

IN THE HIGH COURT OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

CIVIL APPEAL No. 33 OF 2020

(Originating from the District Court of Ilemela at Mwanza Civil Case No. 01 of 2020 of Originated from the Primary Court of Ilemela in Civil Case No. 96 of 2017)

UKUSHIRA (GERVAS MSIMBU) APPELLANT

VERSUS

FORTIDAS KAMALA & ANOTHER RESPONDENTS

JUDGEMENT

Last Order: 02.12.2020

Judgment Date: 17.12.2020

A.Z.MGEYEKWA, J

The present appeal stems from the decision of the Primary Court of Ilemela in Civil Case No. 96 of 2017. The background to this appeal is briefly that, the appellant Fotridas Kamala and Tasiana Kamala are husband and wife who were jointly sued by the respondent in the Primary Court of Ilemela over the loan advanced to them. The trial court ruled that the appellant had

no business licence to undertake banking transactions. The matter was dismissed.

Aggrieved, the appellant appealed to the District Court of Ilemela, at Mwanza whereas the first appellate Court did not determine the matter in merit. The first appellate court suo mottu decided that the appeal was hopelessly time barred. The decision of the District Court of Ilemela on appeal irritated the appellant. He thus appealed to this Court through Land Appeal No. 33 of 2020 on three grounds of grievance, namely:

- 1. That, the trial magistrate erred in law and fact by holding that the appeal was time-barred.*
- 2. That the trial magistrate erred in law by holding that the appellant ought to have lodged the appeal without being supplied with the copy of judgment without taking into consideration that it was difficult to prepare meaningful appeal without copies of the judgment.*
- 3. That the trial magistrate erred in law and fact by raising a pertinent issue suo-motto and dismissing the appeal based on the same issue without giving parties herein chance to address her on the same as the result the appellant was condemned unheard.*

In prosecuting this appeal Mr. Kinango, learned Advocate represented the appellant and the respondents appeared in person unrepresented.

Pursuant to the court order of 16th November, 2020, the appeal was by the way of written submissions which parties complied. The appellant file a written submission on 20th November, 2020, the respondent filed a reply on 27th November, 2020 and there was no rejoinder.

The appellant learned advocate was the first one to toss the ball and opt to argue on two points that the court erred in law by holding that the appeal was lodged out of time and that the court determines the matter without giving parties right to be heard.

It was his submission that the first appellat court raised the issue of time barred suo mottu while the issue needed clarifications. He went on to state that the court ought have given the parties right to address the court on the issue of time barred before proceeding to termine the matter suo mottu. Insisting he cited Genesis 3:1-24 of the Holly bible and the case of **Hamis Rajabu Dibangula v Republic** and **Romadi Makini v Republic** TLR No. 148.

Submitting on the second point, he argued that the appeal was not time barred for the reason that the judgment was not ready for collection. He added that the copy of the judgment was ready for collection on 10th January, 2020 and the same was served to the appellant on 13th January, 2020. It was

his view that it is true that the appellant was not required to attach a copy of judgment but the appellant could not prepare a sensible appeal without having read and understood the judgment. He went on to state that the appellant filed his appeal on 29th January, 2020 within time since the time which the parties were awaiting to be supplied with copies of judgments was excluded for that reason. Therefore, it was his view that the appeal was not time barred.

On the strength of the above submission, Mr. Kinango beckoned this court to allow the appeal, the decision of the trial court and the first appellate court be reversed and to order the first appellate court Magistrate to decide the matter on merit.

Responding, on the first ground, the respondents stated that the matter of limitation of time is jurisdictional, that the court can not entertain the matter which is out of time without obtaining a leave. Enlightening, they cited section 20 (3) and (4) of the Magistrate Courts Act, Cap.11 [R.E 2019] that an appeal lodged without leave is incompetent and the court has no jurisdiction to entertain it. He insisted that the first appellate court was correct to strike out the appeal for lack of leave to file the appeal out of time. The respondents went on to state that right to be heard is not absolute. To bolster his position he referred this court to Article 13 (6),(a) of the Constitution of the United

Republic of Tanzania of 1977. The respondents did not end there, they stated that it was not wrong for the court to move itself *suo mottu* since the appellant had no sufficient reasons to move the court to decided otherwise.

Submitting on the second ground, he argued that a dissatisfied party is not obliged to attach a copy of judgment in a matter arising from the Primary Court and if the appeal is delayed the period is not excluded. It was his view that the appellant ought to have filed an appeal without attaching a copy of judgment. He avers that, the learned counsel did not cite any provision of the law to support his submission. The respondents went on to state that section 14 of the Law of Limitation Act as cited the respondent is not applicable in the case at hand. To buttress his position he cited the case of **Asha Said v Given Manyanga & Another**, Misc. Civil Application No. 28 of 2003 (unreported).

In conclusion, the respondent urged this court to find this ground not meritious.

I have dispassionately considered the submissions of both parties in the determination of this appeal. On the first ground of appeal, the appellant claims that the trial Magistrate erred in law and fact by holding that the appeal was time-barred. Reading the records I have noted that the appeal was filed

on 25th November, 2019 after 65 days from the date when the trial court delivered its ruling and the appellant filed an appeal before the District Court on 30th January, 2020. The law is clear that the any appeal to the District Court originating from the Primary Court shall be filed within 30 days from the date when the judgment was delivered. This is stated under section 20 (3) of the Magistrate courts Act, Cap.11 which provides that:-

“ 20 (3) Every appeal to a district court shall be by way of petition and shall be filed in the district court within thirty days after the date of the decision or order against which the appeal is brought”.

