

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF BUKOBA)

AT BUKOBA

CIVIL APPLICATION NO. 32 OF 2021

(Arising from High Court of Tanzania (Bukoba Registry) in Civil Appeal No. 16 of 2019 and Original Civil Case No. 18 of 2018 at the Resident Magistrate's Court of Bukoba)

TUMAINI NIKODEMU.....APPELLANT

VERSUS

OLAM TANZANIA LIMITED.....RESPONDENT

RULING

Date of Ruling: 13/10/2021

Mwenda, J.

Mr. Tumani Nikodemu (the Applicant) being aggrieved by the decision of this court in Civil Appeal No. 16 of 2019 preferred this application for leave to appeal to the Court of Appeal. The application is made under section 5(1) (c) of the Appellate jurisdiction Act [CAP 141 R.E 2019]. The respondent filed counter affidavit with preliminary objection on point of law that the application is hopeless time barred.

When this application was scheduled for hearing, the applicant was represented by Mr. Zeddy Ally while the respondent enjoyed the legal service of Mr. Innocent Bernard.

During the hearing of this application the learned counsel for the respondent prayed for the preliminary objection on point of law to be argued by the way of

written submission. The prayer was granted and both parties complied with the scheduling order.

In his written submission in support of the preliminary objection the respondent submitted that, the application for leave to appeal to the Court of Appeal should be made either informally on the date when the decision was given or formally by chamber summons within 30 days from the date of the decision. He submitted that the decision in which this application for leave is coming from was delivered on 11th May 2021 and the present application was filed on 11th June 2021. So, to him the time limit to file this application expired on 10th June 2021.

He submitted that since the present application was filed on 11th June 2021 in which time limit had already expired for one day then the applicant was obliged to seek for extension of time to file the present application in accordance with **section 11(1) of the Appellate Jurisdiction Act [CAP 141 R.E 2019]**.

He further submitted that, filing of the present application out of time is fatal in law hence the application should be dismissed. According to him a delay for even a single day must be accounted by the applicant. To him the applicant application is time bared and it has to be dismissed with costs.

The learned counsel for the respondent submitted further that, in application for leave to appeal to the Court of Appeal, attachment of judgment, ruling, decree or drawn order is not a mandatory requirement as it was stated in the

case of **Executive secretary Wakful and Trust Commission vs Saide Salimini Amber [2001] TLR 160** that:

"As there is no provision under rule 43 (a) for the exclusion of the time taken in obtain a copy of the ruling and order, we think that the learned judge erred in entertaining an incompetent application on account of it being time bared. There being no legal requirement for attachment of copy of ruling and order to the application, there was no reason whatsoever for the learned judge to hold that the applicant needed to seized with the copy of ruling and order".

He further submitted that, the above cited rule 43(a) of the Tanzania Court of Appeal Rules of 1979 is in pari materia with Rule 45 (a) of the Tanzania Court of Appeal Rules of 2019 therefore the cited case law though was interpreting the former Court Rules to him this is still binding and applicable in the present application.

With regard to section 19(2) of the law of Limitation Act [CAP 89 R.E 2019] the learned counsel submitted that this section does not apply in the present application on the following reasons;

Firstly, Rule 45(a) of the Tanzania Court of Appeal Rules of 2019 does not mandatory require for the application for leave to appeal to the Court of Appeal

to be attached with the Judgment or Ruling or decree or drawn order. He also submitted that the law allows the application of this nature to made orally on the date of delivery of the decision.

Secondly, he was of the view that even if the attachment was necessary then section 19(2) of the law of limitation Act allows the exclusion of the period of time requisite for obtaining the copy of decree or order appealed from or sought to be reviewed. He submitted that this exclusion is limited on two things (1) the documents are necessary in case of appeal and in case of review (2) the said necessary document to be attached are either the decree or order in which the appeal is based or the application for review. To him in the instant application the applicant did not even attach the decree if it was a necessary document instead, he only attach the judgment which is not mentioned by law to be a document to attach if the need arises.

He concludes that section 19(2) & (5) of the law of limitation Act must be read together, in which sub section (5) empowers the court to exclude the time requisite to obtain the copy if satisfied that the said copy was relevant to the application. So, to him this provision of law allows exclusion of the time by court and not by parties and since no exclusion of time was made by court and the applicant filed the present application, he was of the view that, this application was filed out of time.

Responding to the submission by the counsel for the respondent, the learned counsel for the applicant submitted that, the applicant filed the present

application on 11th June 2021 praying for leave to appeal to the court of appeal whereby the respondent raised a preliminary objection that the application is time barred.

He submitted that, this application is properly filed within the prescribed time and therefore it is not time barred. According to him in order to determine whether this application is time barred or not then the Tanzania Court of Appeal Rules and the law of Limitation must be read together. To cement his argument, he cited section 49 (3) of the Tanzania Court of Appeal Rules.

He was of the view that, the above provision makes it mandatory that leave to appeal to the court of appeal of Tanzania must be accompanied by with judgment/order which is desired to be appealed. To bolster his argument, he cited section 19(2) & (3) of the law of limitation Act [CAP 89 R.E 2019] that in computing time for filing application for leave to appeal to the Court of Appeal time spent in obtaining copy of judgment must be excluded.

