

IN THE HIGH COURT OF TANZANIA

AT SUMBAWANGA

MISC. CIVIL APPLICATION NO. 21/2019

(From Mpanda District Court Civil Appeal No. 1/2019)

TPM MINING AND ENERGY APPELLANTS

VERSUS

VIGOUR SECURITY & DOMESTIC DUTIES RESPONDENT

RULING

MASHAURI, J.

19/01/2020 & 26/03/2020

By dint of the chamber summons embodied with an affidavit deponed by Mr. Eiden Ilasan the authorized principal officer of the applicant, this is an application for leave to file an appeal in this court out of time against the decision of District court of Mpanda in civil appeal No. 1 of 2019, which had accrued from the decision of the Mpanda Urban Primary Court in Civil case No. 286 of 2018.

The decision of the 1st appellate court in Civil Appeal No. 1 of 2019 was delivered on 23rd day of May, 2019. For the reasons he alone is aware, the applicant did not lodge his appeal within a period of time prescribed by the law, hence this application.

Upon being served with the application, the respondent through his advocate Omary Issa Ndamungu, did file in this court Notice of preliminary objection to the effect that:-

- (i) The Application is hopelessly time barred against the sixty (60) days rule.
- (ii) That, the verification clause of the affidavit of the Applicant is incurably defective.

The parties were granted leave by this court to dispose of the raised points of preliminary objection by way of filing written submissions.

In his written submission in support of the 1st point of objection that this application is hopelessly time barred against the sixty (60) days rule, Mr. Omary Issa Ndamungu counsel for the respondent submitted that, so far this application is made under S. 14(1) of law of Limitation Act Cap 89 RE 2002, Section 95 Cap 33 RE 2002 the laws of which do not prescribe the time limit within which applications are to be made before this court, then the laws are applicable in this matter.

Therefore, by dint of part III item 21 in the schedule to the law of Limitation Act Cap. 89 RE 2002, this application has been filed in this court being hopelessly time barred.

That, in this matter, the judgment of the first appellate court Mpanda District Court which is intended to be appealed against was delivered in court on 23rd May, 2019 and the applicant was supplied with copy of the judgment on 31/05/2019 but the applicant filed his application in this court

on 2nd August, 2019 after a lapse of 67 days which is contrary to the sixty (60) days rule.

To buttress his argument on this point, counsel for the respondent referred this court to the case of **Bank of Tanzania vrs Said A. Marinda & 30** others, Civil Reference No. 3 of 2004 CAT, Dar-es-salaam Registry (unreported) in which the court of Appeal cited with approved its decision in the case of **James Masanja Kasuka vrs George Humba**, Civil Application No. 2 of 1997 CAT Tabora Registry (unreported) in which the court of appeal held:-

“We accordingly set the time limit of sixty days in civil applications as we have for criminal application for review”.

In the **Bank of Tanzania’s** case (supra) the court of appeal also cited another case of **Seleman Ally Nyamalegi & 2 others vrs Mwanza Engineering Works** Civil Application No. 9 of 2002 CAT MZA Registry (unreported) in which the court of appeal also cited the **James Masnja Kasuha’s** case (supra).

Having so submitted in support of the first point of preliminary objection, counsel for the respondent prayed the court to dismiss the applicant’s application.

For the 2nd point of preliminary objection that the affidavit is incurably defective for want of proper verification clause, counsel for the respondent submitted that, the affidavit is incurably defective because, the

applicant has in the verification clause verified on paragraphs which do not exist in the affidavit. He has verified 13 paragraphs instead of 10 paragraphs as are contained in the affidavit. Hence incurably defective. He therefore prayed the court to dismiss the application with costs.

In reply, the applicant who in this application appears in person submitted in respect of the first point of the preliminary objection that, the submission by counsel for the respondent in support of the 1st point of preliminary objection is contradictory. The gist of S. 14 of the law of Limitation Act gives room to a person who did not appeal in time against the decision of a court to lodge in court an application for leave to appeal against such decision of the court out of time. Hence this application by the applicant.

In respect of the 2nd point of preliminary objection, the applicant submitted in reply that, with the advent of the principle of Overriding objective brought by the Written laws (Misc. Amendments) (No. 3) Act No. 8 of 2018, the court is required to deal with cases justly and to have substantive justice.

That, the law calls upon courts to determine matters on merit and not on mere technicalities aiming at defeating justice.

To back up his submission in reply the applicant also cited Article 107 A(1)(e)(sic) of the 1977 constitution of the United Republic of Tanzania (as amended from time to time) (the correct is Article 107 A (2)(e) which require courts to do justice without being bound by technicalities.

