

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM SUB DISTRICT REGISTRY)
AT DAR ES SALAAM
CIVIL APPEAL NO. 42 OF 2022

(Arising from the Ruling and Drawn order of the Resident Magistrate Court of Dar es Salaam at Kisutu by Hon. Shahidi PRM, dated on 23rd February 2022 in Misc. Civil Application No.121 of 2021)

STRATEGIES TANZANIA INSURANCE LIMITED.....APPELLANT

VERSUS

SALAAMAN HEALTH CENTRE.....RESPONDENT

JUDGMENT

Date of last Order: 03/08/2022

Date of Ruling: 02/09/2022

E.E. KAKOLAKI J.

The appellant herein discontented with the decision of the Resident Magistrate Court of Dar es Salaam at Kisutu in Misc. Civil Application No.121 of 2021 handed down on 15/07/2021, appealed to this Court on three (3) grounds of appeal in which during the hearing argued only two of them going thus:

- (i) That, the trial magistrate erred in law and facts in entertaining the respondent's application which was time bared.

- (ii) That the trial magistrate erred in law and facts by allowing the application for review in the absence of the grounds for review and in total disregard and violation of the clear provisions of law.

On strength of above grounds, appellant prays this Court to allow the appeal by quashing the ruling and drawn order in Misc. Civil Application No. 121 of 2021 in its entirety.

When the appeal was called on for hearing, the appellant appeared represented by Mr. Jovinson Kagirwa while the respondent enjoyed the legal services of Mr. Juma Nassoro, both learned advocates. Submitting in support of the first ground of appeal, Mr. Kagirwa argued that, Misc. Civil Application No 121 of 2021, before the trial court for review of its own decision in Civil Case No. 46 of 2019, was filed out of prescribed period of time and in infraction of item 3 of part III, to the Law of Limitation Act [Cap 89 R.E 2019] (LLA), requiring the application for review to be filed within 30 days from the date of the decision. According to him, the decision which was intended to be reviewed was delivered on 15/07/2021 and the application for review which is subject of this appeal was filed on 30/08/2021, 45 days after the decision.

Mr. Kagirwa contended that, the fact that the application was filed out of time was noted by the trial court and that, even under exclusion of days under section 19 (2) of the Law of Limitation Act still the application was time barred. He lamented that, despite of so noting as seen at page 6 of the typed proceedings in the court's ruling of 20/01/2022, the trial magistrate went on to determine the application while knowing the issue of time limitation goes to the root of the jurisdiction of the court. In his view the court had to or ought to have dismissed the application for being filed out of time under section 3 of LLA. In view of the fore said, he prayed the court to find that the appeal has merit and allow the same.

In reply, Mr. Nassoro contended that, the application for review was filed within time. According to him the decision sought to be reviewed was delivered on 15/07/2021, in the absence of the plaintiff and his advocate as per page 3 of the typed ruling and it was until 27/07/2021 when the respondent noted that, the court had already delivered its decision and on 23/08/2021 through electronic filing rules filed the application for review. In his view, the application was well within time because as per electronic filling rules the date for filling any court document is the date on which the said document was electronically filed. In the further view of Mr. Nassoro, since

the respondent had no notice of delivery of the decision and was not notified, the time for filling the application for review started to run on 27/07/2021, when the respondent came into knowledge of existence of the decision sought to be reviewed. Mr. Nassoro admitted that, the review was signed by the court clerk on 30/08/2021, but according to the rules of electronic filing that was not the date for filing but rather the date of reception of hard copies of the already electronically filed documents. In his further view, respondent could not file the application for review until when she was supplied with the necessary documents as the mode of preparing and filing an appeal applies mutatis mutandis with the mode of preparation and filing of the application for review, thus one of the documents required for filling the application for review was the decision sought to be reviewed, which according to him was obtained on 27/07/2021. On the reasons thereof he held the view that, the application was filed in time. Mr. Nassoro concluded by submitting that, the Judiciary is the controller of electronic filing system and invited this Court to consult the system to satisfy itself that the same was filed on 23/08/2021. In his view this ground has no merit and ought to fail.