He submitted that they wrote a reminder letter to the deputy registrar to be supplied with copies of judgment and decree on 9th June 2021 as stated in para 5 of the affidavit but they were supplied with the copy of judgment 11th June 2021. According to him under rule 49(3) of the Tanzania Court of Appeal Rules and section 19(2) & (3) of the law of limitation Act the computation of time for filling this application start to run from 11th June 2021 on the same day when the copy of judgment was issued to the applicant so to him this application was filed in time. To cement his argument, he cited the case of

Alex Senkonko & 3 Others vs. Eliamuya Lyimo Civil Appeal No. 16 of 2017 Court of Appeal of Tanzania.

He went further by submitting that, the above cited sections expressly allow automatic exclusion of period of time requisite for obtaining a copy of the decree or judgment appealed from. To him such an exclusion need not to be made upon an order of the court in formal application for extension of time as stated in the following cases **Mohamed Salimini vs Jumanne Omary Mapesa, Civil Appeal No. 345 of 2018, Director of Public Prosecutions vs. Mawazo Saliboko @ Shagi & fifteen others Criminal Appeal No. 2017 and Samuel Emmanuel Flugence vs Republic Criminal Appeal No. 4 of 2018 (unreported).**

On the cited case by the respondent which is the **Executive Secretary Warkful and Trust Commission vs Saide Salimini Amber [2001] TLR 160** he submitted that, this case was decided basing on Tanzania Court of Appeal rules of 1979 in which there were no requirement to attach copy of judgment sought to be appealed. He further submitted that now we have new Tanzania Court of Appeal Rules of 2019 which made it mandatory for a copy of judgment to be attached when filing application for leave.

He concluded that from the above cited cases this application was properly filed on time therefore the raised preliminary objection is misconceived and it lacks merits.

In rejoinder the learned counsel, submitted that there is big different to the application for leave made under Rule 45(a) and Rule 45(b) of the Tanzania Court of Appeal Rules. According to him in regard to the cited law above application for leave before the High Court does not require attachment as the law does not mandatorily require the same. According to him rule 45(b) in its clear wording mandatory requires the attachment of the copies of the decision to be appealed against and the copy of the refusal order by the High Court when the application for leave is made to the Court of Appeal as second bite.

He also submitted that Rule 45(b) of the Tanzania Court of Appeal Rules clearly provide for exclusion of time in term of Rule 49 (3) of the Tanzania Court of Appeal Rules as certified by the registrar of the High court. To him this legal requirement is only limited to the application for leave made as second bite to the Court of Appeal and not that of the high court. He also stated that the purported period of time while waiting the copies for attachment must get a certificate of exclusion from the registrar.

He went further by submitting that the exclusion of time is limited only to the application made under rule 45(b) and not rule 45(a) of the Tanzania Court of Appeal Rules.

In regards to the case of **Alex Senkoro & 3 Others vs. Eliambuya Lyimo Civil Appeal No. 16 of 2017 (unreported)** as cited by the counsel for the applicant, He submitted that this case is distinguishable as it was interpreting

the applicability of section 19(2) & (3) of the law of limitation Act and not Rule 45 (a) of the Tanzania Court of Appeal Rules.

He concluded that, they are maintaining their submission in chief that the application for leave was time bared and shall be dismissed by this court with costs.

Having gone through the submissions by both counsels this court decided to look whether the raised preliminary objection on point of law has merit.

It is the requirement of law that an application for leave to appeal to the Court of Appeal must be filed within 30 days from the date of decision and this is in accordance to **section 45 (a) of the Tanzania Court of Appeal Rules**. This court after going through the submission by both counsels and after a thoroughly perusal of court's record found it is clear that the decision which the applicant is seeking leave to appeal to the Court of Appeal was pronounced on 11th May 2021 while the present application for leave was presented for filing on 11th June 2021. By simple calculations the time from when the decision was pronounced to the time when this application was filed it is almost 31 days. That being the case there is a delay of one day which the applicant is required to account for.

I understand the submission by the counsel for the applicant that the delay was due to the failure to get the copy of judgment in time so as to be attached in the present application and he relied on section 49(3) of Court of Appeal of Tanzania Rules which stipulate that:

"every application for leave to appeal shall be accompanied by a copy of the decision against which it is desired to appeal and where application has been made to the High Court for leave to appeal by a copy of the order of the High Court."

From the wording of the above cited section, this court is of the view that, since the law even allow for the application for leave to appeal to the Court of Appeal to be made either informally on the same date when the decision is pronounced or formally that is by the way of chamber summons supported by an affidavit, then there was no need for respondent to wait for the copy of judgment so as to file the present application. This is so because this is just a leave to appeal and not the appeal by itself. For that matter the respondent erred to rely on rule 49(3) of Tanzania Court of Appeal Rules as this requirement is only limited to the application for leave to appeal as a second bite to the Court of Appeal and not that of the High Court. Rule 45 (a) of Tanzania Court of Appeal does not requires for the leave to appeal to the Court of Appeal to be accompanied by the copy of judgment.

Since it is the requirement of the law that, time limit to file application for leave to appeal to the Court of Appeal is 30 days and the applicant agrees that they filed this application on 11th June 2021 then they were out of statutory time

for 1 day and what the applicant was required to apply for extension of time so as to file leave to appeal to the Court of Appeal out of time.

Following the above analysis, this court found out the application is time bared for being filed out of statutory time. Therefore, the Preliminary Objection is upheld and this application is hereby dismissed with costs.

It is so ordered.




A.Y. Mwenda

Judge

13.10.2021

This ruling is delivered in chamber under the seal of this court in the absence of the appellant and in the presence of Mr. Angelo Mzee for the respondent.




A.Y. Mwenda

Judge

13.10.2021