

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CIVIL APPEAL NO. 60 OF 2009

HEMED RASHID.....APPELLANT

Versus;

SALMA HUSSEIN.....RESPONDENT

RILING

20/10/2011 & 24/07/2014.

Utamwa, J.

This is a ruling on a preliminary objection (PO) lodged by the respondent, Salma Hussein, against the appeal filed by the appellant, Hemed Rashid. The PO is based on a single point that, the appeal is hopelessly time barred. For this point the respondent urged this court to dismiss the appeal with costs. The PO was disposed of by way of written submissions. The appeal is against the Judgement of the District Court of Ilala District, at Samora (exercising its appellate jurisdiction), in Civil Appeal No. 33 of 2009, originating from Matrimonial Cause No. 43 of 2008, at Kariakoo Primary Court.

In supporting the PO the counsel for the respondent (Women Legal Aid Centre) briefly argued that according to s. 25 (1) (b) of the Magistrates Court Act, Cap. 11 R. E. 2002 an appeal against the decision of a District Court exercising appellate jurisdiction must be filed in the High Court within thirty days from the date of pronouncing the decision. But, the impugned decision of the District Court

was delivered on 28 August, 2009 while the appeal was filed in August, 2010 without any colour of right to do so. The appeal was thus out of time and is liable to be dismissed. They cited the cases of **Calico Textile Industries Ltd v. Pyarali Esmail Premji (1983) TLR. 28** and **Francis Itengeja v. Kampuni ya Kusindika Mbegu za Mafuta Ltd (1997) TLR. 148** to support the argument.

In his replying submissions through his learned counsel (Ganrichie & Co. Advocates) the respondent did not dispute the date of pronouncing the impugned Judgement. But he argued that he filed the appeal on 08/04/2010 before the District Court because he delayed to obtain the copy of the impugned judgement and decree which he received on 10/02/2010 and 24/05/2010 respectively. The appellant also submitted that, he had unsuccessfully made various efforts of writing letters to the District Court demanding the copies of Judgement and decree. He also unsuccessfully complained to the Registrar of the High Court for the delay to get the copies. The appellant thus urged this court to exercise its powers under s. 25 (1) (b) of Cap. 11 and extend the time for filing the appeal and decide it on merits. He also relied upon rule 38 (b) and (c) of the Law of Marriage (Matrimonial Proceedings) Rules, 1971, (GN. No. 136 of 1971 as amended from time to time) which gives this court discretion to decide matters of this nature on merits without considering the point of the PO.

In her rejoinder submissions, the respondent reiterated her submissions in chief and disputed the fact that the appellant delayed to obtain the necessary documents. She also argued that, it was the duty of the appellant to first apply for and obtain the extension of time to file the appeal out of time, but he did not do so. The extension of time is not an automatic right, a party seeking it must first furnish sufficient grounds, he contended.

I have considered the arguments by the parties and the record. The main issue before me is therefore whether or not the appeal is time barred. According to the records, it is true that the judgement of the District Court was pronounced on 28 August, 2009 as agreed by the parties. In my view however, the appeal was filed before the District Court on the 8th of April, 2010 vide the exchequer receipt No. 40160131-3 issued against the payment of the filing fees. My view is based on the understanding that according to law, the date of filing a matter in court is the date of paying the filing fees, if any. It follows therefore that the appeal was filed more than seven months after the delivery of the impugned judgement. This was obviously after the expiry of the period of thirty days provided for under s. 25 (1) (b) of Cap. 11 as rightly argued by the respondent. The appellant did not seriously dispute this fact, but he argued that he had good reasons for delaying to file the appeal, being the delay to obtain the copy of judgment and decree despite the efforts he had made; hence he is entitled to the extension of time.

