

IN THE HIGH COURT OF TANZANIA
AT MTWARA
MISC. CIVIL APPLICATION NO.4 OF 2007
FROM CIVIL APPEAL NO. 4/2005 IN KILWA DISTRICT COURT
ORIGINAL CIVIL CASE NO. 4/2004 IN MITEJA PRIMARY COURT
BETWEEN
ALLI MTUMBUKA APPLICANT
VERSUS
OMARI LIMBIMUNGU RESPONDENT

DATE OF LAST ORDER - 10/3/2008
DATE OF RULING - 03/4/2008

RULING

MJEMMAS, J.

The applicant, Alli Mtumbuka filed a "Chamber Summons" which does not show under which section it was made and reads in part as hereunder:

1. That the High court be pleased to expand time and allow the applicant lodge his appeal out of time.
2. That the applicant was not aware on his right of appeal as the same was not explained to him on the date the judgment was delivered. The certified copy of judgment of the Kilwa District court (annexture "A1") discloses nothing about the right of appeal.
3. Any cost to be provided for.

The said "Chamber Summons" is supported by an "affidavit" of the applicant – Alli Mtumbuka. The "affidavit" reads/states:

1. [Not relevant]
2. That on the 12/7/2005 my appeal (Civ. Appeal No.4/2005) was dismissed by the Kilwa District Court and in fact I was not satisfied with the judgment thus intended to appeal but did not know how and where to start as it was not made clear to us.
3. That at the time of delivering the judgment the learned trial District magistrate did not explain to us our right of appeal as from there to where and within which time to do so, until when I went to PM's office Dar es Salaam and complain about this where it was observed that the time was already expired. (Annexure "A1") discloses nothing about appeal and its rights.
4. That after having been directed that I had to go back and lodge my appeal to the Higher Court of Tanzania at Mtwara, financially, I was not in a possession to meet the required procedures in that I had to go back home and start fetching money for court fees and other costs.
5. That when I went to the High Court of Tanzania at Mtwara for the purpose of lodging my appeal could not be entertained because Sec.25 (1)(b)(3) and 4 of the MCA 1994 was not complied with.
6. That following the above reasons and circumstances in general, I found myself that I was totally out of time hence this application.

The respondent, Omari Limbimungu resisted the application and he has filed a counter affidavit. In his counter affidavit he states:

1. [Not relevant]
2. That paragraph 2 of the Applicant's Affidavit is disputed save that ignorance of law cannot be a justification for one to be allowed to appeal out of time.
3. That paragraph 3 is vehemently disputed it is clear that the applicant delayed to appeal in time because he wanted his appeal to be dealt by politicians instead of court of law that is why instead of following the proper procedure of appealing he decided to go to Prime Minister's office at Dar es Salaam hence that delay.
4. That paragraph 4 of the Affidavit is strongly disputed save that poor financial position cannot be a justification in violating the court's procedure, the Respondent states further that the Applicant has not show as to whether he applied for the copies of judgment and decree or later as to when he was supplied with necessary documents to appeal or even when he saved notice of intention to appeal.
5. That paragraph 5 is vehemently disputed save as the Applicant had to follow procedure of appealing as stipulated by law if he wished to do so. The Respondent further states that the Applicant's affidavit is defective as the JURAT does not bear the stamp of the Commissioner for Oath who administered that oath.

6. That following to the above reasons I pray that the application be dismissed with cost as there is no strong reason to entertain and allow such a lame application.

At the hearing of this application the applicant appeared in person, unrepresented and the respondent did not appear. The respondent gave notice to this court on 30/1/2008 that he would not be able to attend hearing of this application due to doctor's advice that he should not walk long distance nor perform heavy duties after he had fallen down from a coconut tree and injured his spinal code. During the hearing of the application the applicant repeated what he has stated in his "affidavit".

After going through the documents filed by the applicant and after hearing him in person there is no doubt that he is asking this court to enlarge the period within which he can file his appeal. In otherwords he is asking this court to be allowed to appeal out of time.

Appeals from district courts in their appellate jurisdiction are covered by section 25 of the Magistrates Courts Act, 1984. Section 25(1) (b) of the said Act provides:

1. Save as hereinafter provided –

(a) [not relevant]

(b) In any other proceedings any party,

If aggrieved by the decision or order of a district court in the exercise of its appellate or revisional jurisdiction may within thirty days after the date of the decision or order, appeal therefrom to the High Court; and the High Court may extend the time for filing an appeal either before or after such period of thirty days has expired.

The powers conferred to the court by the above quoted provision i.e section 25(1)(b) of the Magistrates Courts Act, 1984 are, as it has been said many times by the courts, discretionary, and the court is enjoined to exercise that discretion judicially. To act judicially implies acting for good or sufficient reason [see Kisanga J.A in **Civil Appeal No.5 of 1994 BETWEEN Abdulrasul Ahmed Jaffer, 2. The National Housing Corporation 3. The Registrar of Titles AND 1. Parin A. Jaffer, DSM Registry, (unreported): Martha Daniel Vs. Peter T. Nnko [1992] TLR.359.**]

What constitutes good or sufficient reason has been a subject of discussion by many judicial authorities. Before I discuss those authorities let me comment on one or two things concerning the present application. As indicated earlier in this ruling, the applicant did not cite relevant provision of the law under which the application was made. The second thing is what has been raised by the respondent concerning the applicant's affidavit being defective.

