

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

PC. CIVIL APPEAL NO. 15 OF 2017

*(Originating from Arumeru District Court, Misc. Civil Application No. 37/2016,
Maji ya Chai Primary Court, Civil Case No. 164/2015)*

ABRAHAM SIRAYO.....APPELLANT

VERSUS

NYISAEI JULIUS URIO.....RESPONDENT

JUDGMENT ON APPEAL

S. M. MAGHIMBI, J:

The appellant named above being aggrieved with the decision of Arumeru District Court in Misc. Civil Application No. 37 of 2016, delivered on 20th March, 2017 appealed before this court basing on the following grounds;

1. The Arumeru District Court erred in law and fact when it allowed the respondent to appeal out of time against the judgment in Maji ya Chai Primary Court, Civil Case No. 165 of 2015 in which the Appellant was not a party.
2. The Arumeru District Court erred in law when it allowed Misc. Civil Application No. 37 of 2016 when the respondent and his Advocate were negligent and sloppy in appealing in time

against the decision in the Maji ya Chai Primary Court Civil Case No. 164 of 2015.

3. The Arumeru District Court erred in law when it allowed Misc. Civil Application No. 37 of 2016 when the respondent and his Advocate failed to account for all the period of delay from the 5th day of September, 2016 the day when the decision in the Maji ya Chai Primary Court Civil Case No. 164/2015 was delivered to the 20th day of December, 2016 when the Arumeru District Court in Misc. Civil Application No. 36 of 2016 was filed by the respondent in Arumeru District Court.

Before this court the appellant was represented by Dr. Mchami learned counsel while the respondent appeared in person and unrepresented. The hearing of this appeal proceeded by way of written submissions and both parties filed their submissions accordingly. The brief background leading to this is that the appellant and the respondent herein were the plaintiff and defendant respectively in Maji ya Chai Primary Court Civil Case No. 164 of 2015. At the Primary Court, the Plaintiff claimed against the defendant the sum of Tshs. 801,500/= being the debt she owes him. The matter was decided in the plaintiff's favor and the aggrieved defendant intended to lodge an appeal. She wrote a letter to the court requesting for copy of judgment and decree in order to process an appeal, the documents which were supplied late. She hence lodged the Misc. Civil Application No. 37/2016 applying for extension of time

to appeal. The application was granted and the appellant was aggrieved by the decision hence this appeal.

Arguing the first ground of appeal, Dr. Mchami submitted that it was wrong for the Arumeru District Court to grant the respondent extension of time allowing him to appeal out of time against the judgment in the Maji ya Chai Primary Court Civil Case No. 165 of 2015 in which she was not a party to this case. He pointed that on paragraph (a) of her prayers in her chambers summons before Arumeru District Court, the respondent (then Applicant) prayed that:

"That this Honourable Court be pleased to grant an Order for extension of time to file a Memorandum to appeal out of time to the District Court of Arumeru against the whole decision of Maji ya Chai Primary Court Civil Cause No. 165/2015 of 5 September 2016."

He contended that, the above words shows clearly beyond doubt that the respondent (then Applicant) in Misc. Civil Application No. 37 of 2016 before Arumeru District Court was asking for extension of time of the judgment in Maji ya Chai Primary Court, Civil Cause No. 165/2015 which was delivered on the 5th day of September, 2016. That the same words were clearly repeated by the respondent in paragraph 2 of her Affidavit in support of chambers summons in Misc. Civil Application No. 37 of 2016 in which she stated that;

"That the Applicant and the Respondent were respectively the plaintiff primary Court in which the judgment was delivered in favour of the Respondent herein on 5th September, 2016 ..."

He argued that the respondent named Nyisaeli Julius Urrio was never a party in the Maji ya Chai Primary Court Civil Case No. 165 of 2015 as the parties were Abraham Sarayo who was the plaintiff and Julius John Urrio who was the defendant. He submitted further that when Misc. Civil Application No. 37 of 2016 was being heard before Hon. Buyamba RM, that argument was raised but it was not accepted by the court. That the argument by the respondent that it was only a typing error that she pleaded under paragraph (a) of her chamber summons and paragraph 2 her sworn affidavit that she was a party in the Maji ya Chai Primary Court Civil Case No. 165 of 2015 is of no effect after the appellant has raised this point in his oral reply submission after the respondent (the applicant) had submitted. He therefore prayed the first ground of appeal to be allowed.

