

**IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM
CIVIL APPEAL NO. 129 OF 2019**

**1. TANZINDIA ASSURANCE
COMPANY LIMITED..... 1st APPELLANT**
2. CMC AUTOMOBILE LIMITED..... 2nd APPELLANT

VERSUS

RICHARD AUGUSTINE ZUBERI RESPONDENT

(Origin; Civil Case No. 124 of 2016 Kisutu Resident Magistrate's Court)

RULING

Date of Last Order: 8/6/2020

Date of Ruling: 29/07/2020

S.M. Kulita, J.

This a Preliminary objection on point of law. The appellants, **TANZINDIA ASSURANCE COMPANY LIMITED** and **CMC AUTOMOBILE LIMITED** through their Advocate Hamida Sheikh from Sheikh's Chambers of Advocates filed this appeal against the decision of Civil Case No. 124 of 2016 Kisutu Resident Magistrate's Court which was delivered on 11/2/2019. The Respondent namely **RICHARD AUGUSTINE ZUBERI** is represented by Mr. Mutakyamirwa Philemon from Eminent Attorneys.

In his Counter Affidavit the Respondent's Counsel, Mr. Mutakyamirwa Philemon raised the preliminary objection that the appeal was file out of time

without leave of the Court. The preliminary objection was argued through written submissions.

In his written submission Mr. Mutakyamirwa Philemon argued that the matter at hand has been filed out of time without leave of the court. He said that the appeal originates at Kisumu Resident Magistrate's Court where the judgment was delivered on 11/2/2019 but the appeal was filed on 24/7/2019, which is out of the prescribed time limit. The Advocate stated that the 1st schedule Part II, Column 1 of the Law of Limitation Act [Cap. 89 R.E 2002] provides 90 days period as the general time limit for filing matters to court where no specific time limit has been prescribed for that purpose.

Mr. Mutakyamirwa Philemon, Advocate further stated that the pleadings show that the appellant was supplied with the copies of judgment and decree of the lower court on 19/2/2019 and 10/4/2019 respectively but the appeal was filed on 24/7/2020. He cited O. XXXIX, R. 1 of the Civil Procedure Code [Cap 33 RE 2002] stating that the necessary documents which are mandatory to be attached in the Memorandum of Appeal are the copy of decree and, unless the court dispense therewith the judgment on which it is founded. He said that after obtaining the last document which is the decree on the 10/4/2019 the appellants were mandated to appeal within 90 days period which expired on the 10/7/2019. He concluded by praying the appeal to be dismissed for being time bared.

In reply thereto the Appellant's Counsel, Ms. Hamida Sheikh submitted that the appeal has been filed in time. She said that Respondent's computation of time is totally wrong and his interpretation as to what are the

necessary/essential documents in filing an appeal is erroneously restrictive. She submitted that that is a crux of the problem. Ms. Sheikh stated that necessary documents include the certified copy of proceedings which were supplied to the appellant by the trial court on the 9/7/2019. Therefore, the appeal being filed on the 24/7/2019 it means it was filed on the 15th day of the prescribed time which is 90 days. She said that the appellant had to wait for the copy of proceedings for the purpose of framing a meaningful memorandum of appeal. Ms. Sheikh submitted that since the supply of the said copies had been requested in a statutorily letter which has been attached in the memorandum there was no need for the appellants to apply for extension of time.

She further stated that subsection (5) of section 19 of the Law of Limitation Act [Cap. 89 R.E 2002] states that the court may allow exclusion of time spent in waiting for the supply of copy of proceedings. For those submissions Ms. Sheikh prayed for the Preliminary Objection to be dismissed with costs.

In the rejoinder Mr. Mutakyamirwa Philemon, Advocate submitted that section 19(2) of the Law of Limitation Act provides for the basic documents required in filing appeal being the copies of decree or order, but under section 19(5) the court may exclude the time for waiting of a supply of the copies of proceedings upon the applicant's prayer being submitted to court. It is not automatic as it is for the decree or order as per section 19(2).

From the above submissions the crux is whether filing of the application is automatic for the reasons that the appeal pleadings and its attachments are explanatory by themselves, and whether the period that the appellant was

waiting to be supplied with the copies of proceedings by the lower court is exclusive in counting the duration for lodging the appeal.

According to Item 1 Part II of the 1st schedule to the Law of Limitation Act [Cap. 89 RE 2002] the time limit for filing of Civil Appeal is 90 days as there is no specific provision in the statutes which specifically governs the issue of time limit to lodge the civil appeals at High Court for the matters originating from the District Courts. The provision states;

*"An appeal under the Civil Procedure Code where the period of limitation is not otherwise provided for any written law
Ninety days"*

There is no dispute on that, the issue is the time when the said duration reckons. Order XXXIX, Rule 1 of the Civil Procedure Code [Cap 33 RE 2002] provides for the necessary documents which are mandatory to be attached in the Memorandum of Appeal being the copy of decree and, unless the court dispense therewith the judgment on which it is founded. The provision states;

*"Every appeal shall be preferred in the form of a memorandum signed by the appellant or his advocate and presented to the High Court (hereinafter in this Order referred to as "the Court") or to such officer as it appoints in this behalf and **the memorandum shall be accompanied by a copy of the decree** appealed from and (**unless the Court dispenses therewith**) of the judgment on which it is founded". (emphasis is mine)*

The above cited provision can be interpreted in two different views; the 1st interpretation is that since the decree/judgment has been mentioned as mandatory document to be attached the 90 days time period prescribed under Item 1 Part II of the 1st schedule to the Law of Limitation Act should reckon from the date of supply of the said document to the appellant; while the 2nd view based on the requirement to lodge the appeal in 90 days period as prescribed under Item 1 Part II of the 1st schedule to the Law of Limitation Act notwithstanding the time at which the copy of decree/judgment has been supplied to the appellant.

