IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CIVIL APPEAL NO. 84 OF 2011.

(Original Civil Revision No. 26 of 2010, in Ilala District Court)

MEHBOOB FAZAL RAWJI.....APPELLANT

VERSUS;

MURTAZA FAZAL.....RESPONDENT.

RULING;

14/12/2011 & 04/04/2012

Utamwa, J.

This is a ruling on a Preliminary Objection (PO) raised by the respondent, **Murtaza Fazal** against the appeal preferred by **Mehboob Fazal Rawji,** the appellant, against a decision of the District Court of Ilala District (the District Court) in Civil Revision No. 26 of 2010. The PO is based on a single point of law that the appeal is hopelessly time barred. In this squabble which was argued by way of written submissions the appellant was represented by Mr. **Samaha** learned Counsel from IMMA advocates (a Lawyers' Firm) while the respondent was advocated for by **Mr. Marwa** from Crest Attorneys (also a Lawyers' Firm).

In his written submissions in chief supporting the PO the learned Counsel for the respondent argued that; this appeal is against a decision of the District Court exercising its revisional powers over a decision of a Primary Court. The

ruling was delivered by the District Court on 19th May, 2011 (Hon. Minde, SRM) and the certified copies of the ruling and drawn order (the copies in short) were ready for collection by 26th May, 2011. The learned Counsel contended further that the memorandum of appeal was filed in this court on 16th August, 2011 being 89 days from the date of the ruling and 82 days from the date when the copies were ready for collection. The Counsel further argued that the appeal was time barred because S. 25 (1) (b) of the Magistrates Court Act, 1984 (Cap. 11, R. E. 2002) read together with rule 3 of the Civil Procedure (appeals in proceedings originating in primary courts) Government Notice (GN.) No. 312 of 1964 requires appeals of this nature to be filed within 30 days from the date of decision or order, in which said case the High Court may extend the time of appealing. He also submitted that under the above cited provisions of the law an application for extension of time for appealing must be in writing showing reasons for the delay and may be accompanied by a memorandum of appeal.

Again, the learned Counsel for the respondent put it that, in the matter at hand the appellant filed the appeal out of time without obtaining any leave of this court as required by the law cited above; hence the appeal is liable to be dismissed under S. 3 and 46 of the Law of Limitation Act, (Cap. 89, R. E. 2002). He cited the decision of this court in **George Raphael v. Pastory Rwehabula [2005] TLR. 99** (the George Raphael Case) to fortify his contention. He thus urged this court to dismiss the appeal with costs.

In reply to the submissions in chief, the appellant's Counsel did not essentially dispute most of the arguments advanced by the respondents Counsel. He only argued that the provisions cited by the respondent's Counsel must be read together with S. 19 (2) of Cap. 89 which provides to the effect that in computing the period of limitation prescribed for an appeal, the day on which the decision

complained of was delivered and the period of time requisite for obtaining a copy of the decree or order appealed from shall be excluded. He thus argued that, though the ruling was delivered on 19th May, 2011, the appellant's Counsel was supplied with the copy of the drawn order on the 12th of July, 2011 after he had written to the court applying for the copy of the decree on the 9th June, 2011. The leaned Counsel also contended that the drawn order supplied to him on 12th of July, 2011 was badly dated, so he had to write again to the court on 18th July, 2011 asking for a properly dated drawn order. The bad drawn order was rectified by a Court Clerk by inserting the word "May" by a blue pen into it without it being signed by the magistrate to vindicate the changes. This second irregularity thus compelled the appellant's Counsel to seek for another rectification by asking for a signature of the magistrate, which said process took time up to 28th day of July, 2011 when he obtained the properly dated drawn order. The learned Counsel thus attached to his submissions some documents (including correspondence letters to the District Court, exchequer receipt dated 12/7/2011 and the said badly drawn orders) to support his debate. For these facts he argued, it cannot be said that the copy of the drawn order was ready for collection on 26th May, 2011 as contended by the respondent's Counsel

The appellant's Counsel thus submitted that, by excluding the period as per S. 19 (2) of Cap. 89 and computing the time from the 28th July, 2011 (when the proper drawn order was availed to him) to the 16th day of August, 2011 (when the appeal was filed), one finds that only twenty (20) days had expired, hence it cannot be said that the appeal is time barred. The leaned Counsel for the appellant cited the decision of this court in **Exim Bank v. Walter Buxton Chipeta [Commercial Appeal No. 4 of 2009]** (the Exim Bank case) by Makaramba, J. in supporting his argument in respect of the legal requirement for excluding the period envisaged

under S. 19 (2) of Cap. 89. He thus, urged this court to overrule the PO and proceed to determine the appeal on merits.