Having so submitted the applicant prayed the court to dismiss the respondent's points of preliminary objection with costs.

The issues for consideration and determination in this application are:-

- (i) Whether this application is hopelessly time barred.
- (ii) Whether the verification clause of the affidavit is incurably defective.

By virtue of the chamber summons embodied with an affidavit deponed by Eiden Ilalan, this application is brought before this court under S. 14(1) of the law of Limitation Act Cap. 89 RE 2002, .S. 95 and order XLIII Rule 2 of the Civil Procedure Code Cap 33 RE 2002.

Section 14(1) of the law of Limitation Act provides that:-

14-(1) Notwithstanding the provisions of this Act, the court may, for any reasonable or sufficient cause, extend the period of Limitation for the institution of an appeal or an application, other than an application for the execution of a decree an application for such extension may be made either before or after the expiry of the period of limitation prescribed for such appeal or application.

Section 95 of the Civil Procedure Code Cap. 33 RE 2002 provides that:-

95. Nothing in this code shall be deemed to limit or otherwise affect the inherent power of the court to such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

In itself, order XLIII Rule 2 of the Civil Procedure Code Cap 33 RE provides thus:-

2 Every application to the court made under this code shall, unless otherwise provided, be made by a chamber summons supported by an affidavit.

As indicated at the beginning of this ruling, this application accrues from the decision of the 1st appellate court in Civil Appeal No. 1 of 2019 which was delivered on 23/05/2019. The applicant, being aggrieved by the said decision did not appeal against the decision in the High Court in time, instead, he filed this application for leave to appeal in this court out of time on 02/08/2019 after a lapse of 67 days from the date decision was given.

Under Section 14 of the law of Limitation Act, there is no time limit Specified within which to file an appeal or application in the High Court if a party to the suit is dissatisfied with the decision of a subordinate court.

Having found the lacuna in our laws, and so as to cure the anomaly the court of Appeal of Tanzania has, through it decisions set and restated a sixty (60) days Rule which require applicants in Civil applications as we have for criminal applications for Review within which to file their applications.

In this application it is not disputed that, the same was filed in this court after a lapse of 67 days from the date of the judgment delivered in court. Thereafter, the application was filed in court being time barred.

In his written submission in reply to the respondent's submission in support of the 1st point of preliminary objection that, this application has been filed in this court being hopelessly time barred, the applicant has assigned no any good cause for the delay.

It is cardinal principle at law that, the issue of limitation of time is a fundamental one and not merely a technicality. Once a challenge of time limitation is raised, the court is obliged to pursue the pleadings filed by parties and making a finding whether or not the suit is time barred before proceeding with the case on merits because the rules of limitation are not meant to destroy the right of the parties, but instead they are meant to see that parties do not resort to dilatory tactics but to see their remedy appropriately in time.

The law of limitation on actions knows no sympathy or equity. It is a merciless sword that casts across and deep into all those who got caught in its web.

In law, parties are bound by the life span of any legal remedy for the redress of the legal injury to have been suffered.

For the sake of a systematic and careful perusal and analyzing of the submissions by the parties in support of their respective allegations, I am inclined to the respondent's 1st point of objection that, this application was

filed in this court being hopelessly time barred. The said point of objection therefore is hereby sustained.

Having sustained the 1st point of preliminary objection (supra), I deem it superfluous to deal with the 2nd point as by so doing amounts to indulge in a sterile exercise.

In the event, this application is dismissed with costs.

It is so ordered.


W.R. MASHAURI

JUDGE
26/03/2020

Date - 26/03/2020

Coram - Hon. M.S Kasonde – Ag,Dr.

For Applicant –
Applicant - } Present (Manager)

For Respondent – Mr. Omary Issa – Advocate for

Respondent - Mr. Vicent Kilindira (Director)

B/C - Zuhura

Mr. Omary Issa – Advocate:

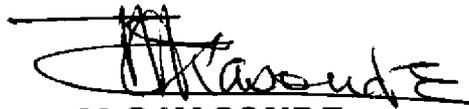
The matter comes for ruling and we are prepared.

Mr. Eldhem (manager) for Applicant:

We are prepared too.

Court:

Ruling delivered in chambers in the presence of Mr. Eldhem Manager for the applicant and Mr. Omary Issa – Advocate for the respondent this 26th day of March, 2020.



M.S KASONDE

Ag, Deputy Registrar

26/03/2020