exclusion of any period in computing the period of thirty days. I do not therefore think that the appeal filed in the District court after the expiry of thirty days from the date the decision was made, was filed on time or that the period for obtaining the copy of judgment is excluded, unless

the provisions of section 19 (2) of this law of limitation Act, 1971 apply to appeals originating from Primary Courts.

This brings us to the second issue, whether the period of obtaining the copy of judgments is excluded by reason of section 19 (2) of the Law of Limitation Act. Section 43 of the Law of limitation Act, 1971 provides, in part, as follows:-

“43 This Act shall not apply to

- (a) (not applicable)*
- (b) (not applicable)*
- (c) (not applicable)*
- (d) (not applicable)*
- (e) (not applicable)*
- (f) Any proceeding for which a period of limitation is prescribed by any other law, save to the extent provided for in section 46”.*

Section 46 of the said Act provides as follows:-

“46. Where a period of limitation is prescribed by any other Law, then, Unless the contrary intention appears in such written law, and subject to the provision of Section 43 the provision of this Act shall

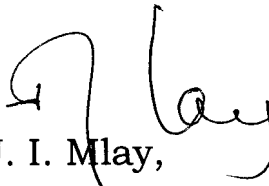
apply as if such period of Limitation has been prescribed by this Act”.

Section 43 of the Law of Limitation Act cited above, excluded the application of that Act to proceedings in which a period of limitation has been prescribed by another written law, except to the extent provided for in section 46 of that Act. Section 20 (3) of the Magistrates Courts Act 1984 provides for a period of Limitation for appeals from Primary Courts. The law of Limitation Act 1971 is therefore excluded from proceedings in the nature of the appeal to the District Court of Temeke, which is the subject of this appeal, unless section 46 of the law of limitation Act, 1971 otherwise allows the Act to be applicable. Section 46 states that the provisions of the Act apply, unless the contrary intention appears in such other written law, which prescribed the period of limitation. Looking at the clear provisions of subsection (3) of section 20 of the Magistrates Courts Act 1984 which makes it mandatory for an appeal to be made within thirty days of the decision and subsection (4) as well as Rule 3 of 6N 312 of 1964 which give power to the appellate court to extend the time and provide for the procedure for making an application for the extension of time, I am satisfied that there is a contrary intention shown in these provisions, that the Law of Limitation Act, 1971 does not apply to appeals from the Primary courts.

Since there is a contrary intention shown in the provisions of section 20 of the Magistrates Courts Act 1984 read together with Rule 3 of GN 312 of 1964, the law of Limitation Act 1971 does not in my considered opinion, apply to proceeding originating from Primary Courts. It follows from this that the provisions of section 19 (2) of the Law of Limitation Act, 1971, which makes provision for obtaining a copy of the judgment, does not apply to an appeal originating from the Primary Court. The appeal to the District Court of Temeke having been presented or filed after the expiry of thirty days from the date the decision of the Primary Court of Temeke was made, and since the provisions of section 19 (2) of this Law of Limitation Act do not apply to that appeal, the appeal was incompetent.

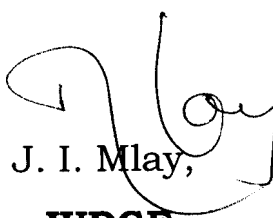
I agree with the appellants counsel that the appeal was not void *ab initio* by reason of being time barred. It was just incompetent and the consequence of being incompetent was to be struck out. The appellant still had the option to apply for extension of time in which to file the appeal. To this extent, District the court was wrong to declare the appeal void *ab initio*, instead of being declared in competent and being struck out.

The decision of this District court is varied accordingly. Apart from the variation made above this appeal is dismissed, with costs.


J. I. Mlay,
JUDGE.

Delivered in the presence of Mr. David Lema advocate holding brief for Mr. Kashumbugu and mr. Rutabingwa advocates for the appellant and respondent respectively and the Appellant this 27th day of July 2006.

Right of Appeal is explained.


J. I. Mlay,
JUDGE
27/07/2006.

Words: 2,968