

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(DODOMA DISTRICT REGISTRY)  
AT DODOMA**

**MISCELLANEOUS CIVIL APPLICATION NO. 32 OF 2020**

*(Originating from the High Court of Tanzania at Dodoma in DC. Appeal No. 14 of 2020)*

**JESCA GENESE SHAYO.....APPLICANT**

**VERSUS**

**1. CRDB BANK PLC MANYONI BRANCH }  
2. ABDALLAH KITIKU } .....RESPONDENT**

**RULING**

21/09/2021 & 21/9/2021

**KAGOMBA, J**

JESCA GENESE SHAYO filed an application before this Court for setting aside dismissal order delivered by the Court (Hon. L. Mansoor, J) on 17/09/2020 in DC Civil Appeal No. 14 of 2020 for want of prosecution and seeks order of this Court to restore the same. The application was brought by way of a Chamber Application made Under Section 95 and order IX Rule 9 (1) of the Civil Procedure Code [Cap 33 R.E 2019] and was supported by an affidavit of Halfani Moshi, the applicant's advocate. This application was presented for filing on 9/11/2020 according to Court records.

On 28/04/2020, the 1<sup>st</sup> respondents through their advocates M/S Vigilance Attorneys, filed a notice of Preliminary Objection with two grounds/limbs, namely:

1. The application is incompetent before this Court for being time barred.
2. The application is incompetent before the Court want of proper enabling provision of the law.

The applicant notified the Court that on the date of hearing he shall pray for dismissal of the application with costs.

I have had the opportunity to hear the preliminary objection today. The applicant was represented by Mr. Halfani Moshi while the first respondent was represented by Mr. Nicholaus Leoni both learned advocates. The latter argued his preliminary objection first.

On the first ground of Preliminary Objection, Mr. Leoni submitted that the appeal giving rise to this application was dismissed on 17/9/2020 for want of prosecution. He argued that the applicant was therefore supposed to file her application to restore the appeal by 16/10/2020, being 30 days allowed by the law. He added that the applicant came to file her application on 9/11/2020, almost 23 days outside the time set under the Law of

- Limitation Act, [Cap 89 R.E 2019] without stating any legal justification for filing late.

In his response on the first ground of preliminary objection, Mr. Moshi conceded that the application was filed out of time but blamed the delay on unnamed Court clerk who gave control number and later cancelled it. Mr. Moshi elaborated that the said Court clerk issued the second control number which was used by the applicant to effect payment. He said, even in this second control number, the applicant effected payment on 24/10/2020 but unfortunately the Court receipt showed that the applicant paid on 9/11/2020.

Mr. Moshi conceded to the position of the law that an application is duly filed in Court on the date the payment of Court fees thereof was effected. He argued that the payment was made on 24/10/2020 but in effect it was made on 9/10/2020 according to Court record. The learned advocate stated his views that since the mistake was done by the Court, the applicant should not be held responsible. To this end, he cited the case of **William Getari Kyege V. Equity Bank and Another**, Civil Application No. 24/08 of 2019 where the Court of Appeal stated that a litigant should not be allowed to suffer through the mistake of an officer of the Court.

Mr. Moshi further argued that, since the mistake was done by the Court clerk who delayed issuance of control number despite the applicant's timely application for the same, the applicant should not be punished. He prayed the Court not to dismiss the application as dismissal would imply the application was conclusively determined by Court. He thus prayed the Court to strike out the application with leave to refile.

On the issue of costs, Mr. Moshi prayed for an order for costs to follow event as the main application has not yet been determined by this Court.

On the second ground of Preliminary Objection the learned advocate conceded also that the application was filed under a wrong provision of the law. He said since the application's proper provision was not Order IX Rule 1 of the Civil Procedure Code, [Cap 33 R.E 2019] as cited, but Order XXXIX Rule 19 of the Code, he was in agreement with the consequences of improper citation of the law, that the application is rendered incompetent. He prayed the Court to strike out the application and not to dismiss it, as the advocate for the first Respondent had prayed.

In his rejoinder, Mr. Leoni reiterated his submission in chief. He added that, based on Mr. Moshi's admission that the Court was not properly moved and if the Court sustains the first ground of objection the only remedy

available is to dismiss the application, in which case the second ground of objection will naturally die.

Mr. Leoni exonerated the unnamed Court clerk because there has been no any proof such as an affidavit from the said clerk taking the blame. He said, the applicant's advocate has not given specific dates on when the first control number was issued, when it was cancelled and the reason for that cancellation. He argued that in absence of such proof the views of the applicant's advocate become an afterthought. He prayed the Court to disregard such views.

Regarding the remedy for filing application out of time, he submitted that Section 3(1) of the Law of Limitation Act provides for dismissal as the only remedy available. He thus prayed the Court to dismiss the application.

Having read the submissions of both advocates in respect of the two grounds of preliminary objection, it is clear to me that the advocate for the applicant has conceded to both grounds.

On the first ground of objection the application is clearly filed out of time. It was filed in this Court on 9/11/2020 instead of being filed before expiry of 30 days, on or before 24/9/2020. The learned advocate for the applicant has conceded to the late filing sin. He however, attempted to justify

it by blaming an unknown Court clerk whom he said had issued a control number for the applicant to pay Court fees but cancelled it and issued another control number. As correctly submitted by Mr. Leoni, the applicant's claims are not proved. One could rightly say that the reason given for the delay is nothing but an afterthought. I accordingly disregard it.

The remedy for an application that is filed out of time is clearly stated under Section 3(1) of the Law of Limitation Act, [Cap 89 R. E 2019], as follows;

*"3-(1) Subject to provisions of this Act, every proceeding described in the first column of the schedule to this Act and which is instituted after the period of limitation prescribed therefore opposite thereto in the second column, **shall be dismissed** whether or not limitation has been set up as a defence". [Emphasis added]*

Since it has not been disputed by the applicant's advocate that the application before this Court was filed out of time, and since the applicant has not adduced any convincing reason to justify the delay, I accordingly dismiss the application with costs.

Having sustained the first ground of preliminary objection, I shall no longer discuss the second ground of objection.

Ordered accordingly.

Dated at **Dodoma** this **21<sup>st</sup>** day of **September, 2021**.



  
ABDI S. KAGOMBA  
**JUDGE**