Submitting on the second ground of appeal, Dr. Mchami stated that it was wrong for the District Court to grant the respondent extension of time because the reason advanced by the respondent that she received the judgment and the decree late is not a good and sufficient cause at law to warrant a grant of extension of time. He submitted further that it is not a mandatory requirement by law that any one appealing against a judgment/decision of Primary Court must attach a judgment and decree to her/his petition when she appeals to the District Court because the right to appeal to the

District Court in a civil case is provided for under section 20 (1) (b) of the Magistrates Courts' Act, 1984, that;

"(b) in any other proceedings, any party, if aggrieved by order or decision of the primary court, may appeal here from to the district court for which the primary court is established."

As such, he argued that there is no mandatory requirement of attaching a decree to a petition of appeal in a civil appeal from the Primary Court to the District Court. Further that even G.N. 312 Of 1964 known as The Civil Procedure (Appeals in Proceedings originating in Primary Courts) Rules, 1994 does not mandatorily require that any one appealing against a decision of the Primary Court to the District Court must attach a judgment and decree to her/his petition of appeal. He supported his argument by citing the case of **Gregory Raphael versus Pastory Rwehabula, 2005 TLR 99** where it was stated that;

"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 court fees. If attachment with copies of judgment as said by Mr. Rweyemamu, is a condition sine qua non in filing PC civil appeal in this court, I think the rules i.e. The Civil Procedure (Appeals in Proceedings (Appeals in Proceedings originating in

Primary Courts) Rules, 1964 GN.312/1964 would have stated so and in very clear words. The rules do not impose that requirement. So it is not proper to impose a condition which has no legal backing”.

On the same argument, Dr. Mchami also cited the case of **Husna Hassan v. Abdillah Shaban Munga** 2016 TLR 266. He submitted that since Civil Case No. 164 of 2015 was delivered in the presence of the respondent on the 5th day of September, 2016 and the appellant filed his application for extension of time on the 20th day of December, 2016 which is 105 days late without accounting for each day of delay; then it was legally wrong for the District Court to grant the respondent extension of time allowing him to appeal out of time. Based on that, he prayed the decision and order of the Arumeru District Court be quashed, set aside and this appeal be allowed with costs.

In her reply, the respondent submitted that she had earlier filed Misc. Civil Application No. 27/2016 in which she applied for extension of time to file an appeal but the application was struck out after being submitted under the wrong provision of the law. That immediately thereafter, respondent filed the Application No.37/2016 a subject of this appeal. She contended that the District court did not grant the respondent herein an opportunity to file an appeal out of time for the Civil Case No. 165/2016 but Civil Case No. 164/2016. She contended that, the issue of citing Civil Case No.165 of 2015 instead of Civil Case No.164 of 2015 was not a material irregularity

for it did not go to the root of the said application, it is hence a curable defect and the same was also raised before the District Court. She cited the Court of Appeal in the case of **Leila Jalaludin Haji Jamal versus Shaffin Jalaludin Haji Jamal Civil Appeal No.55 of 2003**, (unreported) where it was stated that;

".....the error of citing year 2002 instead of 2001 is a minor curable defect. We, therefore, overrule ground of the preliminary objection"

She submitted that, the decision on whether to grant or to refuse the grant of an application for extension of time is entirely in the discretion of the court. That the discretion is judicial, and it must be exercised judiciously for the ends of justice to be reached and not according to private opinion or arbitrarily. She referred this court to the case of **Lyamuya Construction Company Limited vs Board of Registered Trustee of Young Women Christian Association of Tanzania, Civil Application No. 2 of 2010** (unreported). She argued that in determining whether or not to allow an application for leave to appeal out of time, the court has to consider reasons for the delay as well as likelihood of the success of the intended appeal. To support her argument she referred this court to the case of **Samson Kishosha Gabba versus Charles Kingongo Gabba (1990) TLR 133** where the court stated that in considering an application for extension of time, the court should look at other reasons more than just reasons for the delay.

