IN THE HIGH COURT OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

PROBATE CIVIL APPEAL NO. 09 OF 2019

JAMES PETRO NDAKI ..... APPELLANT

VERSUS

NYAMALWA WANGALUKE ..... RESPONDENT

Date of the last Order: 08/04/2020

Date of Ruling: 21/04/2020

RULING

ISMAIL, J.

In this ruling, I am called upon to decide whether the appeal, instituted by the appellant and pending in this Court, is timeous. The appeal has been preferred against the decision of the District Court of Nyamagana at Mwanza, in respect of Miscellaneous Civil Application No. 17 of 2019, in which the present appellant featured as the applicant. The court declined the applicant's urge to have him file an appeal out of time on the ground that the applicant then, now the appellant, was not a party to the original proceedings.

The appeal before this Court has hit an impediment staged by the respondent who contends that the same is time barred. In view thereof, the respondent urges this Court to dismiss it.

When the counsel for the parties appeared in Court on 8th of April, 2020, it was unanimously agreed that the preliminary objection be argued by way of written submissions. It is at this point that the counsel for the respondent abandoned the second limb of the objection, leaving the objection on time bar as a solitary point for contention by the parties.

Submitting in support of the objection, the respondent's counsel began by stating the law that governs appeals from district courts to the High Court. Quoting *section 25 (1) (b)* of the Magistrates' Courts Act, Cap. 11 [R.E. 2002], the learned counsel argued that, whereas time for filing appeals is 30 days, the pending appeal had been instituted 43 days after the expiry of the time frame set out by the law. The counsel fortified his contention by citing the decision in ***Dr. Ally Shabhay v. Tanga Bohora Jamaat*** [1997] TLR 305, in which it was held that parties must show diligence when engaging courts. The respondent further contended that the provisions of section 25 (1) of Cap. 11 do not require that copies of the decree and judgment should accompany appeals to this Court. He buttressed this contention by citing the decision of the Court in ***Gregory***

Raphael v. Pastory Rwehabula, HC-Civil Appeal [2005] TLR 99. It was his view that, even if that was a requirement, the applicant would still be required to apply for extension of time to file the appeal, explaining out the the delay in filing the appeal. In this respect, he cited the decision of this Court in ***Anthony Lukas v. Mosin Muta***, HC-Civil Appeal No. 80 of 2016 (unreported), in which it was held that reasons for the delay ought to be encompassed in an application for extension and not when the appeal has been filed without first obtaining leave of the court. Consequently, he held the view that the appeal is time barred, deserving nothing short of a dismissal.

The appellant did not yield. He fervently held the view that the appeal is timeous. Recalling the dates on which actions were taken on the matter, he submitted that, whilst the ruling appealed against was delivered on 10th April, 2019, the pending appeal was filed on 26th August, 2019. After reckoning the time he was waiting to be supplied with a copy of the ruling, the appeal was filed 24 days after he received a certified copy of the ruling. He based his argument on section 19 (1) (2) of the Law of Limitation Act, Cap. 89 R.E. 2002. He further contended that since the provision is couched in imperative terms then exclusion of the days is mandatory and the law does not provide that such exclusion should be

before leave is sought. The appellant wound up his submission by urging the Court to resist the temptation of disposing of the matter on unnecessary preliminary objections. Instead, he implored upon me to overrule the objection and let the appeal be determined on merit.

Having reviewed the rival contentions, one key issue for my determination is whether, as contended by the respondent, this appeal is time barred. The answer to this question requires me to cast an eye on the provision that sets out a time prescription for appeals of this nature. This is section 25 (1) (b) of Cap. 11 as cited above. For ease of reference, this provision states as hereunder:

> *"(1) Save as hereinafter provided-*
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> *(b) in any other proceedings any party, if aggrieved by the decision or order of a district court in the exercise of its appellate or revisional jurisdiction may,* ***within thirty days after the date of the decision or order, appeal therefrom to the High Court****; and* ***the High Court may extend time for filing an appeal before or after such period of thirty days has expired.****"*[Emphasis supplied]

Glancing through the petition of appeal, it is revealed that the same was filed in this Court on 26th August, 2018, while the ruling in respect of which the appeal has been preferred was delivered on 10th of April, 2019, and not on 13th June, 2019, as contended by the counsel for the respondent. The record reveals, as well, that the impugned ruling was

certified as a true copy on 2nd of August, 2019. This is where the appellant bases his argument that the application was filed 24 days and, therefore, timeously lodged. Effectively, he has netted off the days he spent while waiting to be supplied with a copy of the ruling, and he is of the firm view that his actions were justified by section 19 (1) (2) of Cap. 89. The respondent holds the view that such reckoning ought to have been done through an application for extension of time. It is true that section 19 of Cap. 89 provides for an exclusion of the days on which the judgment was delivered and the period requisite for obtaining a copy of the decree or order sought to be appealed against. The pertinent question, however, is whether the provisions of section 19 of Cap. 89 are, in the circumstances of this case, the relevant provision to rely upon as the basis for contending that the appeal is time barred. The answer to this question requires a revisit to section 25 (1) (b) cited above. This provision not only provides for time prescription for filing appeals, but also the power that the Court has to extend time where an intended appeal is to be preferred outside the time prescription. In peculiar circumstances that involve appeals originating from the primary court, as is the case here, it is right to say that this law is self-contained when it comes to prescribing time for lodging an appeal. It rules out the application of the provisions of Cap. 89 in dealing with

computation and exclusions spelt out therein. This exclusion covers section 19 (2) of Cap. 89, relied upon by the appellant. This exclusion is explicitly spelt out in section 43 (f) of Cap. 89 which provides as hereunder:

