

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

(PC) CIVIL APPEAL NO. 1 OF 2020

(Originating from Enaboishu Primary Court Civil Case No. 57/2016,

Civil Appeal No. 25 of 2016 in the Arumeru District Court)

LEONARD KARAINÉ APPELLANT

VERSUS

LOY ELIAS RESPONDENT

RULING

K.N. ROBERT, J.

This is a ruling on a preliminary objection raised against a petition of appeal filed by the Appellant Leonard Karaine through his counsel on 9th January, 2020 challenging the decision of the Arumeru District Court in Civil Appeal No. 25/2016 delivered on 22nd February, 2017.

When the appeal came up for hearing on 11th February, 2020 the counsel for the Respondent indicated his intention to raise a preliminary objection

against the appeal and prayed successfully for leave to file a formal Notice of Preliminary Objection which he filed on the following day. A preliminary point of objection was to the effect that:

“The Appeal is bad in law for being lodged out of time without leave of this Honourable Court.”

The preliminary objection was argued on 25th February, 2020 during which the Appellant had the representation of Mr. Severin John Lawena, Learned Counsel while the Respondent was represented by Mr. Elibariki Maeda, Learned Counsel.

Arguing in support of his preliminary objection, Mr. Maeda submitted that before the present appeal the Appellant had made an attempt to file another appeal which is Appeal No. 13 of 2017 before Hon. S.E. Moshi, J. However, that appeal was struck out on technical grounds and as a result the Appellant lodged Miscellaneous Application No. 103 of 2017 requesting for the indulgence of the court to extend time to file an appeal out of time.

He submitted further that the Appellant's application for extension of time to file an appeal was heard and decided by Hon. Mzuna, J on 14th May, 2019 granting the Appellant 14 days leave to file the appeal but the Appellant lodged his appeal on 9th January, 2020 which is 236 days out of time

without leave of this court to do so. He argued that the proof of this is manifested on the Appellant's petition of appeal which is indicated to have been dated 23 May, 2019 but the date of being lodged is shown to be 9 January, 2020.

Mr. Maeda observed that if the Appellant had explanations establishing that the appeal was lodged timely but due to the fault, say of the court, it was admitted out of time, such reasons would be good than lodging the appeal out of time without leave of the court. He argued that as the matter stands the appeal is time barred. In the circumstances, he prayed for appeal to be dismissed with cost under the provisions of section 3(1) of the Law of Limitation Act, Cap. 89 R.E.2002.

In response, Mr. Lawena, learned Counsel, admitted that the Appellant filed PC Civil Appeal No. 13/2017 that was struck out due to technicalities and further that the Appellant lodged Civil Application No. 103 of 2017 praying for extension of time to file an appeal which was granted on 14th May, 2019 before Hon. Mzuna, J.

However, Mr. Lawena maintained that immediately after the extension of time being granted the Appellant filed his petition of appeal on 24th May, 2019 at the District Court of Arusha as required by the law. He made

reference to exchequer receipt voucher No. 25308090 as a proof of payment in respect of filing of the petition of appeal in the District Court on 24th May, 2019. He submitted further that the District Court stamped on the Appellant's petition of appeal on the same date. Based on that explanation, the learned counsel argued that, the appeal was filed within time and paid for within time.

However, Mr. Lawena argued that having waited longer for the District Court to send record of proceedings to the High Court, the Appellant wrote a complaint letter to the Deputy Registrar dated 16th October, 2019 complaining on the delayed court records. The Deputy Registrar replied on 14th November, 2019 instructing the Resident Magistrate In-charge of Arumeru District Court to make sure that the court records are sent to the High Court.

After some time, the Appellant followed up the matter at the District Court only to be told that the petition of appeal is missing in the court record and that he should send to the District Court a copy of the petition that was filed earlier in the District Court. The Appellant sent them a copy of the petition which was stamped by the District Court so that they could use it to send their records to the High Court which was also misplaced.

The Appellant was asked to prepare a new petition of appeal, at least to write it in the same wording like the one filed on 24th May, 2019 only to find that the new one was stamped on 9th January, 2020.

Based on that explanation the learned counsel submitted that this appeal is within time and the Appellant should not be penalized for the fault of the court as the record shows that it was timely filed. He prayed that this objection be dismissed and the matter proceed for hearing of the main suit.

In his rejoinder Mr. Maeda submitted that the submission by the Counsel for the Appellant is based on matters of fact which to a greater extent seems to come directly from the Appellant. He argued that the only way we can find out if those facts are accurate is if they were brought by way of an affidavit because the allegation that the court has contributed to the late filing are serious and need to be proved. He maintained that what the counsel for the Appellant has submitted is information from a person who has nothing substantial to rely upon, he stated that such reasons would have been good if they were reasons for extension of time and not at this stage when a preliminary objection has been raised.