Personally I prefer the later opinion for the reason that anything including delay to be supplied with the necessary documents like copy of decree/judgment by the court can be regarded a good reason but the same should be tabled to court through the application for extension of time. One can be supplied with those documents on the last dates towards the expiry of the prescribed period for lodging the appeal and fail to lodge the appeal in time due to the scarcity of time. It may happen that one has totally not been supplied within the time prescribed for lodging the appeal all those are genuine reasons but through the application for extension of time the prayer/application can obvious be granted. Not only that but one can have any other reason for delay, but through determination of the application for extension of time the matter will be determination. It is my view that once the time to lodge the appeal or any other application is lapsed the person who intends to file the appeal or application has to seek leave of the court by filing application for extension of time and the computation of time reckons from the date that the judgment has been delivered. In **MOHAMED**

NASORO MBULU V. TATU ALLY MKUMBA, Civil Appeal No. 36 of 2016, High Court, DSM zone (unreported) it was held that computation of time starts immediately after the delivery of judgment at the lower court. It was also held that the appeal which is out of time should be filed after the grant of leave of the court.

Apart from the copy of decree or judgment it is unsafe for the court to rely on the other copies of documents like letters attached in the pleadings which are not going to be argued at all during the hearing of the application. The genuineness, authenticity and interpretation of those documents can only be known through hearing of the application that would be filed.

As for the matter at hand the Appellant filed the appeal after the lapse of the prescribed time of 90 days from the date of delivery of the judgment at the lower court. He did so just with the hope that the computation of time reckons from the date of supply of the copies of proceedings by the lower court which is 8/7/2020 of which made him to believe that he was in time (15th day) to file the appeal on the 24/7/2019. On this the appellant went far beyond. The provision that the Appellant's counsel has relied upon, that is section 19(5) of the Law of Limitation Act [Cap. 89 RE 2002] actually allows the appellant to lodge the appeal after the supply of the copy of proceedings but that is not automatic. It is applicable upon the applicant/appellant getting leave of the court meaning thereby there must be an application prior thereto. The section states;

*"Where the court to which an appeal or application for leave to appeal or application for review is made, **is satisfied that it was***

necessary for the appellant or, as the case may be, the applicant, to obtain a copy of the proceedings of the relevant suit or proceeding before lodging or making the appeal or the application, the court may allow to be excluded from the period of limitation prescribed for such appeal or application, the period of time requisite for obtaining a copy of the proceedings.” (emphasis is mine)

There is no such prayer for extension of time for the reason of waiting to be supplied with the copies of proceedings that was made by the appellants. Furthermore, this need by the applicant is not automatic as well, one must move the court to get the leave. It is not proper for the appellant to establish that issue at this stage of preliminary objection.

It cannot be known to the respondent nor the appellate court if the appellant has genuine reasons for delay unless the issue is interfered through the preliminary objection as it has been so done in this matter, otherwise by the court wanting the appellant to address the issue. In that sense I find it mandatory for the appellant to seek leave before filing the appeal if it is out of the prescribed time, even if he/she believes to have good reasons.

The reasons submitted by the appellant's Counsel to justify the legality of the appeal at this stage of arguing the Preliminary Objection is inexpedient. It is my humble view that the proper forum for that purpose could be in the application for leave to appeal out of time. The appellant whose appeal has been delayed for good reasons has a duty of seeking leave to file his/her appeal out of time through the formal application and not to plead that fact

in the cause of hearing the appeal. The extension of time to appeal can be done in the application for extension of time to appeal. It cannot be done automatically during the appeal. Had that been the intention of the legislature it would have said so in plain language in the statute. As the exclusion of that time is not automatic there was a requirement for the appellant to show good cause through the application before the said delayed appeal being filed. Dealing with such like matter the Court of Appeal had the following pertinent observation in a case of **EAST AFRICAN MINES LTD V. CHRISTOPHER KADE, CIVIL APPEAL NO. 53 OF 2005 (unreported)**;

"We are in agreement with Mr. Nyange that in computing time within which the application for leave to appeal was made, the period of time is to be reckoned from the date of decision"

Actually the time prescribed for filing appeal of this nature is 90 days. By adopting the similar reasoning time for filing the present appeal ought to be reckoned from 11/2/2019 when the judgment of the lower court was delivered and not any other date unless there is a leave of the court.

In that regard I find this appeal is indeed hopelessly time bared. Consequently, it is entirely struck out with costs.



HK

S.M. KULITA

JUDGE

29/07/2020