In my view, the assertion by the appellant that he delayed to file the appeal following the delay to get the necessary copies of documents, must be proved by an affidavit and not through submissions for, in law submissions are not evidence. Again, the prayer by the appellant for an extension of time at the stage of arguing the PO cannot be considered because, this is not an ideal forum for that. Section 25 (1) (b) of Cap. 11 on which he pegged the prayer does not give mandate to this court to extend time retrospectively, i. e. after filing an appeal out of time. The appellant could have filed an application for extension of time supported by an affidavit giving reasons for the delay before filing the appeal. The court could then extend the time (if good reasons were adduced) by excluding the time necessary for the appellant to obtain the copy of the judgement or other necessary documents. This is the import of s. 19 of the Law of Limitation Act, Cap. 89 R. E. 2002 and

the envisaging in the cases of **M/S Concrete Structure v. Simon Matafu, HC Civil Case No. 12 of 1995, at Mbeya** (Lukelelwa, J), **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 **NBC v. Pima Phares, Civil Appeal No. 33 of 1997, at Mwanza** (unreported). The appellant did not however, comply with that procedure provided by the law. I thus agree with the respondent that an extension of time is not an automatic right of a party to court proceedings; it must be obtained through an application supported by sufficient grounds.

The provisions of rule 38 (b) and (c) of the Law of Marriage (Matrimonial Proceedings) Rules, 1971 cited by the appellant (supra) essentially provide that in determining any matrimonial appeal like the one at hand, the court shall not be confined to the grounds of objection raised in the memorandum of appeal, but may, after giving the parties an opportunity of being heard thereupon, decide the appeal on any ground not raised in the memorandum of appeal; and it shall decide every appeal according to substantial justice without undue regard to technicalities of procedure and without undue delay. In my views, these provisions do not constitute any better legal shelter for the appellant's delay to file the appeal because, they envisaged a hearing of appeals filed in time and not out of time. The legislature could not have meant to protect time barred appeals by enacting such provisions. Otherwise there could be no need to enact the law of limitation such as the provisions of s. 25 (1) (b) of Cap. 11 (supra) and s. 3 (1) of the Law of Limitation Act, Cap. 89 R. E. 2002 which provides to the effect that time barred matters must be dismissed whether time limitation is set as defence or not.

My further settled views are that, had the law been so lenient in permitting parties to arbitrarily exclude the period of time requisite for obtaining the copies of judgement and decree 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. This follows the fear that dishonest appellants 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 could not have intended to accommodate such an absurd construction of the law because, 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 of law 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 81 or (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, the Court of appeal of Tanzania (CAT) emphasized the importance of the law of limitation in the case of **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 for the consequences where proceedings are instituted out of time without leave of the court. I will add here immediately that the reasons why we should have limitation of time in respect of suits are the same as far as appeals are concerned.

The appellant must also be alerted that in law, a right to appeal can only be founded on the relevant statutes and any party who seeks to avail himself of that right must strictly comply with the conditions prescribed by the statutes, see the prudence of the CAT in **Ludovick K. Mbona v. National Bank Of Commerce [1997] TLR 26** (following the Court of Appeal for Eastern Africa in the case of **Harnam Singh Bhogal t/a Harnam A Singh & Co v. Jadva Karsan [1953] 20 EACA 17**).

For the above reasons, I agree with the respondent that the appeal was time barred and I determine the issue positively. Cap. 11 does not provide for any remedy in respect of a time barred appeal. One must thus resort to s. 3 (1) of Cap. 89 which is conspicuously clear that, a time barred appeal shall be dismissed whether or not limitation has been set up as a defence. I therefore, uphold the PO and accordingly dismiss the appeal. The appellant shall pay the costs in this appeal for, in law costs follow event unless there are good reasons to be recorded for deciding otherwise, which said reasons are lacking in this appeal. It is accordingly ordered.

JHK. UTAMWA

JUDGE

24/07/2014

24/07/2014

CORAM; Hon. Utamwa, J.

For Appellant; Present in person

For Respondent; Present in person.

BC; Mrs. Kaminda.

Court; Ruling delivered in the presence of the appellant and the respondent in chambers, this 24th day of July, 2014, R/A explained.

JHK. UTAMWA

JUDGE

24/07/2014