

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

MISCELLANEOUS LAND APPEAL NO. 66 OF 2010

**(From the Decision of the District Land and Housing Tribunal of
Kinondoni District at Magomeni in Land Appeal No. 97 of 2005 and
Original Ward Tribunal of Mbezi Luis Ward in Application No. 163
of 2005)**

**ZAKAYO ELIA APPELLANT
VERSUS
JOSEPH MWANGAKE RESPONDENT**

RULING

MWAMBEGELE, J.:

The preambular statement to the grounds of appeal in the Petition of Appeal has the following words:

*“The Appellant ZAKAYO ELIA, appeals against
the judgment of the Kinondoni District Land*

and Housing Tribunal, at Magomeni in Land Case No. 97 of 2005 by Hon. Chairperson J. T. Kaare dated the 16th (sic) day of March, 2009 (Certified on 16th day of April, 2010) for the following reasons ...”

As will be clear shortly in this judgment, the words as bracketed in the above quotation are pregnant with meaning.

On 19.10.2011 this court ordered that the Preliminary Objection filed by the Respondent be argued by way of written submissions and the submission dates were scheduled accordingly. After fixing several dates of ruling, today 27.03.2012 was fixed as a date of ruling and the case reassigned to me. However, this ruling is not in respect of the preliminary objection as expected; it is on something else raised by this court *suo motu*. It answers the issue whether or not the appeal was filed within the prescribed time limit.

This appeal was filed on 28.05.2010. The judgment of the District Land and Housing Tribunal which is appealed against is dated 06.03.2009 but was certified on 16.04.2010. It is my argument that the appeal was filed out of time in clear contravention of the provisions of Section 38 (1) of the Land Disputes Courts Act, Cap. 216 of the Laws of Tanzania (hereinafter referred to as Cap. 216) as amended by the Written Laws (Miscellaneous Amendments) Act, 2010. This provision provides for time within which a party who is aggrieved by the decision or order of the District Land and Housing Tribunal on matters originating from the Ward Tribunal and revisions thereof, may appeal to this court. It reads:

“Any party who is aggrieved by a decision or order of the District Land and Housing Tribunal in the exercise of its appellate or revisional jurisdiction, may within sixty days after the date of the decision or order, appeal to the High Court:

Provided that the High Court may for good and sufficient cause extend the time for filing an appeal either before or after such period of sixty days has expired”.

Having been commenced in the Mbezi Luis Ward Tribunal, and given the fact that the judgment and decree of the District Land and Housing Tribunal which are being appealed against are dated 06.03.2009, the Petition of Appeal ought to have been filed within sixty days after the date of decision; that is, by 05.05.2009. In the absence of any order of this court extending time within which to file this appeal, I find myself not properly seized or vested with the requisite jurisdiction to entertain it.

For the avoidance of doubt, let me be clear that in appeals under Section 38 of Cap. 216, time starts to run against an aggrieved party on the date on which the judgment appealed against is pronounced. Of course, in computing such period of limitation Section 19 (1) of

the law of Limitation, Cap. 89 (hereinafter Cap. 89) will be invited into play. Section 38 of Cap. 216, does not put as mandatory any document to accompany the Petition except the Petition itself. A copy of judgment or ruling or order appealed against must not necessarily be accompanied by a petition of appeal at the time of filing. Actually, the way subsections (2) and (3) of Section 38 of Cap. 216 (as amended) are couched, it suffices if only a Petition of Appeal is filed in the District Land and Housing Tribunal and the requisite fees paid. After the filing and requisite fees are paid, the Tribunal will thereafter dispatch the petition together with the record of the proceedings to this Court within fourteen days. Let the subsections speak for themselves:

“(2) Every appeal to the High Court shall be by way of petition and shall be filed in the District Land and Housing Tribunal from the decision, or order of which the appeal is brought.

(3) Upon receipt of a petition under this section, the District Land and Housing Tribunal shall within fourteen days dispatch the petition together with the record of the proceedings in the Ward Tribunal and the District Land and Housing Tribunal to the High Court”.

Luanda, J. (as he then was) was faced with an identical situation when interpreting Section 25 (3) of the Magistrates’ Courts Act, Cap. 11 (hereinafter Cap. 11) which is *in pari materia* with subsection (2) above in ***Gregory Raphael Vs Pastory Rwehabura***, 2005 TLR 100. Subsection (3) of Section 25 of Cap. 11 reads:

“Every appeal to the High Court shall be by way of petition and shall be filed in the district court from the decision or order in respect of which the appeal is brought:”

His Lordship, after asking himself as to when does time of appeal to the High Court start to run against an appellant who seeks to contest

the decision of the District Court on matters originating from Primary Courts, held at p. 105 that:

"Attachment of copies of decrees and judgment is a condition precedent in instituting appeals originating from District Courts and courts of resident magistrate."

His Lordship went on:

"But the position is different in instituting appeals in this court on matters originating from Primary Courts. Attachment of copies of decree or judgment along with petition of appeal is not a legal requirement. The filing process is complete when petition of appeal is instituted upon payment of requisite fees"

He concluded that time of appeal starts to run against the appellant from the date the judgment appealed against is pronounced. In computing the time of limitation, no time is excluded, for attachment of judgment and decree are not a mandatory requirement.

The position in respect of appeals under Section 38 of Cap. 216 was well expounded by Mgetta, J. in a recent decision (delivered on 14.8.2012) in the case of ***Fadhila Ally Vs Alex Holela***, Miscellaneous Land Case Appeal No. 05 of 2011 (unreported) in the following terms:

“... the appellant is not necessarily required to attach copies of decree and judgment to petition of appeal as the attachment of such copies is not a condition precedent in instituting appeals originating from Ward tribunals. The filing process of the petition of appeal to the High Court is complete upon presenting it and payment of the requisite fees in the Tribunal”.

