

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
ARUSHA DISTRICT REGISTRY AT ARUSHA**

CIVIL APPEAL NO.31 OF 2021

*(Originating from Civil Case No.9 of 2018 at the Resident Magistrates' Court of
Manyara at Babati)*

**NATIONAL INSURANCE CORPORATION OF TANZANIA
LIMITED.....APPELLANT**

Vs

**OTIENO MICHAEL OLIECH (*The personal legal representative of
Nikusubial John Brown*).....1ST RESPONDENT**
DIRECTOR MVUMO INVESTMENT COMPANY LTD..... 2ND RESPONDENT
NURU LWIDIKO.....3RD RESPONDENT

RULING

Date of last Order:31-5-2022

Date of Ruling:21-6-2022

B.K.PHILLIP,J.

Aggrieved by the decision of the Resident Magistrates' Court of Manyara at Babati, delivered on 19th April 2021, the appellant herein lodged this appeal to challenge the same. The appellant prays for the following orders;

- i) That this appeal be allowed.
- ii) That the proceedings, Judgment and decree in Civil Case No.9 of 2018 be quashed and set aside.
- iii) Costs of this appeal and at the lower Court be provided for.
- iv) Any other relief(s) this Honourable Court deem fit to grant.

Upon being served with the memorandum of Appeal, the learned Advocate Jonathan Mdeme who appeared for the 1st respondent raised the following point of preliminary objection;

That this appeal is misconceived and bad in law for being time barred.

At the same time the learned advocate Kuengwa Ndojekwa who appeared for the 2nd respondent raised two points of preliminary objection, to wit;

- i) That the appeal is statutorily time barred.*
- ii) That this appeal is bad in law since the parties in this appeal are different from the parties in the case where this appeal emanates from.*

Mr. Ndojekwa's second point of preliminary objection mentioned herein above was made orally.

The learned Advocates Christopher Bulendu appeared for the plaintiff. This appeal proceeds ex-parte against the 3rd respondent since he failed to enter appearance in Court despite the fact that he was duly notified on the existence of this appeal.

I ordered all points of preliminary objections to be argued by way of written submissions. Relying on item No.1 of part II to the schedule to the Law of Limitation Act, Cap 89, R.E 2019 (Hereinafter to be referred to as " Cap 89") Mr. Ndojekwa argued that an appeal under the Civil Procedure Code (" CPC") where the period of limitation is not otherwise

provided for by any written law is ninety ("90") days. He went on submitting that the judgment , the subject of this appeal was delivered on 19th day of April 2021 and the copies of the judgment and decree were ready for collection on 22nd day of April 2021. This appeal was filed on 27th July 2021. By simple arithmetic calculation this appeal was filed after the expiry of 90 days, contended Mr. Ndojekwa He implored this Court to dismiss this appeal pursuant to the provisions of section 3(1) of Cap 89.

Moreover, Mr. Ndojekwa argued that the appellant was supposed to seek for extension of time to file this appeal out of time. He cited the case of **Hanay Qwaray Vs Tukula Qwaray, Land Appeal No. 1 Of 2021**, (unreported), to bolster his arguments.

Mr. Mdeme's submission in respect of the first point of preliminary objection are similar to the submission made by Mr. Ndojekwa. He argued that an appeal from the decision of the Resident Magistrates' Court has to be filed at the High Court within 90 days from the date of the impugned decision was delivered. He contended that counting from 22nd April 2021 ,the date on which the judgment and decree were ready for collection , the deadline for filing the appeal was 20th of July 2021. And if one counts from the date of delivery of the judgment , 90 days expired on 17th July 2021 which was a none working day. According to section 60 of the Interpretation of Laws Act, the next working day , which could be taken as the dead line is 19th July 2021.

With regard to the second point of preliminary objection, Mr. Ndojekwa submitted that at the lower Court there were four defendants, namely

Frank Eugen , director Mvumo Investment Co Ltd, Nuru Lwidiko and National Insurance Corporation of Tanzania Limited. In this appeal Frank Eugen is missing. The appellant has omitted him from this appeal. He insisted that the non joinder of Frank Eugen in this appeal is fatal. He cited the case of **Magu District Council and another Vs Mhande Nkwabi, (1997) TLR 286** , to bolster his submission.

In rebuttal , the learned advocate Bulendu submitted the 1st point of preliminary objection is not a pure point of law, thus should not be entertained by this Court since it requires evidence to prove it. He contended that it requires this Court to go through evidence on the electronic filing system to establish whether or not the appeal is time barred. Moreover , he added that the question on when did the appellant receive the certified copies of the judgment and decree is subject to material evidence from the Court registry so as to know when the time for filing this appeal started to run. To cement his arguments he cited the case of **Mukisa Biscuits Manufacturing Company Ltd Vs West End Distributors Ltd (1969) EA 696** and **Theresia Nemes Lawsay Vs Joseph Grace Swai , Civil Revision No.2 of 2021** (unreported).

