IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM

CIVIL APPEAL NO. 70 OF 2020

(Originating from the Ruling of the District Court of Temeke at Temeke in Misc. Civil Application No. 190 of 2019)

LAURIAN PETER.....APPELLANT

VERSUS

EUSTACE KALAURI.....RESPONDENT

JUDGMENT

Date of last Order: 11/5/2021
Date of Judgment: 9/6/2021

MASABO, J.-

The appeal before me has its genesis in Civil Case No. 324 of 2017 instituted by Laurian Peter, the appellant herein, before Temeke primary court. Aggrieved by the outcome, he appealed to the district court of Temeke. Upon being served, the respondent raised a preliminary objection on two points of law. The first point was that the appeal was time barred. After hearing the parties, the court found that indeed the appeal was instituted out of time but proceeded to hear and determine it on merit. In the end, a judgment was entered in favour of the appellant which aggrieved the respondent. He appealed to this court through Civil Appeal No. 32 of 2019 armed with 5 grounds of appeal the first of which was that *the first appellate court erred in law by entertaining an appeal which was time barred*. After hearing the parties, this court, Mutungi, J. found the first ground meritorious and proceeded to quash and set aside the judgment and decree of the first appellate court.

Unhappy with the judgment, the appellant went back to the district court with an application for extension time within which to reinstitute the appeal. The application was met by two points of preliminary objection. The first point asserted that *the application is bad in law, misconceived and an abuse of court process since the applicant had earlier filed an appeal which was declared to be time barred*. The application was dismissed after the court sustained this point, hence, this appeal.

The appellant has listed 4 grounds of appeal on the basis of which he prays that the appeal be allowed:

1. The honourable trial court erred in law and facts in considering that an application for extension of time was an abuse of court process;
2. The honourable trial magistrate erred in law and facts by failing to consider that the High Court in Civil Appeal No. 32 of 2019 had quashed the judgment and proceedings of Civil Appeal No. 59 of 2018 at Temeke District Court which suggests that there was nothing in relations to the decision of the said appeal;
3. The honourable trial Magistrate erred in law and facts by failure to consider that the Appellant's rights in the entire application were to be considered and determined on merits, bearing in mind the fact that the District Court has contributed to the wrong procedure as it was observed by the High Court in Civil Appeal No. 32 of 2019; and

had a contributory role in the wrong procedure is misconceived as it ought to have been raised in Civil Appeal No. 32 of 2019 not in this appeal.

In a brief rejoinder, Mr. Mshukuma insisted that the appellant acted correctly by going back to apply for extension of time as the order of this court in Civil Appeal No. 32 of 2019 left the doors open for the appellant to apply for extension of time and file a fresh appeal.

I have carefully considered the submission for and against the appeal, the court record and the decision of this court in Civil Appeal No. 32 of 2019. The main question awaiting my determination is whether, after the judgment of this court in Civil Appeal No. 32 of 2019 it was open for the appellant to apply for extension of time to file a fresh appeal and if so, whether the district court misdirected itself in upholding the preliminary objection that the application was *bad in law, misconceived and an abuse of court process.*

Before I proceed further, I will reproduce a short extract from the judgment of Mutungi, J in Civil Appeal No. 32 of 2019 which is the bone of contention between the parties:

> "reading the above extracts, it is obvious the honourable District Magistrate misdirected herself. Once she had found the appeal was time barred was supposed to have dismissed the appeal, there was no point to proceed with the second limb since the same amounted to an academic exercise.....

> The court finds merit in the first ground of appeal and proceeds to allow the appeal on the first ground. The judgment and decree of the district court are quashed and set aside."

Two main points are decipherable from the extract above. The first point pertains to the appropriate remedy for a time barred action. I will not allow myself to be detained by this point as I am *functus officio*. Suffice it to state, albeit briefly that, as held by my learned sister, the only remedy for an appeal filed out of time is dismissal. As shown by the respondent, and as demonstrated through the ruling of the trial magistrate, the law on this point is fairly settled. There is plethora of authorities including the cases cited above which I need not reproduce.

The second point is that, having found that the appellate court ought to have dismissed the appeal instead of proceeding to the 2nd ground, the court quashed and set aside the judgment and decree of the first appellate court. In view of this, the argument fronted by Mr. Mshukuma that the entire proceedings of the first appellate court was quashed and set aside and there was nothing on record save the for the judgment of primary court is a lucid misdirection. The extract above entertains no doubt that, save for the judgment and the decree which were quashed and set aside, the rest part of the record, including the notice of preliminary objection and the submissions thereto, remained intact.

In the same spirit, this court while addressing a similar issue in **Tanzania Breweries Limited v Edson Muganyizi Barongo & 7 others** (supra), held that:

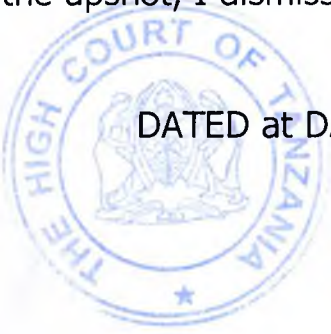
> "Equally in the instant application, the applicant cannot convince the court through the manner they have opted to wit by filing an application for extension of time in which to refile the application. The court cannot resurrect a matter or an application it killed (dismissed under the circumstances of being time barred and the dismissed application. The court cannot resurrect a matter or an application it killed (dismissed) under the circumstances of being time barred and without leave of the court to be filed. It needs another power from another powerful forum or court to resurrect the dismissal applicant matter *c'est-a-dire* (that is to say) a superior court like the Court of Appeal of Tanzania and that is by the applicants going to the Court of the Appeal for a remedy of a dismissed matter and not to come before this "killed" dismissed the matter or application.

Correspondingly, in the present appeal, the decree of this court quashing and setting aside the judgment of the first appellate court and the decree thereto, had the effect of killing the first appeal. It is beyond my comprehension how the district court which is subordinate to this court could

have resurrected the appeal which was declared dead by body superior to it. The resurrection if any, ought to be sought from the Court of Appeal which is the powerful and superior forum to the High Court. Undeniably, the application was destined to fail for being legally untenable.

This said, the 1st, 2nd and 4th grounds of appeal fails as there is no ground to fault the well-reasoned ruling of the trial court. Having found these three grounds devoid of any merit, I see no justification to proceed to 3rd ground of appeal.

In the upshot, I dismiss the appeal with costs.



DATED at DAR ES SALAAM this 9th day of June 2021.

J.L. MASABO

JUDGE