In his rejoinder, the learned Counsel for the respondent argued that according to the **George Raphael** Case (supra), S. 19 (2) of Cap. 89 is concerned with exclusion of time requisite for obtaining a copy of decree or order and not of Judgment. He added that, attaching a copy of decree or judgment is a requirement in appeals originating in District or Resident Magistrates Courts only, and that this requirement is not applicable in appeals originating in primary court. He also submitted that according to the wording of rule 3 of GN. No. 312 of 1964 (supra), the reasons why an appeal was delayed are adduced in an application for extension of time and not otherwise.

The main issue before me is therefore, *whether or not in law this appeal is time barred.* From the above arguments, it is not disputed by the parties that the law cited above requires an appeal of this nature to be filed within 30 days from the date of the impugned decision, in which said case the High Court may extend the time for filing the appeal upon the appellant/applicant adducing good reasons for the delay. The parties are also not in dispute on the statutory requirement for excluding the period envisaged under S. 19 (2) of Cap. 89. Furthermore, the parties are at one that the appeal at hand was in fact filed after the expiry of 30 days from the date of the delivery of the ruling complained of (i.e 89 days after the date of ruling). The main point of contention between the parties is on the procedure for exclusion of the period envisaged under S. 19 (2) of Cap. 89. In essence the respondent's Counsel argued that the exclusion of the period can only be considered in an application for extension of time in which said case the court gives leave for the exclusion of the period, hence the extension of time, which said procedure was not followed by the appellant in the matter under discussion. It is

also apparent that the respondent is alternatively arguing that S. 19 (2) of Cap. 89 is not applicable in this appeal. On his part, the appellant's Counsel is of the view that the exclusion envisaged under S. 19 (2) of Cap. 89 is automatic and an appellant can exclude the period himself and file the appeal after the expiry of the 30 days from the date of the impugned decision without any leave of the court as he did in this matter. The sub-issue here is therefore; *whether or not the appellant in the matter at hand was in law, entitled to file this appeal after the expiry of 30 days from the date of the impugned ruling (i. e. 89 days thereafter) upon excluding the period envisaged under S.19 (2) of Cap. 89 himself and without any leave of the court.*

It is probably indispensable to have all the pertinent provisions of law cited above reproduced for the sake of a readymade reference; S. 25 (1) (b) of Cap. 11, R. E. 2002 reads thus;

> *"Save as hereinafter provided; 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 there from 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"*

Rule 3 of GN. No. 312 of 1964, which said GN is made under the Judicature and Application of Laws Act (Cap. 358, R. E. 2002) and couched in the following terms;

> *"An application for leave to appeal out of time to a district court from a decision or order of a primary court or to the High Court*

from a decision or order of a district court in the exercise of its appellate or revisional jurisdiction shall be in writing, shall set out the reasons why a petition of appeal was not or cannot be filed within thirty days after the date of the decision or order against which it is desired to appeal, and shall be accompanied by the petition of appeal or shall set out the grounds of objection to the decision or order: Provided that where the application is to a district court, the court may permit the applicant to state his reasons orally and shall record the same".

As to the provisions of S. 19 (2) of Cap. 89, they are paraphrased in the following pattern;

*"**In computing the period of limitation prescribed for an appeal,** an application for leave to appeal, or an application for review of judgment, the day on which the judgment complained of was delivered, and **the period of time requisite for obtaining a copy of the decree or order appealed from or sought to be reviewed, shall be excluded".*** (bold emphasis is mine).