With regard to the merit of the points of preliminary objections , Mr. Bulendu conceded that the decision of the lower Court was delivered on 19th April 2021 and the certified copies of the proceedings and judgment were ready for collection on 22nd April 2021. He contended that this appeal was filed electronically on the 15th of July 2021 and admitted on Friday 16th July 2021. The filing fees was paid on Monday the 19th of July 2021 through receipt No. EC100979484928 and control No.991400471746

with reference No.921200058334901.He maintained that this appeal is not time barred. The appellant complied with the legal requirement provided in Rule 8 of the Judicature and Application of Laws (Electronic filing) Rules, 2018 by filing this appeal electronically.To cement his arguments he cited the case of **Mohamed Hashil Vs National Bank of Commerce, Revision No. 106 of 2020**, (unreported). He insisted that the date that appears in the document filed in Court and served to the respondent is not the filing date of the appeal but it was inserted by the Court clerk when the hard copies of the Memorandum of Appeal were filed in Court.

With regard to the second point of preliminary objection, Mr. Bulendu argued that at the trial Court the case proceeded ex-parte against Mr. Frank Eugen and the appellants has no any ground of appeal against him.The appellant has appealed against the decree of the lower Court in respect of the reliefs granted to the respondent's herein. Excluding Mr. Frank Eugen from this appeal will not hinder this Court from arriving at the proper decision. Furthermore , he submitted that Order XXXIX Rule 1 (1) of the CPC does not require all parties who were parties to a case should be joined in the appeal if any. He distinguished the case of **Magu District Council and Another** (supra) from the facts of this case on the ground that the same involved an issue concern with joining a party who was not in the original suit. Mr. Bulendu prayed for the dismissal of the points of preliminary objection with costs.

In rejoinder, Mr. Mdeme reiterated his submission in chief and argued that the point of preliminary objection is pure point of law. The provision

of section 3 of the Law of Limitation Act provides clearly that matters filed out of time have to be dismissed. He contended that the provisions of the Rule 8 of the Judicature and Application of Laws (Electronic filing) Rules, 2018 did not amend section 3 of the Law of Limitation Act. The case of **Teresia Nemes Lasway** (supra) cited by the appellant is not applicable in this case since the record shows clearly that the appeal was filed in Court on 27th day of July 2021.

With regard to second point of preliminary objection, Mr. Mdeme reiterated his submission in chief and argued that Mr. Ndojekwa has misdirected himself miserably in his submission because a decree can be executed against a party who did not enter appearance at the trial. Omitting to join a party in a appeal who was a party at the lower Court is a serious issue and fatal since the that party is denied his/her right to be heard as enshrined in Article 13(6) (a) of the Constitution of the United Republic of Tanzania, 1977. In addition , Mr. Mdeme argued that this Court has not issued any order to proceed with the hearing of the appeal ex-parte against Mr. Frank Eugen.

In rejoinder, Mr. Ndojekwa insisted that the appeal has been file out of time. The Judicature and Application of laws (Electronic Filing) Rules , 2018, has not removed the application of the Law of Limitation Act. He argued that the point of preliminary objection that the appeal is time barred is a pure point of law. The case of **Mukisa Biscuits** (supra) has been cited out of context.

In addition, he maintained that omitting Frank Eugen from this appeal is fatal since it amounts to removing him from the Court's records. He contended that Court's records cannot be lightly impeached. He cited the case of **Halfan Sudi Vs Abieza Chilichili (1998) TLR 527.**

Having analyzed the submissions made by the learned advocates, appearing herein, let me embark on the determination of the merit of the points of preliminary objections. First and foremost , I wish to point out that it is not in dispute that the advent of electronic filing followed by the promulgation of Judicature and Application of Laws (Electronic filing) Rules, 2018 has brought tremendous changes in the style and mode of filing cases / appeals / applications in our Courts. The conventional filing of documents is phasing out. However, that has not changed the position of the law, that is, issues pertaining to time limit in filing matters in Court are issues of law and the issue on whether or not the appeal is filed in time remains to be an issue of law because the time limit for taking any legal action or step is provided in the laws. Similarly, the point of preliminary objection that an appeal is time barred is a pure point of law. The fact that one needs to check on the date the appeal was filed in Court so as to ascertain whether or not the appeal is time barred does not turn it not to be a point of law. After all, to my understanding, a date of filing the appeal is the date of payment of the Court fees. This is regardless whether the appeal is filed electronically or not. The reason is simple, without payment of the filing fees the registration of the case/appeal/application cannot be completed and the matter cannot be scheduled for hearing, except for cases/ matters exempted from

payment of the Court fees. The receipt for payment of the Court fees is among the necessary documents for completion of the process for registration of a case /appeal/ application. Electronic filing has not removed the requirement for payment filing fees and the application of the Law of Limitation Act. That is why after lodging the appeal/case/ application electronically, a control number for payment of the Court fees timely is issued. And if a party faces problems in filing the documents electronically, which includes payment of the relevant Court fees, then provisions of section 24 of the Judicature and Application of laws (Electronic Filing) Rules , 2018 comes into comes into play to rescue the situation. For clarity let me reproduce the same hereunder;

Rule 24 (1) the period during which electronic filing system is not in operation, for any reason, shall be excluded from the computation of time

(2) Problems on the user's end, such as problems with the user's service provider (SP), hardware, or software problems, shall not constitute a sufficient reason for an untimely filing.

