IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[ARUSHA DISTRICT REGISTRY]

AT ARUSHA

CIVIL APPEAL NO. 05 OF 2018

(Originating from the Resident Magistrates' Court of Arusha at Arusha, Civil Case No. 106 of 2016)

ALPHONCE ANAEL TARIMO .....APPELLANT

VERSUS

HERMAN RICHARD..... 1ST RESPONDENT

VALENCY V. TARIMO .....2ND RESPONDENT

JUDGMENT

18th August & 30th October, 2020

MZUNA, J.

This appeal by **Alphonce Anael Tarimo** is against the order of the Resident Magistrate Court of Arusha ('the trial Court'), which ordered **Herman Richard** (the first respondent) to pay him Tshs 50,696,000/= and Tshs 10,000,000/= as specific damages and general damages respectively. The claim was based on an accident involving the motor vehicle make Mitsubishi Canter, with registration No. T 890 CUU, driven by the first respondent recklessly causing the injuries and loss of income to the appellant who was knocked while driving his motorcycle with registration No. T 718 BCX make Tuktuk, from kwa Morombo heading to Mbauda. The incident

which took place on 15th August, 2014 left the appellant's right leg broken and did suffer other several injuries in different parts of his body. He was rushed to Mt. Meru Hospital where he was hospitalized for four months.

During such time, it is said lost income which he calculated to the tune of Tshs 40,000/= daily which he earned from his Bodaboda work as well as other daily undertakings. He also had a poultry project, which he could no longer take care of, which caused him loss of Tshs 2,000,000/=. The appellant's motorcycle was damaged beyond repair and should it be repaired, it would cost him Tshs 788,000/=. He also asked for costs he incurred during his treatment. The trial court awarded him the reliefs as above indicated.

The trial court found that the second respondent **Valency V. Tarimo**, could not be held vicariously liable for the acts committed by the first respondent since he was not a party to the contract. The court believed his defence that he was exonerated from liability for the reasons that he was shielded by the contract he signed with the driver he handed his vehicle which was involved in that accident, one Wilson Claud Kimario through the contract they signed on 3rd June, 2014. The appellant was aggrieved by that

decision hence this appeal. The suit proceeded ex-parte as against the first respondent, as all efforts to serve him proved futile.

It was agreed that the appeal be disposed of by way of written submissions. The appellant was represented by Mr. Hamis Mkindi learned advocate from the Legal and Human Rights Center, while the respondent enjoyed the services of Mr. Kapimpiti Mgalula learned advocate.

The appeal comprise the following grounds:-

a) *That, the trial Magistrate erred in law and fact for his failure to held (sic) the second defendant (second respondent herein) liable for the acts of the first defendant as he is the owner of the vehicle which caused the accident;*
b) *That, the trial Magistrate erred in law and fact for not considering the framed issues;*
c) *That, the trial Magistrate erred in law and fact for holding the first defendant to be liable without considering that he was driving the vehicle owned by the second defendant;*
d) *That, the trial Magistrate misdirected himself by dealing with the issue of an employment of drivers while that matter was neither pleaded by the defendants in their written statement of defence nor framed as an issue for determination during the hearing of the case.*

Before I delve into the substantive part of this appeal, it is opportune at this moment to determine the raised Preliminary points of objections by the learned counsel for the second respondent. It reads:-

a) *That, the appeal is misconceived and bad in law for being filed out of time; and*
b) *That, the memorandum of appeal is defective for including a non-existing party*

There are two issues relevant for the raised preliminary objections:-
First, whether the appeal is defective for including a non-existing party. Second, whether the appeal is out of time?

In the first issue, Mgalula contended that the appellant has included the second respondent Valency Tarimo in the Memorandum of appeal while he did not form part of the judgment and decree. The appellant ought to have applied to rectify the anomalies in the judgment and decree instead of rectifying them at his own wishes. To support his argument, he cited the case of **Elizabeth Michael Ringo vs. Alex Reuben Kimaro**, Civil Appeal No. 161 of 2018 (unreported).