It is now settled that non citation or wrong citation of proper provisions of law in a chamber application is fatal. In **Civil Application No.21 of 2006 between Abdallah Ndope and others AND National Housing Corporation [DSM registry, unreported]** the Honourable Justice Mroso, J.A said:

“Failure to cite that provision renders the application incompetent because the court had not been moved under the proper provision of the rule to give it jurisdiction.....”

In the same spirit, the Honourable Justice Nsekela, J.A in the case of **Sheikh Issa Seif Gulu and Three Others V. Rajabu Mangara Mtoro and Ten Others, Civil Application No.178 of 2006 DSM [unreported]** remarked that:

“..... the need to move the court by a proper provision of the law was only a matter of practice since the days of the Court of Appeal for Eastern Africa (see **Abdul Aziz Suleman V. Nyaki Farmers Cooperative Ltd and Another [1966] EA.409**). This court has however emphasized in a number of decisions that it was necessary to cite the relevant provision from which the court derived the power to hear and determine the matter brought before it.”

In the present application the applicant did not cite the relevant provision from which the court derived the power to hear and determine the application. That reason is enough to dispose of this application but let me consider other important issues in this matter. The respondent has raised an important point with regard to the “affidavit” of the applicant. The said affidavit is purported to have been sworn before one H.K. Mbepo, Commissioner for Oaths but there is no official stamp nor address of the said H.K. Mbepo. It is not also shown where the affidavit was sworn. It is my humble opinion that those omissions are fatal and there is in actual fact no “affidavit” properly so called. That ground is also enough to dispose of the application.

For the sake of argument or discussion let’s assume that the chamber application and the accompanying affidavit were in order,

did the applicant show reasonable or sufficient cause/reasons for the delay? The applicant's argument or reasons for the delay are essentially based on ignorance of the procedural rules governing appeals and lack of financial resources. **The Court of Appeal for Eastern Africa**, held in the case of **Zabitisi Kawuka Vs. Abdul Karim [1938] 5 EACA 37** that “**ignorance of the time in which an appeal must be lodged is no ground for an extension of time**” In the case of **Rozendo Ayres Ribeiro Vs. Oivia Daritta Siqueira E. Fachao and Lilia Ozlinda Pia Daritta Siqueira [1934] Vol.I EACA.1** it was held that mere misunderstanding of the provisions of appeal rules will not amount to special circumstances to warrant extension of time to appeal.

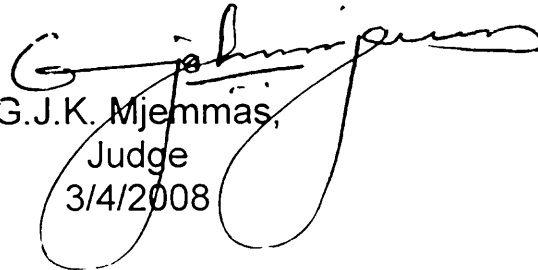
I am aware of some decisions from our courts which have attempted to distinguish the above authorities particularly when it comes to poor and lay persons litigants:- Refer to **Martha Daniel V. Peter Thomas Nnko [1992] TLR.359** and **Ramadhani Nyoni V. M/S Haule & Company Advocates [1996] TLR.71**. I understand the problems and difficulties which many people particularly the poor in this country are experiencing when they pursue their legal rights because of ignorance of the law, poverty and other limitations.

However, ignorance of law and lack of means cannot be good grounds for extension of time to appeal.

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In the present matter the applicant was able to pursue the matter to the Prime Minister's office in Dar es Salaam that means he was not totally incapacitated financially. However as I said before, ignorance of law and lack of means are not sufficient or good reasons to extend the period of limitation to file an appeal.

From the foregoing this application fails and it is hereby dismissed. Each party to bear its own costs.


G.J.K. Mjemmas,
Judge
3/4/2008

Date: 3/4/2008

Coram: Hon. G. J. K. Mjemmas, J.

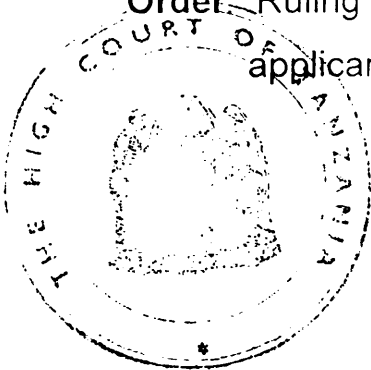
Applicant: Present in person

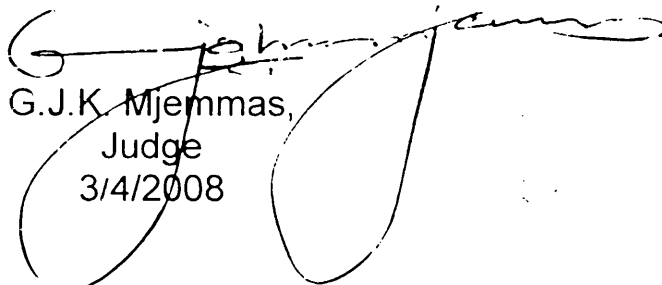
Respondent: Absent with notice/leave

B/C: G. Luoga, RMA

Court: This matter is coming today for ruling.

Order: Ruling delivered today 3/4/2008 in the presence of the applicant and absence of the respondent.




G.J.K. Mjemmas,
Judge
3/4/2008