Upon reading the above quoted statutory provisions, my settled view is that, as rightly submitted by the Counsel for the respondent, this being an appeal originating in primary court, is indeed mainly governed by the provisions of S. 25 (1) (b) of Cap. 11, R. E. 2002 and rule 3 of GN. No. 312 of 1964 which are to the effect that an appeal of this nature must be filed within 30 days from the date of the impugned decision, unless the High Court extends time for filing the appeal upon the party aggrieved by the decision of the District Court filling an application for extension of time and adduces sufficient grounds for the delay, which said

application must follow the tune of rule 3 of the GN. No. 312 of 1964. These provisions [S. 25 (1) (b) of Cap. 11 and rule 3 of GN. No. 312 of 1964] form the major law governing the procedure of such appeals, and in this ruling I will proceed to consider and refer to them as such.

I also agree with the decision of this court in the case of **George Raphael** (Luanda, J. As he then was), cited by the respondent's Counsel (supra) that S.19 (2) of Cap. 89 does not apply in appeals originating in primary courts because under the major law governing such appeals, there is no any requirement for attaching a copy of the decree or order appealed from. This court (Msofe, J. as he then was) was of the same view in **Nakayo Samwel v. Titos Lema, High Court Misc. Civil Review No. 5 of 2002, at Arusha** and **Tumuti Saruni and Lakindi Saruni v. Edward L. Meiyani, High Court Civil Review No. 1 of 2002, at Arusha.** It is for this ground that I distinguish the decision in the case of **Exim Bank v. Walter Buxton Chipeta** (cited by the appellant's Counsel supra) because it decided on an appeal originating in a District Court and not in a primary court like the one at hand. For this only reason, I am justified to determine the sub-issue posed above negatively. This course accordingly rationalizes me to answer the main issue positively that the appeal is indeed time barred. However, before I formerly make the findings in respect of the sub-issue and the main issue, I will engage myself into a discussion that I find significant in view of making the law clear for the sake of better future practice.

My observation is that, even if it is assumed (of course without holding) that S.19 (2) of Cap. 89 is applicable in this appeal, I could not find the sub-issue and the main issue in favour of the appellant on the following grounds; the right to exclude the period envisaged under *S. 19 (2) of Cap. 89* is not automatic and arbitrarily exercised by the appellant as the Counsel for the appellant wants to

suggest. In my view, an appellant who wants to exclude such period has a duty to first prove to the satisfaction of the court (and not to his own satisfaction) that such period was indeed necessary for him to obtain the copy of the decree or order, and the best forum according to the major law governing such appeals (cited supra) is in the application for extension of time where a chamber application supported by an affidavit will be considered. The appellant will thus prove (through that application) that the period to be excluded was in fact necessary for him to obtain the copy. That proof will be through his affidavit which in law is a means of proof that takes place of oral evidence; see the remarks of this court in **Asibu Nyemba v. Gidion Mwakapalila, Civil Appeal No. 47 of 2003, at Mbeya** and that of the **TCA in Zuberi Mussa v. Shinyanga Town Council, Court Of Appeal Civil Application No; 100 of 2004, at Mwanza.** Such an appellant cannot therefore, be heard vindicating the exclusion of that period through submissions in a preliminary objection the way the appellant in the matter at hand tried to do, this is because such submissions do not carry any evidential value in law; see the holding by the TCA in the case of **The Assistance Imports Controller (B.O.T) Mwanza v. Magnum Agencies Co. L.T.D. Civ. Appeal No; 20 of 1990 , at Mwanza** (unreported). It is thus also true that even the documents which the appellant attached with his replying submissions cannot be good evidence in law. Such documents ought to have been considered in an application for extension of time to appeal out of time on the ground that the appellant had the right to exclude the period envisaged under *S. 19 (2) of Cap. 89* (i.e by proving that the period to be excluded was indeed necessary for him to obtain the copy of order).

