

**N THE HIGH COURT OF TANZANIA**  
**(DAR ES SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**CIVIL APPEAL NO. 65 OF 2016**

*(Originating from the judgment dated 23<sup>rd</sup> day of December, 2015 in  
Civil Case No. 10 of 2010 before Hon. A.H. Mbadjo, RM, Kibaha District  
Court.)*

**STANLEY JULIUS MBAGA.....APPLICANT**

**VERSUS**

**NESTORY OMARY DIWANI.....RESPONDENT**

**RULING**

***13 March & 22 June, 2018***

**DYANSOBERA, J.:**

The appellant herein has filed an appeal against the decree of the District Court at Kibaha in Civil Case No. 10 of 2010.

The respondent has resisted the appeal by filing a reply to the petition of appeal. In addition, he has filed a notice of preliminary objection praying the appeal to be dismissed with costs on the ground that:

1. The appeal is time barred.

The preliminary objection was disposed of by way of written submissions; Mr. Nickson Ludovick, learned advocate representing the respondent and submitting in support of the preliminary objection while the appellant was represented by Mr. Barnaba Luguwa, learned counsel who submitted in opposition of the preliminary objection.

Submitting in support of the preliminary objection Mr. Ludovick, learned counsel for the respondent told this court that the appellant was required to file his appeal within ninety days from the date of judgment and that this is a legal position as stipulated under Part II section 1 of the Law of Limitation Act [Cap.89 R.E.2002] which states that *“an appeal under Civil Procedure Code where no period of limitation is not otherwise provided for by any written law is ninety days”*. Counsel for the respondent argued that the appellant filed his appeal on 4<sup>th</sup> May, 2016 (I think he meant on 20<sup>th</sup> April, 2016) while the judgment of the trial court delivered by Hon. A.H. Mbadjo, RM was delivered on 23<sup>rd</sup> December, 2015 which means that the appeal was filed beyond 131 days after the delivery of judgment and the delay was therefore of 41 days. According to learned counsel for the respondent, the

appellant ought to have filed his appeal on or by 23<sup>rd</sup> March, 2016 so as to be within the prescribed period of ninety days; otherwise, the appellant had to first seek leave for extension of time within which to lodge his appeal which was time barred, the fact he did not do. Counsel for the respondent relied on the case of **Fanuel Maro Nyangatile v. Omary Ally**, PC Civil Appeal No. 41 of 2013 where this Court (Hon. Lila, J –as he then was) had this to say “..a simple arithmetic calculation reveals that the appellant was required to file such appeal on or before 14/4/2013. So by filing such appeal on 22/4/2013 the appellant was late by at least 38 days. I have perused the records and I am satisfied no extension of time to file an appeal out of the prescribed time limit as required by law.”

It was further submitted that the appellant did not seek leave of the court to file his appeal out of time but, instead, he directly filed this appeal without leave of the court while knowing that he was out of time. According to learned counsel, the appellant was required to make an application for extension of time with an affidavit supporting the reasons why he delayed in appealing in time. This court was referred to the requirement of the provision of section 14 (1) of the Law of Limitation Act which is to the effect that the court may for any reasonable and sufficient cause, extend the

period of limitation for the institution of an appeal.... Such extension may be either before or after the expiry of the period of limitation prescribed for such appeal. Counsel for the respondent also relied on the case of **Mechanical Installation and Engineering Co. Ltd v. Abubakar Ndeza Maporo and Another** [1987] TLR 44 in which the court held that failure to obtain High Court leave and failure to file a notice of appeal render the appeal incompetent whereby the appeal was dismissed.

Lastly, counsel for the respondent submitted that the appeal contradicts the provision of Order XXXIX Rule 1 (1) of the Civil Procedure Code [Cap.33 R.E.2002] as no decree is attached as required by law.

For these reasons, it is prayed that the appeal be struck out with costs.

Mr. Barnaba Luguwa, counsel for the appellant seems to have no quarrel with what Item 1 Part II of the Law of Limitation Act provides but argues that the important point is when does time begin to run against the appellant. He sought to distinguish the case of **Fanuel Maro Nyangatile v. Omary Ally** (supra) from the facts of this case arguing that the said case originated from the Primary Court and was governed by the Magistrates Courts' Act

and Rule 5(3) of the Civil Procedure (Appeals originating from the Primary Court) Rules, GN No. 312 of 1964 as stated in paragraph 2 of the 2<sup>nd</sup> page of the said appended cited judgment whereby the time begins to run from the date of the judgment but that in our case, in computing time, court before which an appeal is filed must put in account the provisions of section 19(2) of the Law of Limitation Act which provides that 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. Counsel for the appellant in support of argument relied on the case of **Marian Faith Healing Centre @ Wanamaombi v. The Registered Trustees of the Catholic Church, Sumbawanga Diocese:** (CA) Civil Appeal No. 64 of 2006 at pp. 7 & 8 of the typed judgment where it was stated:

