**AT BUKOBA**

**CIVIL APPEAL NO. 26/2016**

*(Arising from Misc. Civil Cause No. 10/2015 of Bukoba Resident*

*Magistrate's Court of Bukoba)*

**MEDARD KAJUNA ANACRET ---------- APPELLANT**

**VERSUS**

**EUSTACE RWEGOSHORA CHRISTIAN ---------- 1ST RESPONDENT**

**ASST. RETURNING OFFICER KIKUKURUWAR---- 2ND RESPONDENT**

**RETUR. OFFICER KYERWA DISTRICT COUNCIL - 3RD RESPONDENT**

**THE ATTORNEY GENERAL ---------- 4TH RESPONDENT**

**RULING**

*14/3/2018 & 01/06/2018*

Kairo, J.

This ruling is the result of the Preliminary points of objections raised by the Advocate for the 1st Respondent one Advocate Mutagahywa Danstan when

replying to the petition of appeal filed by the Appellant through his Advocate; the Learned Counsel Advocate Joseph Matete. Advocate Mutagahywa raised two points of Preliminary objections as follows:-

1. That the appeal is time barred.
2. The memorandum of appeal is not maintainable in law and thus he prayed the court to dismiss the appeal with cost.

The 2nd – 4th Respondents were jointly represented by Ms. Masule, the State Attorney.

On the hearing date, the counsels for the parties prayed to dispose the P.Os raised by written submission, the prayer which was granted by the court. By consensus the court and the parties drew the schedule for filing of the written submissions, which schedule was accordingly followed. I should point out from the onset that the P.Os were argued by the Learned Counsels for the Respondent who raised it and Advocate Matete for the Appellant who replied the same. Ms Masule opted to be a spectator.

In his submission, Advocate Mutagahwya started arguing the first P.O. contending that the Appellant has filed his appeal out of time without court leave contrary to the legal requirement. He went on that according to Paragraph 2 of part II of the schedule made under section 3 of the Law of Limitation Act, Cap 89 RE 2002, the appeal of such nature is to be filed within 45 days since the delivery of the decision appealed against. He went on to inform the court that, the instant appeal arose from Misc. Civil Cause

No. 10/2015 of the RM's court, Bukoba thus governed by the provisions of the Local Authorities (Election) Act Cap 292 RE 2015. That under the said law, no time limit was given for an aggrieved party to appeal to the High court thus in such a circumstances, the Law of Limitation Act Cap 89 RE 2002 comes into play which provides for 45 days. The Advocate for the 1st Respondent submitted that, the decision which the Appellant is appealing against was delivered on 26/05/2016 and the appeal was instituted on 30/7/2016 which means 64 days later thus out of time prescribed with no leave of the court as required under section 14 (1) of Cap 89 (supra).

He further argued that, the Appellant under paragraph 6 of the grounds of appeal stated that he started making the follow - up of the decision from 26/5/2016 but until 24/6/2016 that is when he was informed by Hon. Maweda that the ruling was ready. He secured the same on 27/6/2017 hence that should be the date to start counting the appeal period. He went on to argue that the contents of paragraph 6 of the memorandum of appeal is not a ground of appeal as per order XXXIX R 1 (2) of the CPC Cap 33 RE 2002, arguing that the said provision demands the memorandum of appeal to set forth the appeal without any argument or narrative and thus paragraph 6, being a reason for delay of filing the appeal, ought to have been narrated and witnessed in the Appellant's affidavit to accompany the application for the extension of time to appeal and not in the memorandum of appeal as was done arguing that the contents of paragraph 6 are matters of evidence which need proof.

He cited the case of *Ponsian Baitataffe vrs Khalid S. Husein; Civil Appeal No. 28/2016 High Court Bukoba (unreported)* at page 7 to bolster his argument.