Had the law been so lenient in permitting parties to arbitrarily exclude the period envisaged under *S. 19 (2) of Cap. 89* themselves and file appeals out of time without leave of court as the appellant wants to envisage, flood gates of

unnecessarily delayed appeals would be opened and chaos in courts of law would be the order of the day because, dishonest litigants would hide themselves under that loophole and deliberately bring to court delayed appeals under the pretext of excluding that time for themselves without any sufficient cause. I am settled in mind that the legislature did noy intend to accommodate such an absurd situation by enacting S. 19 (2) of Cap. 89 for, that trend would surely render the law of limitation a nugatory command, which said situation cannot be condoned by courts of law for the significance of the law of limitation in civil litigations.

The worth of the law of limitation in civil litigations has been religiously underscored by courts, and parties coming to court must indeed abide with it; this court in **Tanzania Breweries Ltd v. Robert Chacha, HC Civil Revision No. 34 Of 1998, at Dar Es Salaam** (Katiti, J. as he then was) following the English case of **R. B. Policies At Lloyds v. Butler (1950) 1 KB. 76, at 81or (1949) 2 ALL ER 226 at 230** remarked to the effect that the reasons why we should have the Statutes of limitation are *inter alia* that long dormant claims have more of cruelty than justice in them and the person with good cause of action, should pursue his right with reasonable diligence. It was further remarked in that English Case (at pages 229-230) that principles underlying the law of limitation include the following; that those who go to sleep on their claims should not be assisted by the courts in recovering their property, there shall be an end of matters filed in court, and there shall be protection against stale demands. Again, here at home the TCA emphasized the importance of the law of limitation in the **Hezron Nyachiya v. Tanzania Union of Industrial Commercial Workers and another, Civil Appeal No. 79 of 2001** by observing that the Law of Limitation plays many roles including to set time limit within which to institute proceedings in a court of law and to prescribe the consequences where proceedings are instituted out of time without

leave of the court. I would add here the essence of the law of limitation is the same both in suits and in appeals like the one under discussion.

It is for this essence of the law of limitation and for avoidance of the absurd situation mentioned above that courts should always stick, as I would certainly do, to the *'Purposive Approach'* technique of statutory interpretation which urges them to construe statutory provisions in a manner that will avoid absurdity and unjust situations. This method of statutory construction was adopted into our jurisdiction from English practice; see the holding by the Court of Appeal in **Goodluck Kyando v. Republic, Criminal Appeal No; 118 of 2003, at Mbeya** (unreported, at page 16-18), following its previous decision in **Joseph Warioba v. Stephen Wassira and another [1997] TLR. 272** and the English decision in **Nothman v. London Borough of Barnet [1978] 1 ALL ER. 1243.**

Recently, in the case of **TANESCO v. Christopher Bita Makunja, HC Civil Appeal No. 42 Of 2011, at Dar Es Salaam,** I was faced by an issue similar to the one at hand and my views were as demonstrated herein above and I still vindicate it in this matter at hand. This stance is in fact supported by the decision of this court in **M/S Concrete Structure v. Simon Matafu, HC Civil Case No. 12 of 1995, at Mbeya** (Lukelelwa, J), the envisaging in **Elly Ngole and 2 others v. Jactan Sigala, HC Misc. Civil Appeal No. 14 of 2004, at Mbeya** (Othman, J as he then was) and in **NBC v. Pima Phares, Civil Appeal No. 33 of 1997, at Mwanza** (by Mrema, J. as he then was). In the **M/S Concrete Structure** case where an application for review was under consideration the court discussed the procedure for excluding the period envisaged under S. 19 (2) of Cap. 89, which said procedure I find to be applicable *mutatis mutandis* to appeals like the one under discussion. In that case the applicant (for a review) arbitrarily excluded the period of time requisite for obtaining a copy of the ruling and filed the application

for review out of time without any leave of the court the way the appellant filed this appeal at hand. This court remarked, and I quote for a quick reference;

> *"Any application beyond that date has to be with leave of the court.* ***It is the court which will have to extend the period if it is satisfied that the applicant obtained the copy of the ruling late, it is not the applicant who have to exclude the period necessary to obtain the copy of the ruling"*** (bold emphasis is provided).

