IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

MISC.CRIMINAL APPLICATION NO.4 OF 2021

CATHERINE JAPI ....APPLICANT

VERSUS

PASCHAL GEMBE..RESPONDENT

(Application from the decision of the High Court of Tanzania, Shinyanga

Dated the 8th of December, 2020

In

PC. Criminal Appeal No. 11 of 2020

....

RULING

28th June & 13th August, 2021

MDEMU, J.:

On 8th of December, 2020, this court dismissed PC. Criminal Appeal No.11 of 2020 by upholding preliminary objection that the appeal was hopelessly out of time. The Applicant applied to this court to set aside the decision as the preliminary objection was determined *ex-parte*. At the inception, the Respondent filed a notice of preliminary objections raising the following:

1. *That, the application is misconceived and unattainable in law.*

2. *That the application is bad in law for being brought under in applicable law.*

On 28th of June, 2021, I heard the Respondent in person and Mr. Phares Marengo, learned Advocate for the Applicant. The Respondent submitted briefly in the first preliminary objection that in criminal procedure, there is no law requiring to set aside ex-parte decisions. In the second preliminary objection, his view was that, the application has been intimated under inapplicable Article 108 of the Constitution of United Republic of Tanzania, 1977. He thought the said Article may only be invoked where there are no any enabling provisions for the purpose. He thus urged me to dismiss the appeal.

Mr. Phares Marengo found no substance to the first preliminary objection because *ex-parte* decisions in criminal cases may be set aside. He also faulted the Respondent for not suggesting remedy available to the Applicant if at all he is not permitted to apply to have such decision set aside. He cited the case of **Pangea Minerals Limited vs. Petro Fuel Tanzania Limited, Civil Appeal No.96 of 2015**(unreported) insisting that, unless remedies available in the High Court has been exhausted, a person may not be permitted to appeal to the Court of Appeal.

He also cited rule 18(1) of Judicature and Application of Laws (Criminal Appeals and Revisions on Proceedings Originating in Primary Courts) Government Notice No.390 of 2021 as an enabling provision. He was thus of the view that, the only remedy available to any ex-parte decision is to have it set aside. In his further view, along with GN No.390 of 2021, the cited Constitution provision mandates this court to adjudicate any matter. He however added that, GN No.390 of 2021 met this application in place as it was filed on 19th of January, 2021. He thus found no basis in both objections and asked me to overrule the same.

In this application, the subject of the preliminary objection, Mr. Marengo wants to set aside the decision of this court which upheld the preliminary objection that the appeal was time barred. The provisions of the Constitution used in the application which the Respondent objected to be inapplicable reads as hereunder:

> *108.(2) Iwapo Katiba hii au Sheria nyingine yoyote haikutamka wazi kwamba shauri la aina iliyotajwa mahsusi litasikilizwa kwanza katika Mahakama ya ngazi iliyotajwa mahsusi kwa ajili hiyo, basi Mahakama Kuu itakuwa na mamlaka ya kusikiliza kila shauri la aina hiyo. Hali kadhalika,*

Mahakama Kuu itakuwa na uwezo wa kutekeleza shughuli yoyote ambayo kwa mujibu wa mila za kisheria zinazotumika Tanzania, shughuli ya aina hiyo kwa kawaida hutekelezwa na Mahakama Kuu.

Isipokuwa kwamba masharti ya ibara hii ndogo yatatumika bila ya kuathiri mamlaka ya Mahakama ya Rufani ya Tanzania kama ilivyoelezwa katika Katiba hii au katika sheria nyingine yoyote.

Interpreting the above provisions; I entirely agree with the Respondent that, unless there is no any law for the purposes, this provision of the Constitution may not be invoked. Mr. Phares Marengo thought to resort to Rule 18 (1)(2) of GN No.390 0f 2021, but he hesitated on account that, when this application had its way to this court, the said Rule was inexistence. For clarity the Rule reads:

18-(1) The appellant or his agent may, where an appeal has been dismissed under rule 17(2) in default of his appearance, apply to the appellate court concerned for the re-admission of the appeal.

(2) The court may, ***upon being satisfied that the appellant was prevented by good cause from appearing*** *either personally or by an agent when the appeal was called for hearing, re-admit the appeal.*

My reading to the rule indicates that, the rule applies to appeals dismissed for non-appearance of the Appellant. The instant appeal was dismissed for being time bared after entertaining a preliminary objection ex-parte. The two, in my view poses different circumstances for invocation of the rule. With due respect to the learned counsel, the provision is inapplicable to the instant application.

In essence, the question would be whether this application is tenable in law. In fact, this is what is in the first limb of the preliminary objection. As this is not an application for extension of time to appeal, even when the Applicant was present at the hearing of the preliminary objection, he would have no evidence on the delay to appeal. I am saying so because, it is in an application for extension of time where the Applicant in the affidavit in support of the application will demonstrate what courts have said now and then on the sufficient cause, or say, account for every day of the delay. Otherwise, entertaining such arguments will be doing what again courts has

asked to disregard; submissions at the bar. What therefore the Applicant will intend to submit on setting aside an *ex-parte* dismissal ruling on preliminary objection that the appeal was time barred; be done in an application for extension of time to appeal.

Essentially in the instant move, the applicant will simply be heard as to where he was when the preliminary objection was heard. If satisfied, the court will now hear him why the appeal was out of time mindful that there is no an application for extension of time. In my view, this will be an uphill task because, as said, where will the Applicant have evidence that there are sufficient causes?

In my considered view, when courts are faced with preliminary objections that the appeal is hopelessly time barred, the duty is arithmetical one, meaning that, making arithmetic calculations as to when the decision was made, when the appeal got lodged to the court and what does the law prescribe on time limitation. If in this arithmetic work the numbers go beyond the statutory time prescripts on the appeal, then the remedy is one of dismissal. I do not think, if under the premises and for want of an application for time enlargement to appeal, the Appellant will have a room to demonstrate on the over sang sufficient causes.

In principle, this is what this court did when it did uphold the preliminary objection *ex-parte* in the appeal of the Applicant in **Catherine Japi vs Paschal Gembe, PC. Criminal Appeal No.11 of 2020** (unreported) at page 3 that:

> *Having gone through the records and taking into account the legal requirement, I noted that the decision of the District Court was delivered on 8th of July, 2020 and on 17th of August, 2020, the Appellant lodged the instant appeal to this court, which was after nine (9) days had elapsed.*
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> *In terms of the provisions of the law as cited above, an appeal originating from primary court must be lodged to this court within thirty days from the date of the judgment. The Appellant did not do that within the prescribed time.* ***The Appellant would have applied for extension of time to file the instant appeal instead of appealing without leave of the court.***

With this therefore, Mr. Marengo would have sought extension of time to appeal to this court under the circumstances. I consequently upheld the

first preliminary objection that the application is untenable and is accordingly struck out. It is so ordered.

Gerson J. Mdemu
JUDGE
13/08/2021

DATED at **SHINYANGA** this 13th day of August, 2021

Gerson J. Mdemu
JUDGE
13/08/2021