***“It occurs to us, however, that an appeal can best be determined without necessarily resorting to the apparent long and conclusive route taken and impressed upon us by Mr. Shayo. We will henceforth determine the***

*appeal on the basis of the record before us and the law applicable on the matter.*

*“In our understanding and appreciation of the record it is evident that the judgment of the resident Magistrates Court (Shaidi, RM) was delivered on 2/5/2003. Mr. Shayo wrote letter to the court applying for copies of judgment, proceedings and decree with the view to preferring an appeal to the High Court”.*

*Further,*

*“....at this point in time, we think it is important to digress again a bit and make the following point. A look at the decree in issue shows that the words “Given under my hand and the seal of the Court this..” were followed by an insertion of the date “2<sup>nd</sup> day of May, 2003 after which Mr. DYANSOBERA, a Resident Magistrate duly signed it. Under Order XX Rule 7 of the Civil Procedure Code [Cap.33 R.E.2002] the date of 2<sup>nd</sup> day of May, 2003 was actually the date of the decree because that was the date of the pronouncement of the judgment...*

*In this case there is no dispute that under item 1 part II of the Law of Limitation Act Cap. 89 R.E.2002 the appellant ought to have appealed against the decision of the Resident Magistrate within the period of ninety days. There is also no dispute that section 19(2) of the said Act provides that:*

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

*In view of what we have endeavoured to show above, and the in the light of section 19(2) (supra) it showed that the period between 2<sup>nd</sup> May, 2003 and 15<sup>th</sup> December, 2003 when the appellants eventually obtained a copy of decree ought to have been excluded in computing time. Once that period was excluded, it would again follow that when the appeal was lodged on the 19<sup>th</sup> December, 2003 it was in fact and in law not time barred”.*

It was in the Counsel's further submission that going by this position laid down by the Court of Appeal, in the case in hand the record is clear that the judgment in issue was delivered by Hon. A.H. Mbadjo, RM on the 23<sup>rd</sup> day of December, 2015; Stanley Mbaga, the appellant above named wrote letter seeking for the judgment and decree for purposes of filing an appeal on the 19<sup>th</sup> day of December, 2015 and the said letter was received in court on the same date and a certified copy was ready for collection on 8<sup>th</sup> day of April, 2016. The appellant then filed this appeal on 20<sup>th</sup> day of April, 2016 a span of hardly twelve days. The appeal was therefore in time. Learned counsel for the appellant concluded.

The issue for determination is whether or not the appeal before this time barred.

As correctly pointed out by learned counsel for the respondent and conceded to by learned counsel for the appellant the position of the law is well stated under Item 1 Part II of the Schedule to the Law of Limitation Act [Cap.89 R.E.2002] which provides that an appeal under the Civil Procedure Code where the period of limitation is not otherwise provided for by any written law is ninety days.



The record shows that this appeal was filed on 20<sup>th</sup> day of April, 2016 while the judgment of the District Court against which this appeal is preferred was delivered on 28<sup>th</sup> day of December, 2016. More than ninety days had elapsed. There was no application for extension of time within which to file the appeal. The appeal was therefore time barred.

It was argued on part of the appellant that section 19 (2) of the law of Limitation Act excluded the time requisite in obtaining copies of judgment and decree which means that this appeal is not time barred. In view of the principles propounded by this court in its various decisions, this argument cannot hold water. I will explain.

In the first place, this court in Land Appeal No. 52 of 2010 between the **Headmaster Forest Hill Secondary v. Robert K. Mluge** (unreported), Hon. Khaday, J. at p. 7 stated thus:

*“...However, I find that the application of section 19 (2) is not that automatic. In my opinion, the same has to be applied for through formal application to be brought under section 14 (1) of the same Cap 89. It is further my view that had things to go that automatic, there would have been no need to have Limitation Act to regulate times for actions by the parties.”*

Second, in the case of **TANESCO v. Christopher Bitamkunja**, Civil Appeal No. 42 of 2011, Hon. Utamwa, J. observed that the party cannot exclude the time himself, he must prove and proof must be by affidavit.

Third, this same court in the case of **Kulwa Salum Konjovu v. Yusuph Shaban Matibwa**, Civil Appeal No. 75 of 2015, Hon. Nchimbi, J (rtd.) held that the appellant's /applicant's counsel must have known that the appeal was definitely out of the prescribed time and for whatever reason she should have sought leave of the court to file it out of time as the law permits that course to be taken.

With due respect, I subscribe to that standing.