He went on adding that the right of action to appeal is deemed to have accrued on the judgment date as per section 6 (j) of Cap 89 (supra). Thus section 19 (2) of the Act simply provides one of the reasons sufficient to enable the court under section 14 (1) of the Limitation Act extend the limitation period for institution of an appeal. He argued this to be due to the fact that, the time requisite for obtaining the copy of the order appealed against need to be first ascertained and approved by the court through an application by the party wishing to appeal out of time. He went on that section 19 (2) of the Law of Limitation doesn't give an automatic reason to file an appeal out of time without first seeking the leave of the court to extend the period of limitation.

Advocate Mutagahywa cited the case of *Mrs. Kamiz Abdulla MD vrs Registrar of Buildings and Miss Hawa Bayona (1988) TLR 199* to support his argument. He further argued that the wording of section 14 (1) of Cap 89 has given an option that, an intending Appellant has a chance to lodge an application to extend the period of limitation even in contemplation that the decision to be appealed against is likely to be delayed, as such an intending appellant cannot rely on section 19 (2) of the same Act to lodge an appeal without first applying for the extension of the period of limitation. The Advocate concluded by praying the court to invoke section 3 of Cap 89 to dismiss this appeal.

As for the 2nd ground, Advocate Mutagahywa argued that the Appellant is seeking to appeal against the orders which are not appealable. In amplifying his argument, the Advocate contended that for an order to be appealable it must have a final effect as enunciated in the case of *Bazson vrs. Attrinchan Urban District Council (1903) I KB 948* which was adopted by the Court of Appeal in the case of *Murtaza Ally Mangungu vrs The Returning Officer for Kilwa North Constituency & 2 others: Civil Application No. 80/2016* (unreported) which the Advocate contended has defined the "nature of the order test" as follows;

*"does the judgment or order made finally disposes the rights of the parties. If it does, then ought to be treated as a final order, but if it doesn't it is then an interlocutory order".*

Advocate Mutagahywa applying the cited case argued that the rights of the Appellant and the 1st Respondent were not finally determined by the orders the Appellant seek to appeal against, thus it was an interlocutory one. In insisting his argument, the Advocate further quoted the observation in the case of *Murtaza Ally Mangungu (supra)* that is

*".....it is our view that on order is final only when it finally disposes of the rights of the parties that means that the order or decision must be such that it could not bring back the matter to the same court".*

He concluded that, since the Appellant had a chance to bring back the case in the RM's court through review process, then this appeal cannot be maintained in this court and prayed the appeal be dismissed.

In reply, Advocate Matete refuted the arguments by Advocate Mutagahywa with regards to the first objection on point of law. He contended that the appeal was filed within time and that section 19 (2) of Cap 89 (supra) gives an automatic right for the appellant to file his appeal when the delay to secure the order or judgment to be appealed against was not due to his negligence, but the court process. He argued that for the purpose of appeal, the legal position is to the effect that time begun to run from the date of receipt of the copy of the decision appealed against and cited the case of *Ahmed Mwinyiamani vrs R (1972) HCD No. 171* to substantiate his argument. He went on contending that when counting from the date of obtaining the ruling; the last date to file the appeal was supposed to be 8/8/2016 but this appeal was filed on 30/7/2016 which is nine days before the expiry time, as the period of time requisite to obtain a copy of the decree or order to be appealed against is required to be excluded as was decided in the case of *Joseph Mniga vrs Abbas Fadhili Abbas and Another [2001] 213*, he argued. He therefore contended that the days of obtaining the order cannot be counted and cited the provision of section 60 (1) (h) and 2 of the Interpretation of Laws Act Cap 1 RE 2002.

Advocate Matete went on to argue that the cited cases by Advocate Mutagahywa are of no help because where there is a contradiction between

the written law and the case law, written law prevails. The Advocate further clarified the applicability of section 14 (1) and 19 of Cap 89 (supra) whereby he argued that section 14 (1) is applicable where there are other grounds other than the period of time requisite for obtaining a copy of the decree or order appealed against. He further argued that, if the reason for delay is only caused by failure to secure judgment appealed against in a prescribed time, a party cannot prefer an application for an extension of time as the law has already excluded those days from being counted for the purpose of limitation. He added that the case of *Mrs. Kamiz Abdulla (supra)* is distinguishable as the Appellant therein was applying for leave and certificate of the High Court so as to appeal to the Court of Appeal and no provision has stipulated the exclusion of days when one is so applying. But in case of appeal, the period of time requisite for obtaining a copy of the decree or order appealed against is to be excluded and further quoted the holding of the case of *Mrs. Kamiz (supra) to bolster his argument:*