Responding to the second limb of the P.O, Mr. Mkindi stated that the name of the second respondent is in the court records, and its omission is a clerical error which is curable. Therefore, according to him, the cited case of

Elizabeth Michael Ringo (supra) is distinguishable since in that case the issue was involvement of a completely a non-existing party.

This court has this to say, on the alleged joining the second respondent while according to the respondent's counsel was not a party in the trial court. The trial court record, shows that the second respondent was actually a party after amendment of the plaint on 22nd May, 2017. The appellant prayed to amend the plaint so as to add the second respondent as the second defendant, a prayer which was granted. The amended plaint was filed on 12th June, 2017. The second defendant filed his written statement of defence on 30th June, 2017 meaning that he knows the existence of this case. The second respondent testified in the trial court as the sole defence witness. His testimony was referred throughout the trial court judgment. The fact that his name did not feature in the judgment and decree as the second respondent, is as rightly contended by Mr. Mkindi a typing error, or irregularity not affecting merits or jurisdiction. It is curable under section 73 of the Civil Procedure Code, Cap 33 (R.E 2019). The cited case of **Elizabeth Michael Ringo vs. Alex Reuben Kimaro**, (supra) is distinguishable because in that case the person who was joined as the respondent was not a party in the original case contrary to the instant appeal. The omission to

include him in the judgment and decree is an oversight which may entitle this court to send the record to the trial court so as to be remedied by making necessary amendment. That said, the second limb of preliminary objection relevant for the first issue is overruled.

I turn to the second issue, on time bar, relevant for the first limb of the preliminary objection. The question is, is the appeal time barred? Mr. Mgalula stated that paragraph 1 Part II of the schedule to the Law of Limitation Act, Cap 89 [R.E 2002] provides for the time to appeal against the decision originating from the Resident Magistrate's Court to the High Court to be 90 days. That from the date when the trial court judgment was delivered on 18th December, 2017 to the date of filing the instant appeal on 28th March, 2018, it is 101 days which had expired from the date of the judgment. He cited two cases to support his argument; **Issa Okashi Vs. Said Okashi,** PC Civil Appeal No. 01 of 2028 and **Samson Kazimoto Vs. Tanzania Legion and Club** Misc. Labour Application No. 01 of 2010. On that account, the appellant ought to have first sought an extension of time to file this appeal.

In response, Mr. Mkindi, the learned counsel concedes to the first limb of preliminary objection in that the appeal was filed out of the statutory time

prescribed to file appeals save that the appellant was late to be supplied with the necessary appeal documents. He applied to be supplied with the documents on 20th December, 2017 and the documents were made available to the appellant on 27th February, 2018, and the instant appeal was filed on 28th March, 2018, which is 30 days from the date the copies were supplied to the appellant.

Mr. Mkindi relied on section 19(2) of the Law of Limitation Act, Cap 89 [R.E 2019] which excludes the period of time requisite for obtaining the copies of necessary documents for appeal. On that account he maintained that the appeal was filed in time, citing the decision of the Court of Appeal in **The Registered Trustees of the Marian Faith Healing Center @Wanamaombi vs. the Registered Trustees of the Catholic Church Sumbawanga Dioces,** Civil Appeal No. 64 of 2006 (unreported). He distinguished the two cases cited by Mr. Mgalula that in the case of **Issa Okashi** (supra), it originated from the Primary Court in which the Law of Limitation Act and the CPC do not apply, and **Samson Kazimoto** (supra), is purely labour case and the CPC and Cap 89 are inapplicable in labour matters.

This court has the following to say. The respondent's counsel contended that the appeal was filed out of time since the statutory time to file appeal from the Resident Magistrate's Court to the High Court is 90 days. The learned counsel for the appellant, in reply did not dispute that, but he was quick to reason that the appeal was filed out of time because the appellant was delayed to be supplied with the appeal documents, including the decree which was issued to him on 27th February, 2018. That he applied for copies on 20th December, 2018. The appeal was then lodged on 28th March, 2018, meaning it was just after 30 days and therefore is within the 90 days.

The law, I dare say, is clear that the time to lodge appeals originating from the Resident Magistrate Courts, according to section 19 (2) of the Law of Limitation Act, Cap 89 (R.E 2019) read together with Paragraph I part II, item 1, is "ninety days".

