

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF MWANZA
AT MWANZA

MISC. CIVIL APPLICATION NO. 08 OF 2022

(Arising from Civil Appeal Case No. 29 of 2021 of the High Court Mwanza Sub-Registry)

MAGDALENA WIYANGALILA NYANDA APPLICANT

(LATE ASTERIA EMMANUEL LUMAJA)

VERSUS

NATION INSURANCE CORPORATION OF (T) LTD 1ST RESPONDENT

MAPAMBANO CONSTANTINE 2ND RESPONDENT

MUSOMA WATER SUPPLY AND SEWERAGE

AUTHORITY (MUWASA).....3RD RESPONDENT

RULING

5th July, 2022

Kahyoza, J.:

Magdalena Wiyangalila Nyanda (the Administratrix of the Estate of the late Asteria Emmanuel Lumaja) applied for leave to appeal to the Court of Appeal of Tanzania against the decision of this Court in favour the National Insurance Corporation of (T) Limited (NIC), Mapambano Costantine and Musoma Water Supply and Sewerage Authority (MUWASA). The National Insurance Corporation of (T) Limited raised a preliminary objection with two limbs that:-

- (a) The application filed by the applicant is time barred as it has been filed out of time prescribed by the law under rule 45(a) of the Tanzania Court of Appeal Rules, 2009, which is 30 days; and
- (b) The application is incompetent for the affidavit being incurable defective for being dated at Mwanza but verified and affirmed at Dar es-Salaam.

The applicant's advocate Mr. Sijaona conceded that the application was time barred. He prayed the application to be struck out and costs waved.

National Insurance Corporation's advocate, Mr. Marco opposed the applicant's prayer that the application be struck out without costs. He prayed the Court to dismiss the application with costs. To support his contention, he cited the case of **Alex Maganga V. Abubakar Mkakile and Another** Misc. Land Application No. 274 of 2020.

The third respondent's state attorney joined hands with the first respondent's submission.

In his rejoinder, the applicant's advocate prayed the case to be struck out without costs. He contended that he delayed to file an application as he had no copy of judgment.

Having heard rival submissions, I wish to state at the outset that this Court is a creature of law. It can decide and make orders accordingly to law.

Thus, this Court can either strike out a time barred an application or dismiss it according to law. There is no law applicable to the current situation, which provides for the consequences of filing an application for leave out of time.

The practice of the Court of Appeal has been to strike out an application filed out of time. See the case of **East African Development Bank v. Blueline Enterprises Limited**, Civil Appeal No. 101/2009, CAT unreported. The law which provides the remedy for matter filed out of time to be dismissed is section 3 of the **Law of Limitation Act**, [Cap. 89 R.E. 2019], which does not apply to matters filed under the Court of Appeal Rules, 2009 G.N. No.. 368/2009 or under the Appellate Jurisdiction Act. [Cap 141 R.E. 2019].

It should be noted that there is no general law that matters filed out of time must be dismissed. The consequence of instituting any matter out of time depends on the applicable law. Applications and matters filed out of time where the **Law of Limitation Act**, applies, the remedy is to dismiss. See the observation of the Court of Appeal in **East African Development Bank v. Blueline Enterprises Limited** (supra) where the it stated that-

“So, if an appeal or an application is instituted beyond that period it shall be dismissed under Section 3 (1) (of the Law of Limitation Act) An applicant who wishes to play it safe must bring an application for

enlargement of time before or after the expiry of the stipulated period (before instituting the contemplated proceedings, of course). If the application is granted then he or she will be free to institute the appeal or the application. We do not read anything under Section 14 (1) to suggest that an applicant is free to bring an application for extension of time after a legal proceeding is dismissed under Section 3 (1), as happened here. To do so, would be res judicata as we have attempted to show above.”

The application for leave to appeal to the Court of appeal is not regulated by the Law of Limitation Act, but is regulated by the Court of Appeal Rules and the Appellate Jurisdiction Act. I will not apply the Law of Limitation Act, instead I now borrow a leaf from the Court of Appeal practice of striking out application filed out of time. Consequently, I strike out the application for being time barred.

As to the prayer to waive costs, I do not find any reason for doing so. The law is clear that costs follow the event. The respondents are awarded costs of this application. Acting under item 44 of the Advocates Remuneration Order, G.N. No. 263/2015, I award Tzs. 500,000/= as instruction fees to defend the application to the 1st respondent's advocate and the same amount is awarded to the third respondent's State Attorney. I award also the 1st and 3rd respondents costs of appearance at Tzs. 50,000/= per each appearance. Since they appeared twice, I awarded an amount of

Tzs. 100,000/= as costs of appearance. In addition, I award reimburse costs of Tzs. 40,000/= as cost of filing a counter affidavit and notice of preliminary objection.

In the upshot, the application is struck out and the 1st respondent awarded costs at the tune of Tzs. 640,000/= and the 3rd Respondent awarded of costs of Tzs. 600,000/= only. The second respondent has never entered appearance is awarded nothing.

It is ordered accordingly.

Dated at Mwanza this 5th day of July, 2022.



J.R. Kahyoza
Judge

Court : ~~Ruling~~ delivered in the presence of Mr. Sijaona for Applicant, Mr. Marco for the 1st respondent, and Mr. Kitilya State Attorney for the 3rd respondent. The 3rd respondent was absent. B/C Ms. Jackline (RMA) present.

J.R. Kahyoza
Judge
05/07/2022