*"the time required for preparation and delivery of copy of proceedings in the High Court shall be excluded in computing the time within which an appeal to the Court of Appeal is to be instituted if application for that copy has been made within 30 days of the decision of appeal".*

He argued that the quoted decision is binding to this court while the one in the case of *Ponsian Baitataffe (supra)* is persuasive and not binding to this court. The Advocate concluded by praying this court to reject this P.O with cost.

In replying the 2nd P.O, Advocate Matete contended that the submission by Advocate for the 1st Respondent is a misconception, clarifying that, the order appealed from is appealable as it has determined the matter to its finality. He went on that the RM's court has dismissed the suit in its entirety as such there was no other room to bring back the case into the same court without first being appealed against. Advocate Matete argued that the review suggested by Advocate Mutagahywa is not applicable arguing that each order which is fit for review can be appealed against but the reverse is not the case always since not each order which is fit for appeal can be reviewed. He cited section 78 (1) (a) of the CPC Cap 33 RE 2002 to support his argument. He further argued that a review is not a right while appeal is, as per the case of *Managing Director, Souza Motors Ltd vrs Riaz Gulamali and Another [2001] TLR 45 and section 74 (2) of CPC (supra).*

He finally argued that the appeal before the court is not time barred and that the same is maintainable in law as it emanated from an appealable order. He thus prayed the court to dismiss both the raised points of law for want of merit.

After going through the rival arguments with regards to the raised two points of law, this court will start addressing the first one concerning time limitation being a paramount as it has the effect of affecting the jurisdiction of the court if proved.

The contentious issue is centered on the interpretation of section 19 (2) of Cap 89 (supra). According to the 1st Respondent, he contended that the appeal was filed out of time without applying for an extension of time as stipulated in section 14 (1) of Cap 89. In amplifying his argument he submitted that, section 19 (2) doesn't give an automatic exclusion for time spent in making the follow – up for the order to be appealed against, rather the appellant has to apply for an extension of time and raise a delay to get the order or decree appealed against as a reason. The rival argument on the part of the Appellant is to the effect that the period of time requisite or spent for obtaining a copy of the order appealed against is to be excluded automatically. He further amplified that the application under section 14 (1) of Cap 89 is made where there are other grounds but where the reason for delay is only a delay to secure the order appealed against, there is no need of applying for an extension of time as the law has already excluded those days as per section 19 (2).

According to record, the decision appealed against was delivered on 26/5/2016 and the appeal was filed on 27/7/2016 that is 62 days later. Both parties are at idem that the time within which to file the appeal was forty five days as per paragraph 2 of part II of the schedule made under section 3 of the Law of Limitation Act Cap 89 RE 2002. As a general rule, the right in respect of an appeal is deemed to have accrued on the date which the decision was made. The begging question is whether the Appellant was

required to apply for an extension of time in the meaning of section 19 (2) Cap 89 (supra).

For easy reference I wish to quote the provision contested;

Sec. 19(2) *"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"* (emphasis mine)

In my judicial interpretation an appealing party is not the one to determine the requisite time for obtaining the order appealed against rather it is the court. The reason is not far-fetched. Determining the same entails adducement of evidence by the Appellant and affords the opponent party an opportunity to counter or concede to the same. The modality of so doing is to move the court by filing an application so that it can determine whether the time alleged to be spent was necessary or required for the intending appellant to obtain a copy of the decision to be appealed against, lest the intending appellant was negligent in following up the same.