Even if, for the sake of argument, section 19 (2) of the Law of Limitation Act excluded the period of time requisite for obtaining a copy of judgment appealed from, the appellant was still duty bound to prove that he obtained the copy of judgment immediately after it was certified. In this case, there is no such proof. Hon. Massati, J. (as he then was) had occasion, in the case of **Selestin Silowoka v. Symphorian R. Kifale**, Civil Appeal No. 88 of 2002 (unreported) to make the following remarks at p. 5:

*“The period requisite for obtaining of the copy of judgment would, I think, be that between the date of judgment and that on which the court certifies it as a true copy of the original”.*

In supporting the argument that section 19 (2) of the Law of Limitation Act excluded the period of time requisite for obtaining a copy of judgment appealed from, counsel for the appellant cited the case of **Marian Faith Healing Centre @ Wanamaombi v. The Registered Trustees of the Catholic Church, Sumbawanga Diocese:** (CA) Civil Appeal No. 64 of 2006 (Unreported). I have read the said judgment and I am in no doubt that the said case is distinguishable from the facts of this case. First, the Court of Appeal in that judgment did not say that where a party finds that he is barred by limitation, he should no file an application for leave to file the appeal out of the prescribed time. Second, in that case, the affidavit of Stephen Maufi detailed the reasons for the delay and the efforts undertaken to get copies of the documents the appellant was pursuing in court. This is not the case in the present application where there is neither an application for leave to file the appeal out of time nor a filed affidavit explaining the delay. Here, we have just submissions which are neither pleadings nor evidence.

In short, in view of the fact that the appeal was time barred, the applicant was duty bound to first apply for leave justifying extension of time by providing evidence to satisfy the court that he was delayed in obtaining the copy of judgment if the copy of judgment was ready and collected in time. All this could have been done by way of an application for extension of time under section 14 (2) of the Law of Limitation Act, mainly because section 19 (2) of the said Act should not be read in isolation.

Besides, a close reading of the Memorandum of Appeal filed by the appellant on 20<sup>th</sup> day of April, 2016 reveals that there was no proper decree and this is in contravention of Order XX rules 3 and 7 (1) and (2) of the Civil Procedure Code as amended by the Civil Procedure Code (Amendment of the First Schedule Order), 2010- GN No. 223 of 2010 published on 18.6.2010). It is provided thereunder as follows:

***3. The judgment shall be written by, or reduced to writing under the personal direction and superintendence of the presiding judge or magistrate in the language of the court and shall be dated and signed by such presiding judge or magistrate as of the date on which it is pronounced in open court and, when once signed, shall not afterwards be altered or added to, save as provided by section 96 or on review.***

***7. (1) The decree shall bear the date of the day on which the judgment was pronounced and, when the Judge or magistrate has satisfied himself that the decree has been drawn up in accordance with the judgment he shall sign the decree.***

***7. (2) The decree shall bear the date on which the decree was extracted from the decision.***

The record shows that the decree appealed against was signed by the Resident Magistrate on 8<sup>th</sup> day of April, 201 while the judgment was delivered on 28<sup>th</sup> day of December, 2015. In his submission, counsel for the respondent pointed out this anomaly and counsel for the appellant seems to have taken note of the anomaly when, on 8<sup>th</sup> December, 2016 he said that the decree is in contravention of Order XX rules 3 and 7 of the Civil Procedure Code and sought to withdraw the appeal with leave to refile, the invitation which was declined as that move was tantamount to pre-empting the preliminary objection that had been raised on part of the respondent.

Having found that the appeal has been instituted out of time and without the leave of the court, the next issue is what are the consequences. Fortunately, the Court of Appeal of Tanzania in the case of **Hezron M. Nyachiya v. Tanzania Union of Industrial and**

**Commercial Workers and Organisation of Tanzania Workers Union**, Civil Appeal No. 79 of 2001 provides an answer. At p. 7 of the judgment, the Court observed:


*“The Law of Limitation has a provision for the consequence where the proceeding is instituted out of time without leave of the court. It is section 3. Under that provision, that is section 3, the consequence is that, such proceeding shall be dismissed whether or not limitation has been set up as a defence.”*

For the reasons stated above, I find the appeal incompetent for having been filed out of the prescribed period of time, without leave of the court and against an incompetent decree.

The preliminary objection is upheld and the appeal is, thus, dismissed with costs to the respondent.

Order accordingly.



  
W. P. Dyansobera

JUDGE

22. 6.2018

Delivered at Dar es Salaam this 22<sup>nd</sup> day of June, 2018 in the presence of Mr. Barnaba Luguwa, learned counsel for the appellant and the respondent in person.



W. P. Dyansobera

JUDGE