The question, is when do we start to count such 90 days limitation period?

The law is settled in view of the decision of the Court of Appeal in the case of **The Registered Trustees of the Marian Faith Healing Center @Wanamaombi vs. the Registered Trustees of the Catholic Church Sumbawanga Dioces** (supra) cited to me by the learned advocate for the appellant, that it is from the date when a party is served with copy of the judgment and decre. This is in accordance to the provisions of section 19 (2) of Cap 89. The court in the case of **The Registered Trustees of the Marian Faith Healing Center @Wanamaombi** (supra) observed that:-

> *"In view of what we have endeavored to show above, and in the light of section 19(2) (supra), it follows that the period between 2/5/2003 and 15/12/2003 when the appellants eventually obtained a copy of the 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 19/12/2003 it was in fact and in law not time barred."*

The court cited that provision which reads:-

> *"19. Exclusion of certain periods:-*
>
> *(1) In computing the period of limitation for any proceeding, the day from which such period is to be computed shall be excluded.*

(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.***

(3) ..." (Emphasis original.)

That provision and the above cited case law, suffices to hold that the period between 18th December, 2017 when the impugned judgment was delivered, and 28th February, 2018 when the appellant was issued with the copy of decree, which is a mandatory document in filing appeals originating from District Courts and Courts of Resident Magistrate's, is excluded in computing time.

In computing that period however, there must be application <u>for copy of the judgment and decree which must be within 30 days.</u> The appellant says he applied for same on 20th December, just two days after the decision of the court was pronounced. He also purports to say he attached copy of the application letter to such judgment and decree which is however missing. This has the necessary implication that in fact it was not applied for and that it is an afterthought.

It was held in the case of **Mrs. Kamiz Abdullah M.D. Kermal** vs. **The Registrar of Buildings** and **Miss Hawa Bayona** (1988) TLR 199 that:-

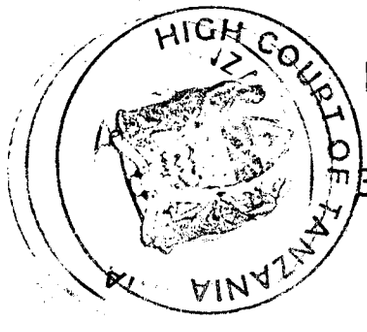
> *"...**a copy of the proceedings is applied for in writing within 30 days of that judgment or order appealed against**..." (Emphasis mine).*

Such application for copies, ought to have been in writing and must be within 30 days. The appellant ought to have said in the application seeking for extension of time reasons for the delay instead of purporting to annex copy of the letter to the written submissions which he is aware is only summary of argument not evidence. The learned counsel purports to submit from the bar instead of by way of an affidavit.

I would agree with the learned counsel for the respondent Mr. Mgalula, that the appeal was filed outside the prescribe time limit. The Court of Appeal in the case of **Selemani Jabiri v. Hon. Mary Chatanda**, Civil Application No. 139/02 of 2018, CAT at Arusha (unreported), held at page 7, that *"the applicant has shown good cause for the delay to file appeal as he was waiting to be supplied with a copy of the proceeding in **the High court which he had promptly requested."*** (Emphasis mine).

There must therefore be a prompt request. I would hasten to add that one can safely say, it is not disputed that, computation of time is from the date when a party is served with the said relevant documents based on the reasons that there is no clear provision under the CPC governing the matter at hand, recourse being under section 19 (2) of Cap 89 RE 2002. This provision however cannot be abused instead it may cover a litigant who is diligent by applying for a copy within 30 days from the date of the decision. Failure of which the party has to seek extension of time showing if there are sufficient reasons for such a delay. The appellant filed this appeal outside the prescribed time limit without first seeking for leave. It has been said time and again that *"a party does not come to court as and when he chooses"* otherwise limitation period would lose its effective meaning.

The appeal is therefore outside the prescribed time limit. The appeal stands struck out with costs.



M. G. MZUNA,
JUDGE.
30th October, 2020