In this regard therefore, I am with a settled mind that section 19 (2) is not automatically applicable. Rather one has to move the court praying for an extension of time to appeal giving the delay to get the relevant documents as a reason upon which the court would determine as to whether the said delay was not caused by the intending appellant, but the court, hence

sufficient cause or otherwise, having in mind that one can obtain the order lately but out of negligence. A similar stance was given in the case of **Praxeda Jambo vrs Edward Jambo: Civil Appeal No. 13/2013 High Court Dar es salaam Registry** (unreported) quoted with approval in the case of **Ponsian Baitataffe (supra)** wherein his Lordship Utamwa, J has observed as follows:-

> *"From the record, it is obvious that this belated filing of the appeal was performed without any prior leave of the court. In my settled view for which ever reason,* ***even if it meant the delay by the trial court to supply copies of the judgment or decree to the appellant*** *(emphasis mine). She (the appellant) was obliged by the law to first apply for leave of the court so that it could extend the time for her to appeal out of time. She could thus adduce reason for her delay through an affidavit supporting the application, so that that the court could determine whether or not the reasons were sufficient for extending time".*

In the matter at hand the Appellant has stated his reason for delay in the memorandum of appeal which is the document to raise the grounds of objection in the decision appealed against as per Order XXXIX R.1(2) of the CPC Cap 33 RE 2002.

Despite being not a proper document within which to narrate the reason for delay but also the reason is subject to contention which again is not legally

allowed to be raised in the memorandum of appeal as correctly argued by the counsel for the Respondent.

As earlier stated, the modality for determining the "**requisite time**' was to be by an application supported by an affidavit. On this stance the case of the **Registered Trustee of Archdiocese of Dar es salaam vrs the Chairman of Bunju village Government and 11 others: Civil Appeal No. 147/2006 CAT Dar es salaam** can be of assistance wherein the Appellant has stated his reason for delay in his submission and the court observed as follows *"reason for failure to appeal on time must be given on affidavit not on submission because submission are not evidence".*

I should hasten to add; neither the said reason for delay is to be given in the memorandum of appeal, being a contentious fact which may need evidence to prove.

A similar stance was also given in the case of **Helen Jacob vrs Ramadhan Rajab (1996) TLR 139** wherein the court observed that the reason for delay was to be canvassed in the affidavit being evidence.

Advocate Matete in insisting on his argument that an application in the circumstance of this appeal is not needed argued that the cited cases of **Ponsian Baitataffe and Praxeda Jambo** (supra) are also High Court decisions and thus this court being a High Court also is not bound by the same to which I concede. However the court must have a reason to depart from the said stance to which I should confess to have found none. On the argument

by Advocate Matete that where there is a contradiction between the law and a decision of the court, what prevails is the provision of the law suffice to state that, the provisions of law get its interpretation through cases. As such the question of contradiction in this respect doesn't arise with due respect in my opinion.

All in all, it is the finding of this court that the automatic application of section 19(2) is a misconception on the part of the counsel for the Appellant. Once the time prescribed by law to appeal has lapsed – regardless of the reason, an application for the extension of time has to be sought. Thus I concede that this appeal was filed out of time with no leave of the court. The only remedy is to have the same dismissed with cost as per section 3 of Cap 89. In the same vein I hereby dismiss this appeal with cost for want of court leave to file the same out of time.

The 1st P.O having been disposed the matter, I feel not obliged to go on determining the second raised P.O.

It is so ordered.

Right of Appeal explained.


L.G. Kairo

**Judge**

At Bukoba

01/06/2018

Date: 01/06/2018

Coram: Hon. L. G. Kairo, J.

Appellant: Present in person, Advocate Mulokozi

1st Respondent: Present in person, Advocate Mutagahwa

2nd Respondent:
2nd Respondent: - Absent -Ms. Masule State Attorney
2nd Respondent:

B/C: R. Bamporiki

**Advocate Mutagahwa**:

Hon. Judge, the matter is for ruling. We are ready to receive the same.

**Advocate Mulokozi**:

Hon. Judge, we are also ready to receive the ruling.

**Court**:

The matter is scheduled for ruling which is ready. The same is read over before the parties as per today's quorum in open court.

L.G. Kairo

**Judge**

01/06/2018