In the light of the above two cases, it is clear therefore that in instituting appeals to this court on matters dealt with the District Land and Housing Tribunal in its appellate or revisional jurisdiction, attachment of copies of decree or judgment is not a legal

requirement. The filing process is complete when a petition of appeal is instituted in the District Land and Housing Tribunal upon payment of requisite fees. Thus, in computing the time of limitation, no time is excluded. Time starts to run against an aggrieved party right from the date of judgment of the District Land and Housing Tribunal which the intended appellant seeks to challenge.

It is evident therefore that the Appellant in the present case wasted his precious time - more than a year - waiting for a copy of judgment so as to file his petition. He could have filed the petition of appeal without a copy of judgment and it could be fine before the eyes of the law. Time started to click against him on 06.03.2009 when the judgment appealed against was pronounced.

The court is not properly moved if an appeal is filed out of the prescribed time. That is the reason why I raised this issue *suo motu*.

There is a line of decisions of the Court of Appeal; the highest court of the land, which give me strength so to do. These cases include ***Michael Leseni Kweka Vs John Eiliafe***, Civil Appeal No. 51 of 1997 (unreported), ***Faustine G. Kiwia and Another Vs Scolastica Paulo***, Civil Appeal No. 24 of 2000 (unreported) and ***Nicomedes Kajungu & 1374 Others Versus Bulyankulu Gold Mine (T) LTD*** Civil Appeal No. 110 of 2008 (unreported), to mention but a few.

For instance, in the ***Nicomedes Kajungu*** Case (supra) the Court of Appeal, Speaking through Othman, J. A (now Chief Justice of Tanzania) held:

*“...it is the duty of the Court to satisfy itself that it is properly seized or vested with the requisite jurisdiction to hear and determine a matter. It is a well settled principle that a question of jurisdiction ... goes to the root of determination – see ***Michael Leseni Kweka V. John Eiliafe***, Civil Appeal No. 51 of 1997 (CA) (unreported)”. A challenge of*

jurisdiction is also a question of competence". (Underlining supplied)

Having found that the appeal was filed out of time, what then should I do in the circumstances? This is the question to which I now turn. There are two options. The first one is to have the appeal dismissed in the light of the provisions of Section 3 of the Law of Limitation. This provision read:

"... every proceeding ... which is instituted after the period of limitation ... shall be dismissed whether or not limitation has been set up as a defence".

The second option is to strike it out according to the directions of the Court of Appeal as demonstrated in ***Ngoni-Matengo Cooperative Marketing Union Ltd Vs Alimamohamed Osman***, (1959) EA, and ***Abdallah Hassan Vs VODACOM (T)***, Civil Appeal No. 18 of 2008, (unreported). These cases direct that in situations, as in the present one, where the application is incompetently before the court, the proper course to take should be to strike the appeal out rather than

dismissing it. The distinction between dismissing and striking out an appeal was well articulated by the ***Ngoni-Matengo*** case (supra). At page 580, Windham, J. A speaking on behalf of Sir Kenneth O'Connor, P. and Gould, J.A had this to say:

“... [The] Court, accordingly, had no jurisdiction to entertain it, what was before the court being abortive, and not a properly constituted appeal at all. What this Court ought strictly to have done ... was to “strike out” the appeal as being incompetent, rather than to have “dismissed” it; for the latter phrase implies that a competent appeal has been disposed of while the former phrase implies that there was no proper appeal capable of being disposed of”. (Emphasis supplied).

The above quotation in the ***Ngoni-Matengo*** Case was quoted with approval by the Court of Appeal in ***Abdallah Hassan Vs VODACOM (T)*** (supra). The Court of Appeal reiterated and emphasised the well structured explanation of the ***Ngoni-Matengo*** case in respect of the distinction between “dismissing” and “striking out” an appeal. The defunct Court of Appeal for East Africa sat on 21.05.1959 and 11.06.1959 at Dar es Salaam deciding Civil Appeal No. Dar. 2 of 1959.

The Court of Appeal of Tanzania in the ***Abdallah Hassan*** case (supra) also referred to its decision in ***Thomas Kirumbuyo and Another Vs Tanzania Telecommunications Co. Ltd.***, Civil Application No. 1 of 2005 (CA - unreported) in which, speaking through Lubuva, J. A held:

“From the outset, and without prejudice, it is to be observed that the learned judge having upheld the preliminary objection that the application was hopelessly out of time, and therefore incompetent, should have

proceeded to strike it out. Dismissing the application as happened in this case, presupposes that the application was competent and that it was heard on merits". (Emphasis supplied).

With these decisions of the court of appeal, my way forward becomes simple. It is crystal clear therefore that there is a clear distinction between dismissing and striking out an application, a suit or an appeal as the case may be. Dismissing an application, a suit or an appeal, as the case may be, would signify that the matter has been entertained on merits. While striking out an application, a suit or an appeal, as the case may be, would imply that there was no matter before the court to be entertained on merits. I have declined to entertain this appeal on merits. I find and hold that this appeal was filed belatedly out of time as a result of which, having not sought and obtained leave of this court to appeal out of time, the appeal is incompetently before me. In the light of the authorities

cited above, the appeal deserves the punishment of being struck out as incompetent rather than having it dismissed.

In the upshot, this appeal is struck out for being filed hopelessly out of time. In view of the fact that the appeal has been disposed of on a ground raised by this court *suo motu*, I make no order as to costs.

DATED at DAR ES SALAAM this 27th day of September, 2012.

J. C. M. MWAMBEGELE

JUDGE