Submitting on the fact that the Appellant got a call from the District Court to reproduce the already filed petition of appeal so that the records could be

forwarded to the High Court on the ground that the court lost its copy, the learned counsel submitted that the trend in such circumstances has always been for the duplicate file to be prepared using the records available to the parties and not opening a completely new appeal as it happened in the present appeal.

With regards to the exchequer receipt Ref. No. 25308090 referred to by the Counsel for the Appellant, Mr. Maeda submitted that the exchequer receipt seems to be of payment for filing petition of appeal in the District Court Civil Appeal No. 25 of 2016. This is completely different from the present appeal. He submitted further that even the documents lodged as proof also seems to have been lodged on different dates. The previous petition of appeal seems to have been lodged on 24th May, 2019 while the one we are contesting was filed on 9th January, 2020. He submitted that these are two different appeals.

As to whether this petition was filed timely, Mr. Maeda maintained that it would be prudent if such reasoning would be demonstrated on an application for extension of time. He therefore prayed for this appeal to be dismissed for being time barred.

Let me pose here and make an observation that there is a contentious point for determination on whether or not the appeal before this court is time barred.

It is not in dispute that on 14th May, 2019 the Appellant was granted 14 days leave to file an appeal by this court vide Miscellaneous Application No. 103 of 2017. A simple arithmetic computation reveals that the Appellant was supposed to file his appeal on or before 28th May, 2019. However, the petition of appeal indicates that the Appellant presented his appeal for filing on 9th January, 2020 which, as rightly submitted by Mr. Maeda, is 236 days out of time. Mr. Lawena, on the other hand, imputes the wrong doing on the court by arguing that the Appellant filed his petition of appeal within time, that is, on 24th May, 2019 as evidenced in exchequer receipt No. 25308090. However, his petition became missing in the District Court records whereby he was asked to prepare another petition of appeal to be dispatched together with the District Court records to the High Court. He blames the District Court for indicating that the subsequent petition of appeal was filed on 9th January, 2019 instead of 24th May, 2019 which, according to him, was the date of filing of the first petition of appeal which went missing.

Mr. Lawena's submission is strongly rebutted by Mr. Maeda who maintained that exchequer receipt No. 25308090 shows that payment was done in respect of filing of Petition of appeal in (DC) Civil Appeal No. 25/2016 which, he argued, is completely different from the present appeal. He argued that the previous appeal was lodged on 24th May, 2019 while the present appeal was lodged on 9th January, 2020.

I am well aware that both as a matter of practice and also as a matter of law documents cannot be properly filed in civil registry unless fees have been paid. I therefore have no doubt whatsoever that exchequer receipt No. 25308090 is a proof for payment done in respect of Petition of appeal (DC) Civil Appeal No. 25/2016 lodged on 24th May, 2019. It would appear to me, however, that the lodging of the subsequent petition on 9th January, 2020 does materially alter the situation. It is difficult for this court to find that the petition marked to be filed on 24th May, 2019 is one and the same as the one presented for filing on 9th January, 2020 even if they relate to the same case.

This court thinks the blame for the alleged mistake on the District court is misplaced and the argument by Mr. Lawena that the Appellant is not at fault is equally misplaced. The luxury of raising these arguments was available to the Appellant before the preliminary objection was raised by

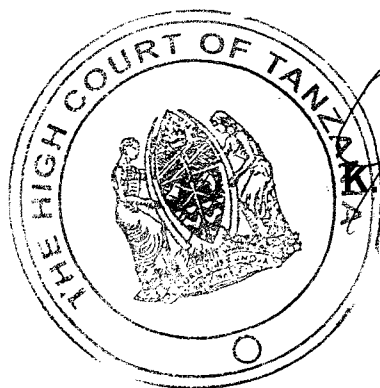
the Respondent. I agree with Mr. Maeda's submission that the Appellant needed to prove these allegations and proof must be by affidavit. What I have here is just submissions which are neither pleadings nor evidence.

Be that as it may, the Appellant's petition of appeal having been presented for filing on 9th January, 2020, as indicated in the petition of appeal before me, the appeal was time barred by limitation. He was, therefore, duty bound to first apply for leave to file the appeal out of the prescribed time and detail the reasons for the delay in the affidavit.

Having found that the appeal was instituted out of time and without leave of the court, I hereby uphold the preliminary objection and strike out the appeal. The Respondent shall have their costs.

It is so ordered.

DATED at Arusha this 23 day of March, 2020.



K.N. Robert
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JUDGE