The appellant submitted further that before ruling on whether or not to allow an application, the Resident Magistrate considered the reasons adduced by both parties and exercised his judicial discretion by allowing the applicant to file an appeal out of time. That he considered sufficient reasons for the delay, the length of the delay, and overwhelming chances of success in appeal. She argued that one of the reasons was that the trial records show an error which needs to be corrected by the District court in an appeal as the Primary Court entertained Civil Case No.164 of 2015 knowing that plaintiff (Appellant herein) had no *locus standi*. That the appellant herein is the Chairman of MBOMAPO SACOSS and respondent herein had borrowed the money from MBOMAPO SACOSS and not from one Abraham Sirayo (Appellant herein) hence the proper party to institute the suit was MBOMAPO SACOSS and not the applicant herein. She contended that, the court had to consider other factors such as reasons for the delay and other sufficient reasons, such as the existence of points of law of sufficient importance, such as illegality of the decision sought to be challenged. She cited the case of **Shamimu Fanuel Vs. Shabani Ally Lesian, Misc. Civil Application No. 28 of 2015** (unreported) which quoted with approval the case of **Joel Silomba versus Republic, Criminal Application No. 5 of 2012** where the Court of Appeal sitting in Mbeya held that;

"it is trite law that in considering whether or not to grant such extension of time, court take into account these factors:-

- (i) The length of the delay*
- (ii) The reason for the delay was the delay caused or contributed by the dilatory conduct of the applicant*
- (iii) Whether there is an arguable case, such as whether there is a point of law or the illegality or otherwise of the decision sought to be challenged and/or*
- (iv) The degree of prejudice to the opposite party if the application is granted.*

She thus submitted that, since the appellant herein is the Chairman of MBOMAPO SACOSS and respondent herein had borrowed the money from MBOMAPO SACOSS and not from one Abraham Sirayo (Appellant herein) the proper party to institute the suit was MBOMAPO SACOSS and not the applicant herein. Based on that, she prayed that this court dismiss this appeal for lack of merits with costs.

In rejoinder, the appellant's counsel reiterated what he stated in his submission in chief and maintained his prayer that this appeal be allowed with costs.

On my part, I have considered the submission of both sides and have gone through the records of this appeal. The first argument raised by Dr. Mchami was that the it was wrong for the trial Resident Magistrate to grant an application for extension of time as the applicant (herein respondent) was not a party in Civil Case No. 165/2015 which the respondent referred in his Chamber Summons

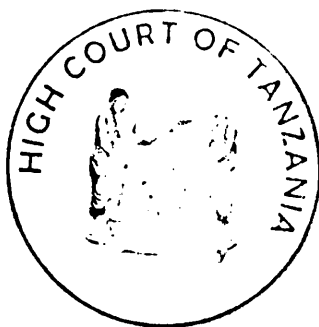
and the Affidavit. I have gone through the records of appeal and as correctly so argued by the respondent, the error of referring to Civil Case No. 165/2015 in her Chamber Summons and Affidavit supporting the application for extension of time instead of referring to Civil Case No. 164/2015 which was intended to be challenged against did not go to the root of the case. As it was held in the referred case of **Leila Jalaludin Haji Jamal** (Supra) the error is a minor curable defect and could after all have been raised by the appellant during the hearing of the intended appeal, that the appellant and not to have formed the basis of the current appeal.


Proceeding with grounds of appeal, in this appeal the appellant seek to challenge the decision of the Resident Magistrate which granted an application for extension of time. The decision to grant or refuse extension of time is discretionary powers of the court, powers which must be exercised judiciously. It is trite law that an order, which is not a decree, is not appealable, unless it is otherwise so provided in any written law. I have thoroughly gone several laws including the Magistrate Court's Act and the Civil Procedure (Appeals in Proceedings originating in Primary Courts) Rules, 1964. G.N. No. 312 of 1964, but have failed to see any law which provides that an order granting an extension of time is appealable. The spirit of the law in appeals is that what should be appealable should be that which has the effect of finally determining the rights of the parties. Question here is, is the order granting an extension of time to appeal in any way determine the rights of parties to finality? The answer is

definitely NO. This order gives room for the parties to have the decision of the law court/tribunal have the scrutiny of the appellate court. Nothing in that order puts finality to the rights of the parties. Had the order been that refusing to grant extension of time then, since the effect would determine the rights of parties to finality; extension of time may be challenged to see whether that was done judiciously. What I see here is a delaying tactic on the part of learned Counsel Dr. Mchami, because the time wasted to prosecute this appeal would have been wisely and economically used to prosecute the intended appeal by the respondent.

Based on that reason, I see no need to dwell on the other grounds of appeal after all; the arguments raised herein are obviously the arguments that would have been raised during the hearing of the intended appeal. This appeal is therefore dismissed. The respondent shall have her costs.

Dated this.....23rd.....day ofAugust....., 2018.




S. M. MAGHIMBI
JUDGE