

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

MISCELLANEOUS CIVIL APPLICATION NO 65 of 2010

MWINYISIMBA MOHAMED.....APPELLANT

VS

FARIDA SALUM.....RESPONDENT

Ruling

Date of last Order: 04-02-2011

Date of Ruling: 01-03-2011

JUMA, J.:

This is an application by Mwinyisimba Mohamed which he brought by way of chamber application under section 14-(1) of the **Law of Limitation Act, Cap. 89**. The applicant is seeking an extension of time within which to file an appeal out of time against the Judgment and Decree of the District Court Temeke which was delivered on 15th July 2009 by Kayombo-**DM**. The Applicant was a defendant at the Primary Court of Kigamboni where the Respondent (Farida Salum) had filed a Matrimonial Case No. 6 of 2007. The Judgment of the Primary Court was delivered on 17th March 2008 by Ikanda-**PCM**.

Dissatisfied with the decision of the Primary Court, the Applicant appealed to the District Court of Temeke.

The Applicant found himself out of time because instead of appealing against the decision of the District Court, he asked this Court (Massengi, J.) to call and inspect the record of proceedings in the District Court of Temeke (Civil Appeal No. 11 of 2008) and Kigamboni Primary Court (Matrimonial Cause No. 6 of 2007) to satisfy itself as to their correctness, legality and propriety. The Applicant was again unsuccessful because this Court (Massengi, J.) ruled that instead of asking the High Court to call and inspect the records of the District Court the Applicant should have sought an appeal.

After failing to proceed by way of revision, the Applicant would now like an extension of time to enable him to appeal against the decision of Temeke District Court which was delivered on 15th July 2009. The reasons the Applicant has advanced to explain why he could not appeal immediately after the Judgment and Decree of the District Court on 15th July 2009 are to be found in paragraphs 6, 7, 8 and 9 of his affidavit which basically are-

- i) Thinking that the remedy against the decision of the District Court was revision proceedings, he immediately filed revision proceedings in this Court.

Had he known that the proper remedy was an appeal, he would have filed that appeal within time;

- ii) His intended grounds of appeal which he has annexed to this application stand an overwhelming chance of success.

The application was opposed by the Respondent Farida Salum who affirmed a counter affidavit and made an oral submission on 4th February 2011 basically reiterating that decision to opt for a revision instead of lodging an appeal was due to the negligence of the Applicant and his Advocate and does not constitute sufficient reason to allow an extension of time to allow the Applicant to appeal to this Court. Submitting in support of the application for extension of time, Mr. Mwambene the learned Advocate for the applicant advanced the reason that applicant's intended appeal against the decision of District Court of Temeke (Civil Appeal No. 11 of 2008) fell out of limitation period because he had initially opted for revision proceedings under section 79 of the **Civil Procedure Code, Cap 33** and section 30 (i) (a) and (b) of the **Magistrates Courts Act, 1984**.

I have considered the affidavits together with above submissions. I am of the opinion that in the interests of justice the applicant should be granted leave to pursue an appeal

to this court. This court has on several occasions held that the **Civil procedure Code, Cap. 33** does not apply to proceedings originating from primary court. An appeal to the High Court from the decision or order of the District Court in proceedings originating from the Primary Court has to be filed within 30 days of such decision or order, according to section 25-(l) of the **Magistrates' Courts Act, 1984**.

There is a proviso however, that the High Court may extend the time for filing such appeal. Even so, there must be sufficient reason to make the High Court exercise its discretion to extend the time, for the High Court in exercising its discretion it must act judicially. To act judicially implies acting for good or sufficient reason. In the case of **Martha Daniel v Peter T Nko 1992 TLR 359** Mroso J. (as he then was) held that a plea by a lay person that he be allowed to file an appeal out of time in an appropriate court after his earlier appeal has been struck out or is voluntarily withdrawn from the High Court because it had been wrongly filed there, but timely, constitutes a sufficient reason.

I have taken into account that the Applicant lodged his earlier application for revision within prescribed time before it was struck out by this Court (Massengi, J.). I am persuaded by the decision of this Court in **Martha Daniel v Peter T Nko 1992**

(supra) and I am prepared to hold that although the Applicant was represented by a learned Advocate when he filed that application which was struck, he should all the same be accorded leave to lodge an appeal to this Court.

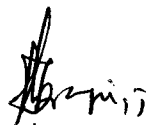
From the foregoing, the applicant has assigned sufficient reason to explain what prevented him from lodging an appeal within the prescribed period and is hereby granted 14 days within which lodge its appeal. No order is made on costs.

It is ordered accordingly.



I.H. Juma
JUDGE
01-03-2011

Delivered in Court Chambers in the presence of: **Abdallah Gonzi, Advocate (for Mwambene, Adv.) for the Applicant and Farida Salum (Respondent).**



I.H. Juma
JUDGE
01-03-2011

