

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CIVIL APPEAL NO. 15 OF 2002

(Original case employment cause No. 31 of 2001)

EDWARD MSAGO.....APPELLANT/APPLICANT

VERSUS

AG HA KHAN SPORTS CLUB.....RESPONDENT

Date of last order - 8/2/2007

Date of Ruling- 16/4/2007

RULING

ORIYO. J.:

This matter has a long history. In Employment Cause No. 31 of 2001 in the Resident Magistrate's Court at Kisutu, the appellant/applicant claimed payment of some unpaid terminal benefits from the respondent, his ex-employer. The suit was dismissed for lack of Cause of action; on 19/11/2001. Dissatisfied he appealed to this court and the appeal was dismissed on 9/5/2003 (Bubeshi J., rtd.) for lack of merit.

On 23/2/2004, the appellant/applicant filed an application for extension of time to file an appeal against the dismissal order. Unfortunately for the applicant, on 12/5/2005, this court, (Massati, j.) held that the application was both incompetent and lacked substance as it did not disclose any sufficient cause for the delay to file the appeal.

Again dissatisfied, the appellant/applicant filed this application on 21/6/2005 for enlargement of time to file Notice of Appeal against the decision of 12/5/2005. The application is made under SECTION 14 of the LAW OF LIMITATION ACT [CAP 89, R.E. 2002], SECTIONS 93 and 95 of the CIVIL PROCEDURE ACT, [CAP 33, R.E. 2002]. According to the applicant's affidavit, his main reason for the delay in filing the Notice of Appeal is contained in paragraphs (iv) and (v) thereof. In summary, he filed the notice within the statutory period of 14 days and duly served a copy on the respondent. He states further that on following up the case he was informed that he had lodged the Notice in the wrong office (sic). So he blames the secretary at the Open Registry for not directing him properly. The respondent on the other hand opposes the application vehemently.

Before delving into the merits of the application, let me consider the competency of the application first. As stated above, the applicant has cited S 14 Law of Limitation Act and SS 93 and 95 Civil Procedure Act to move the court to determine the application for enlargement of time to file Notice of Intention to appeal to the Court of Appeal. Limitation period within which to file Notice of Appeal is provided for under Rule 76 (2) of the Tanzania Court of Appeal Rules made under SECTION 12 of the Appellate

Jurisdiction Act, [Cap 141 R.E. 2002]. It states:-

"76-(1) Any person who desires to appeal to the Court shall lodge a written notice in duplicate with the Registrar of the High Court.

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

Interms of Section 43 (b) read together with Section 46 of the Law of Limitation Act; Section 14 of the Law of Limitation Act is not applicable here. The limitation period is provided under Rules made under the Appellate Jurisdiction Act and the enlargement of time should be made under the same law.

On the use of Sections 93 and 95 of the Civil Procedure Act to move the Court to enlarge time; it has been repeatedly stated by the Court of Appeal that the scope of the application of the two provisions are limited. SECTION 93 states:

" Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this

*Code, **the court may, in its discretion,**
from time to time, **enlarge such period,**
even though the period originally fixed or
granted may have expired."* (emphasis
provided)

It is clear from the wording of Section 93 that its application is limited to situations where the limitation period has been set by the court. In the case of KENYA AFRICAN ASSOCIATION OF FARMERS AND TRADERS (COOP) LTD vs MWIGARIURI 17 EA 70, the East African Court of Appeal held that **Section 93** cannot be used to extend time limited by law but can only be used to extend periods fixed by the court in its judicial capacity and not in its rule making capacity. See also decision in the case of MANIBHAI B. PATEL vs MOHEL SINGH (1956) 23 EACA 209.

In our application here, the limitation period is set by statute and therefore section 93 cannot be used to move the court to extend such statutory period.

Similarly for Section 95 which merely preserves the inherent powers of the Court. It cannot be used to move the court where there are specific provisions - See decisions in the cases of JOOMA

and JAFFER vs BHA UBRA (1967) EA 326, HASSAM KARIM & CO. LTD. vs AFRICA IMPORT & EXPORT CENTRAL CORPORATION LTD (1960) EA 396 and TANESCO vs IPTL & ORS., Consolidated Civil Application Nos. 19 and 27 of 1999, Court of Appeal, DSM Registry, (unreported).

The Court of Appeal has on several occasions held that where an application is filed under inapplicable law, the court is deemed to have not been properly moved and renders the application incompetent. In the case of NAIBU KATIBU MKUU (CCM) vs MOHAMED IBRAHIM VERSI & SONS, ZNZ Civil Application No. 3 of 2003 (unreported) at page 3 of the typed judgment the Court of Appeal stated as follows: . . *it is important that the Court must be properly moved to hear and determine the application. The applicant has not cited the provision from which the court derives power to enlarge time to appeal to this*

*Court out of time. **This is a basic requirement, it is a prerequisite in an application***"(emphasis provided)

As the court here has not been properly moved by the applicant for the enlargement of time to file Notice of Appeal, the application is undoubtedly incompetent.

The above finding is sufficient to dispose of the application. But for the interest of justice, I will consider the substance of the application.

The applicant's reason for the delay is alleged to be caused by an officer of the court who misdirected him to file the Notice in the wrong registry. There is no copy of the alleged Notice endorsed by a registry officer annexed to the affidavit. Other details as on the name and title of registry officer, date of filing, copy endorsed by the respondent; are all missing. So the reason for the delay remains a mere allegation of the applicant with no scintilla of evidence before the court.

The other aspect of the application is that the Notice is for the applicant's intention to appeal to the Court of Appeal. The intended appeal is against the refusal of this court to allow him to file an appeal to the Court of Appeal out of time. In terms of the Court of Appeal Rules; where an application has been made to this court and refused; the remedy, is to file an application in the Court of Appeal within 14 days of such refusal by this court. Therefore the Notice to Appeal, if any filed; against the refusal order of 12/5/2005 is redundant and incompetent.

For the reasons I have explained above, the application is both incompetent and lacks merit.

It is accordingly dismissed with costs.

(K.K. ORIYO)

JUDGE
16/4/2007