(3) For the purpose of sub-rule (1) , the excluded time shall not extend the limitation period for such filing under the Law of Limitation Act, or any other written law.

(4) Where electronic filing is done the rules relating to time for the purpose of limitation shall be the same as those applicable to a conventional filing.

(5) Where a party misses a filing deadline due to technical problems referred to in sub-rule (1) the party shall move informally and ex-parte the Registrar or the Magistrate in charge not than 15:00 hrs of the following working day for the appropriate relief.

(6) Where the Registrar or Magistrate in charge is satisfied that there was a good cause for missing the deadline, he shall grant the request under sub-rule (5) in writing".

(Emphasis of added)

What I am trying to show here is that as far as the filing date of the appeal is concern, the Courts record speaks on itself. Therefore, it is my settled opinion the point of preliminary objection raised by the respondents that this appeal is time barred is a pure point of law and does not need evidence to be established as presented by Mr. Bulendu. The same can be established by just perusing the Court's records/pleadings as I have endeavored to elaborate herein above. The case of **Theresia Nemes Lasway** (supra) is not binding to me. It is only persuasive. I have perused it. However, with respect, I am holding a different position from the holding of that case as I have explained herein above.

Now , starting with the first point of preliminary objection, it is a common ground that the judgment , the subject of this appeal was delivered on 19th April 2021. The pertinent issue here is when does the time to file the appeal starts to run? Mr. Bulendu has indicated in his submission that the time for filing the appeal starts to run when a party is supplied with the judgment and decree, that is why he was of the view that in order to establish whether or not the appeal is time barred one needs to check with the registry office. With due respect to Mr. Bulendu his aforesaid contention is wrong. The position of the law is that days for filing the appeal starts to run from the date of delivery of the judgment and if there is delay in being supplied with the necessary documents then an

application for extension of time to lodge the appeal has to be filed. The delay in obtaining the copies of the judgment and decree will be a reason for seeking the extension of time.

In this appeal it is not in dispute that counting from 19th April 2021 , ninety days (90) for lodging the appeal expired on saturday 17th April 2021 which was not a working day. Thus. the expiry date for filing the appeal was on Monday the 19th July 2021.It is not in dispute that the filing fees for this appeal was paid on 19th July 2021 and the record show so.Mr. Mdeme's argument that the appeal is time barred is based on the date indicated in the Memorandum of Appeal that was presented for filing to the court clerk on 27th of July 2021.With due respect to Mr. Mdeme, I have explained herein above the filing date of the appeal is the date on which the filing fees was paid. With the new mode of filing documents electronically, the date indicated in the Memorandum of Appeal does not necessary reflect the filing date of the appeal because a person can pay for the filing fees at night and bring the hard copy of the Memorandum of Appeal to the Court the next day. If the Court clerk will indicate the date of receipt of the Memorandum of Appeal as the filing date, definitely, it will be different from the date of payment of the filing fees. What is important here is that the same principle applies, that is, the date of payment of the filing fees for the case is the one which has to be taken as the correct filing date of the appeal/case. In fact, the Court clerk is supposed to indicate the correct filing date of the document/appeal to avoid creating unnecessary confusion to the parties.

In the upshot, I am inclined to agree with Mr. Bulendu that this appeal is not time barred.

With regard to the second point of preliminary objection, I hasten to say that the same has no merit because there is no law which provides that on appeal all parties who were at the trial Court should be parties in the appeal. In other words, there is nothing wrong with omitted Mr. Frank Eugen from this appeal. As correctly submitted by Mr. Bulendu, the case of **Magu District Council** (supra) cited Mr. Mdeme is irrelevant in this appeal because that case was concerned with an issue pertaining to joining a party to a case in appellate stage. Likewise, the case of **Halfan Sudi** (supra) is irrelevant since omitting Frank Eugen from this appeal does not amount to impeaching the Court's records.

From the foregoing, both points of preliminary objections are hereby dismissed. Costs will be in course. It is so ordered.

Dated this 21st day of June 2022



A handwritten signature in black ink, appearing to read "B.K. Phillip", with a long horizontal line extending to the right.

B.K.PHILLIP

● **JUDGE**