Applying the above provision of the law and reading the instant case, it is crystal clear that the appeal before the District Court was time barred. The appellant's learned counsel acknowledged that the appeal was filed 65 days after the judgment was delivered but he disputed the days that the days which the appellant was waiting for the copies of the judgment were excluded in the computation of time limit. I have revisited the law in particularly section 20 (4), (b) of the Magistrate Court Act, and Rule 4 (1) of the Civil Procedure (Appeals and Proceedings Originating from Primary Courts) Rules GN No. 312 of 1964 that the appeal shall be by the way of petition and no need for the copy of the judgment to be attached. It is from this excerpt I differ with the learned counsel for the appellant that the time when he was waiting for

the copies of the judgment falls in the time of exclusion in the computation of time to file his appeal. This court has this to say, with respect of a delayed copy of the judgement, in the case of:- **Anthony Lucas Vs Mosi Mwita** PC Civil Appeal 80/2016 HC at Dsm. Arufani J said that:-

"As for the argument that she delayed getting the copy of the judgment of the trial court which would have assisted her to prepare the sound grounds of appeal the court has found that the said argument would have been used in seeking for extension of time to lodge the appeal out of time and not to lodge the appeal out of time without seeking for leave of the court to file the appeal out of time."

Undeniable, I agree with the learned trial magistrate that the appeal was time-barred. At the first place, the appellant was required to apply for an extension of time within which he could by the leave of the court file the appeal. However, the appellant did not do so, and as a consequence, his appeal stood as it was before the first appellate court, hopelessly time-barred and as good as not existing before the first appellate court.

Eventually, my practice also realizes that an appeal from the Primary Court to the District Court does not require the dissatisfied party to attach a copy judgment is not a legal requirement. In the case of **Sophia Mdee Vs**

Andrew Mdee & 3 Others Civil Appeal No. 05 of 2015 CAT at Arusha, July 2015 (unreported) court of Appeal held that:-

"From the foregoing, it is clear that attachment of a copy of Judgment along with the petition of appeal is not a legal requirement in instituting appeal originated from Primary Court"

From the above authority, it is settled that no suppository to cure lapse of time except the extension of time with due reasons, and therefore the first ground of appeal fails for lack of merit.

On the second and third grounds of appeal, the learned counsel claims that the first appellate court erred raised the matter *suo motto* and parties were not given right to be heard, the same was contested by respondent. There is no doubt that the appellate court raised the issue *suo motto* after it discovered that there was a statutory breach by the appellant that the appeal did not properly pass to the court to be eligible for a trial. I find it proper for the court to exercise its powers *suo motto* and what is contested is failure of the court to give parties their rights to submit over the raised issue. I agree with the appellant learned counsel that this is a constitutional right to the parties and should be exercised without despair. Article 13(6)(a) of the Constitution of the United Republic of Tanzania 1977 (as amended time to

time) same was quoted by the learned counsel for the appellant on his submissions that when the rights and duties of any person are being determined by the court or any other agency, that person shall be entitled to a fair hearing.

I have perused the court records of the first appellate court and it was my findings that the first appellate court went on determining the appeal on the raised issue without affording parties right to address the court. I concur with the appellant's learned counsel that the court entered into an error and skipped the vital procedural requirement which renders its decision nullity. I have borrowed the wisdom in the case of **Scan-Tan Tours Limited versus The Registered Trustees of the Catholic Diocese of Mbulu**, Civil Appeal No. 78 of 2012, CAT, it was stated that:-

"... when an issue being introduced is so pivotal to the whole case and would form a basis for the decision of the trial Court, it is pertinent that the parties should be given a chance to address the Court on the new issue".

The same was portrayed in the case of **Wegesa Joseph Nyamaisa v Chacha Muhogo**, Civil Appeal No. 61 of 2016, whereas, the Court of Appeal of Tanzania stated that:-

“ Failure to give parties right to address the court renders the decision reached thereof a nullity for having violated the principles of natural justice on the right to be heard.”

Based on the above authorities, it is clear that a decision likely to adversely affect the rights of parties shall not be made without affording the parties a right be heard.

In the upshot, without bet for the outcome of the same, the constitutional right is of far important to be observed at any expense for justice to grin audaciously. I, therefore, hasten to uphold the constitutional rights firm and in so doing I find that the first appellate court decision dated 04.05.2020 nullity for want of parties to address the court. Much as it requires, I nullify the first appellate court decision and order the case be remitted back to the first appellate court to call upon parties and afford them right to address the court on the matter at hand. Since the matter was not occasioned by parties, no order as to costs. It is so ordered.

Dated at Mwanza this date 17th December, 2020.




A.Z.MGEYEKWA

JUDGE

17.12.2020

Judgment delivered on 17th December, 2020 in the presence of the appellant and the first respondent.


A.Z.MGEYEKWA

JUDGE

17.12.2020

Right of Appeal fully explained.