> *"This Act shall not apply to-*
>
> *(a) N/A*
> *(b) N/A*
> *(c) N/A*
> *(d) N/A*
> *(e) N/A*
> *(f) any proceeding for which a period of limitation is prescribed by any other written law, save to the extent provided for in section 46."*

From the foregoing, it is clear that resort to the relief given under section 19 (2) would constitute a serious misdirection because section 25 (1) (b) of the MCA has given a time prescription and what a prospective appellant ought to do to file an appeal out of time. But even assuming that section 19 (2) Cap. 89 is applicable in the present case, which is not the case, the next question would be: is attachment of a copy of the judgment or decree that the appellant waited for so long a prerequisite? The answer to this question is gathered from section 25 (3) and (4) of the MCA which provides as hereunder:

> *"(3) Every appeal to the High Court shall be by way of petition and shall be filed in the district court from the decision or order in respect of which the appeal is brought:"*

(4) Upon receipt of a petition under this section the district court shall forthwith dispatch the record of proceedings in the primary court and the district court to the High Court."

From the quoted provisions, it is quite clear that filing of the appeal under the provisions of section 25 (1) (b) of the MCA does not require attaching a copy of the judgment, decree or order sought to be appealed against. As such, delays whose reason is the late supply of copies of the said decisions is of no consequence in appeals such as this one. This position got a solid backing from the ***Gregory Raphael case*** (supra), cited by the counsel for the respondent. In this case, this Court held as follows:

> *"But the position is different in instituting appeals in this Court on matters originating from Primary Courts.* ***Attachment of copies of decree or judgment along with petition of appeal is not a legal requirement. The filing process is complete when petition of appeal is instituted upon payment of requisite fees.*** *If attachment with copies of judgment, as said by Mr. Rweyemamu, is a condition sine qua non in filing PC civil appeal in this Court, I think the rules i.e.* The Civil Procedure (Appeals in Proceedings originating in primary Courts) 1964, G.N. 312/1964 would have stated so and in very clear words. ***The rules do not impose that requirement***. So it is not proper to impose a condition which has no legal backing." [Emphasis supplied]

The foregoing position follows in the footsteps of another decision of the Court (Manento, J. as he then was) in ***Abdallah S. Mkumba v. Mohamed Lilame*** [2001] TLR 326 at p. 329. It was held:

> *"…. But this appeal originated from a decision of a primary court of Temeke. The law applicable is therefore the Magistrates' Courts Act Number 2 of 1984. There is a big difference between these two legislations in matters relating to appeals to the High Court. Whereas appeals against decisions in cases originating from a District Court or a court of a Resident Magistrate the appeal is by way of Memorandum of Appeal accompanied by a decree (see Order 39, rule 1 (1) of CPC 1966), the appeals to the High Court in relation to matters originating in primary Courts are by was of a petition of appeal under section 25 (3) of the Magistrates' Courts Act 1984. Secondly, that whereas a Memorandum of Appeal and a copy of the decree under the CPC, 1966 order 39 (rule 1 (1) is presented to the High Court, the petition of appeal is filed in the District Court, which, upon receipt of the petition, the District Court forthwith dispatches the petition, together with the record of the proceedings in the Primary Court and the District Court to the High Court.* ***Nowhere in the Magistrates' Courts Act is the word decree mentioned or any other document to be accompanied to the petition of appeal."***

From these passages, the clear message is that appeals originating from the Primary Court do not require attachment of a decree or the judgment as a prerequisite for founding a matter in Court. It follows that the appellant's alleged pursuit of the documents which were needless in founding the appeal is, to say the least, an excuse which would not find any purchase, or help him sanitize the appeal which is dipped in the water

contaminated with wanton procrastination. The documents that the appellant was allegedly waiting for were of no use in his journey to this Court. This leaves the appeal hopelessly time barred and deserving nothing less than a dismissal. This is the wisdom that was applied in cited decisions and I am persuaded to follow the same path (See: ***Yusuf Same and Another v. Hadija Yusuf*** [1996] TLR 347.

In sum, I sustain the objection and hold that this appeal is time barred and, therefore, incompetent. I dismiss it with costs.

It is so ordered.

DATED at **MWANZA** this 21st day of April, 2020.

M.K. ISMAIL

JUDGE