It could not therefore, be open for the appellant in the matter at hand to automatically and arbitrarily exclude the time for himself and file the appeal out of time without any leave of the court. He had the duty to file the appeal in time according to S. 25 (1) (b) of Cap. 11 or upon finding himself out of time for not obtaining the copies promptly, to apply before this court for it to extend the time by excluding the period of time under S. 19 (2) of Cap. 89, in which said case he had to first adduce sufficient cause by proving that the time to be excluded was indeed necessary for him to obtain the copy of the impugned order. It must be born in mind that, in law a right to appeal can only be founded on the relevant statute, and any party who intends to exercise that right must strictly comply with the conditions prescribed by the applicable statute; see the prudence of the TCA in **Ludovick K. Mbona v. National Bank Of Commerce [1997] TLR 26** following **Harnam Singh Bhogal t/a Harnam A. Singh & Co v. Jadva Karsan [1953] 20 EACA 17).**

I am also of the firm view that, by virtue of the doctrine of *stare decisis* as it applies in our jurisdiction, and for the grounds I have demonstrated above which I firmly believe to be cogent, I could not be bound by the decision in **Exim Bank** case (cited by the appellant supra) for being decided by my brother Judge of this same court with whom we enjoy concurrent jurisdiction. I could therefore, be

justified to depart from that decision upon satisfying the requirement for such departure as set by the TCA in the case of **Ally Linus and Eleven Others v. Tanzania Harbours Authority & The Labour Conciliation Board Of Temeke District [1998] TLR 5** in which said case it was held to the effect that, a judge of this court cannot lightly depart from the considered opinions of his brethren unless he adduces good reasons for that course.

For the above reasons, I determine the sub-issue posed above negatively to the effect that the appellant was not in law, entitled to file this appeal after the expiry of 30 days (i.e. 89 days) from the date of the impugned ruling upon the purported exclusion of the period envisaged under S.19 (2) of Cap. 89 and without any leave of the court. Having negatively answered the sub-issue I determine the main issue posed above positively to the effect that this appeal is indeed time barred.

A sub-issue that arises at this juncture is; *what is the legal remedy for this matter being a time barred appeal*? The provisions of S. 3 (1) of Cap. 89 are clear that a time barred matter has to be dismissed and not otherwise. S. 3 of Cap. 89 applies to appeals of this nature by virtue of Ss. 43 (f) and 46 of the same Cap. 89 because, by reading the major law governing appeals of this nature, I do not see any contrary intention (that the legislature intended to exclude the applicability of S.3 of Cap. 89 in such appeals), this is how one can determine whether or not certain provisions of Cap. 89 apply to proceedings governed by other statutes, see also the envisaging in the case of **Hezron Nyachiya** (cited supra). Courts of this land have also been positive that the consequences of s. 3 of Cap. 89 is none other than a dismissal order; see the **Hezron Nyachiya** case (supra), the **M/S Concrete Structure** case (supra), the **Tanzania Breweries Ltd** case (supra) and **Hashim Madongo and 2 others v. Minister for Industry and Trade and 2 others, Civil**

Appeal No. 27 of 2003, at Dar es salaam (by the Court of Appeal). Other decisions supporting this view are **Koja Shia Ithnasheri Jamaat and another v. Modest Rutanyagwa, Civil Appeal No. 19 Of 2007 at Dar Es Salaam (by the High Court)** and **Stephen Masato Wasira v. Joseph Sinde Warioba and the Attorney General [1999] TLR. 334.** For the above reasons I agree with the respondent that this appeal is liable for being dismissed.

For the foregoing reasons I hereby uphold the PO raised by the respondent and I consequently dismiss the appeal with costs. It is so ordered.

J. H. K. UTAMWA

JUDGE.

04/04/2012.

Date; 04/04/2012

CORAM; Hon. Utamwa, J.

Appellant; Mr.Marwa (advocate) for Fatma Karume (advocate).

Respondent; Mr. Marwa (advocate).

BC; Mrs. Kaminda.

Court; ruling delivered in the presence of Mr. Marwa, learned Counsel for the respondent who also holds briefs for the Counsel for the appellant this 4th day of April, 2012.

J. H. K. UTAMWA.

Judge.

04/04/2012