

**IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA**

MISC. CIVIL APPEAL NO. 04 of 2019

(Arising from the District Court of Kahama, in Misc. Civil Application No.15 of 2019)

**1. ALINA MSHANGA @ MAMA DIANA }
2. ADAM ALLY HOROMA }APPELLANTS**

VERSUS

MAYALA MAJELE MAYALA.....RESPONDENT

RULING

11/08 & 2/10/2020

Mdemu, J.;

The Respondent herein, filed Miscellaneous Civil application No.15 of 2019 in the District Court of Kahama for the Court to order the Appellants either to furnish security in the sum of Tshs. 50,000,000/= or produce the title deed of a go down situated in Plot No.20 Block B, Kagongwa area. The court heard the application and on 7/08/2019, ordered the Appellants to produce the said title deed of Plot No.20 Block B Kagongwa area or deposit in Court the sum of Tshs. 40,000,000/= as security.

The Appellants were dissatisfied with the decision of the trial Court, thus lodged the instant appeal on the following three grounds of appeal: -

(1) That, the trial Magistrate erred in law and fact in granting the Respondent application without the

facts/allegations raised by him being proved at the required standard.

(2) That, the trial Magistrate erred in law and in fact in ordering the Appellants to produce the title deed of Plot No.20 Block B, Kagongwa area or deposit in Court Tshs. 40,000,000/= as security.

(3) That, the trial Magistrate erred in law and in fact holding that, according to Order XXXVI, Rule 6(1) of the Civil Procedure Code, Cap.33, the Appellants were required to show cause why they should not furnish security for their appearance.

The Respondent after being served with the petition of appeal, filed a notice of preliminary objection raising two points of preliminary objections on the competence of the appeal on the following grounds;

(i) That, the appeal is time barred.

(ii) That, the impugning order is unappealable.

At the hearing the two preliminary objections on 11/08/2020, the two Appellants were represented by Mr. Bakari Chubwa Muheza, Learned Advocate and Mr. Masendeka, Learned Advocate, appeared for the Respondent.

Addressing the first preliminary point of objection, Mr. Masendeka submitted that, the instant appeal is time barred. On his observation, the Appellants filed the appeal on 3rd of December, 2019 intending to challenge the decision of the District Court dated 7th of August, 2019. On this, the appeal was out of ninety (90) days required by the Law. He stated further that, any matter filed out of the prescribed time has to be dismissed. In this, he cited also the provisions of section 3 of the Law of Limitation Act, Cap. 89 to support his position.

In arguing the second ground of preliminary objection, he submitted that, the order is not appealable in terms of the provisions of Order XL (i)(q) and Order XXXVI, Rule 6 of the Civil Procedure Code, Cap. 33 because all orders made under the provisions are not appealable.

Opposing the two preliminary objections, the Learned Advocate for the two Appellants submitted that, the appeal is in time basing on the provisions of section 19(1) of the Law of Limitation Act Cap. 89. because time used to have copies of judgement and proceedings is normally excluded. His view was that, time is therefore counted from the date copies got certified and supplied to the Appellant.

He added that, documents got certified on 19/8/2019 and the drawn order was issued on 1/11/2019. Therefore, to him, the appeal is in time. He further concluded that, the Law of Limitation Act, Cap. 89 directs that, appeals of this nature, have to be filed within 90 days.

In the second preliminary objection, he argued that, an order requiring the Appellants to deposit certain sums or the title deed is appealable. To support his propositions, he referred me to the provisions of section 74(g) of

Civil Procedure Code. Therefore, to him, they are challenging the evidence to the effect that, there was insufficient cause towards attachment.

In his rejoinder, the learned advocate for the Respondent emphasized that, the issue of delay is relevant only if there is an application for extension of time. Furthermore, he stated that, orders provided for under the provisions of section 74(g) of the Civil Procedure Code are appealable. There is no arrest and no temporary injunction granted under section 68 of the Civil Procedure Code. Therefore, court orders as provided for under the provisions of Order XXXVI Rule 6 of the Civil Procedure Code are not appealable.

Having carefully considered submissions of both parties, and the record before me, for clarity, I will determine each preliminary objection seriatim. To start with the first preliminary objection that the appeal is time barred; It is not disputed that, the Appellants' appeal was lodged on 3rd of December, 2019 challenging the decision of the District Court of Kahama delivered on 7th of August, 2019. This being a Civil appeal originating from District Court, Part II, Paragraph 1 of the Law of Limitation Act, Cap.89 provides that: -

*"an appeal under the Civil Procedure Code, where the period of limitation is not otherwise provided for by any written law
..... ninety days"*

Furthermore, the provisions of section 19 (1) of the Law of Limitation Act, Cap.89 provides that;

"In computing the period of limitation for any proceeding, the day from which such period is to be computed shall be excluded."

According to the provisions as cited above, the law is clear that, where no period of limitation is provided for appeals, time to appeal is ninety days.

As stated above, in the instant appeal, the Appellants filed an appeal on 3rd of December, 2019 challenging the decision of the District Court of Kahama delivered on 7th of August, 2019 which was certified on 19th of August, 2019. This means, the appeal was filed after almost one hundred and five (105) days. In that stance, the appeal is hopelessly out of time.

In terms of the provisions of section 3(1) and (2) (b) of the Law of Limitation Act, Cap.89, the only remedy available to an appeal filed out of time is to dismiss it. The Section reads as follows: -

*"Subject to the provisions of this Act, every proceeding described in the first column of the Schedule to this Act and which is instituted after the period of limitation prescribed therefore opposite thereto in the second column, **shall be dismissed** whether or not limitation has been set up as a defense." (emphasis mine)*

This being not an application for extension of time, reasons for delay alluded by the Appellants in their submissions cannot be accommodated. Therefore, I find the first preliminary objection has merits and is accordingly sustained. In my view, this preliminary objection alone has disposed the whole application. In that regard, the second preliminary objection won't be determined.


Having sustained the first preliminary objection, and as per the provisions of section 3(1) of the Law of Limitation Act, Cap 89, I hereby dismiss the appeal for being filed out of time. Each part to bear own costs.

It is so ordered.


Gerson J. Mdemu
JUDGE
02/10/2020

DATED at SHINYANGA this 2nd day of October, 2020.




Gerson J. Mdemu
JUDGE
02/10/2020