In rejoinder, Mr. Kagirwa while in agreement that, under section 19(2) of LLA, the days spent while awaiting for collection of the decision sought to be

appealed or reviewed are subjected to exclusion, he argued in this matter the dates in which the copy of the decision sought to be reviewed was requested and collected were not placed before the Court for the respondent to rely on exclusion under section 19(2) of LLA. On the issue of electronic filing, it was his submission that, the same should not be the reason for the delay in filing the application as in his view the court gives two days for submission of hard copies to the court after online filing. In further view of Mr. Kagirwa, even if the application was filed electronically on 23/08/2021, the applicant could not wait for seven days to submit the hard copies on 30/08/2021. Otherwise he reiterated his earlier submission in chief and the prayers thereto.

I have given deserving weight the submissions by both parties for and against this ground of appeal. I have also extensively perused the relevant records in a bid to satisfy myself with the appellant's complaints. The main issue which this court is called for determination is whether the application for review was filed out of time as contended by the appellant. As submitted by Mr. Kagirwa, under item 3 of part III to the law of LLA, the application for review has to be filed within 30 days after delivery of the decision sought to be reviewed. In the present appeal the decision sought to be reviewed

was delivered on 15/07/2021, the copies for the said ruling were supplied on 27/07/2021. Thus, applicant had to file his application on or before 25/08/2021 but the same was filed 30/08/2021, which is 4 days late. However, there is no evidence whatsoever tendered by the respondent during the hearing in the trial Court or to this Court to prove that, the said copy of ruling was supplied to her on 27/07/2021 as rightly submitted by Mr. Kagirwa, hence respondent cannot rely on exclusion provision under section 19(2) of the Law of Limitation Act as prayed by Mr. Nassoro. In his further submission Mr. Nassoro tried to convince this court that, he filed the same through e-filing on 23/08/2021 before he filed hard copies on 30/08/2021 thus, the application was within time. The electronic filing system is recognized by our laws as among the means of filing documents in Court. It is governed by the *Judicature and Application of Laws (Electronic Filing) Rules, 2018, G.N. No. 148 of 2018. Rule 21(1) of the said G.N. No. 148 of 2018, provides that:*

"A document shall be considered to have been filed if it is submitted through the electronic filing system before midnight, east African time, on the date it is submitted,

unless specific time is set by the Court or it is rejected."

[emphasis supplied]

From the above cited rule, a document filed through electronic filing system is considered to be filed in Court on the date it was submitted but before midnight. Furthermore, it is a practice of the Court that, after the document is lodged online the party has to file the hard copy too. This was illustrated in the case of **Mohamed Hashil Vs. national microfinance Ltd (NMB Bank)** Revision No. 106 of 2020 (unreported).

As alluded to above, Mr. Nassoro contends that, the application was filed electronically on 23rd August 2021 which was within time while in his submission on the same issue before the trial court he said it was filed electronically on 24/08/2021. That notwithstanding, neither before the trial court nor in this Court he produced any evidence proving his assertion that the application was filed on 23/08/2021 or 24/08/2021 as asserted. It is well settled that, he who alleges has the duty to prove the allegations, the principle which is encompassed in section 110(1) and (2), and 111, 112, of the Law of Evidence Act Cap 6 R.E 2022.

In this appeal, the respondent's advocate as holder of the account in the filing system, was duty bound to prove that he filed the application electronically and to discharge this duty, he had to retrieve the uploaded application from the Judicial Statistics Dashboard (JSDS) through his account, print and attach the same so as to prove his allegations, but he failed to do so. The argument by Mr. Nassoro that, since the Court is the custodian of the e-filing system should go in and satisfy itself whether the respondent filed the application online on 23/08/2021, with due respect to the learned counsel that amounts to shifting of the burden of proof to the Court which is not a party to the case.

That aside, even if for the sake of argument, I would have agreed that, the application was filed electronically on 23/08/2021, it is not explained as to why the applicant had to wait for 7 days to file a hard copy on 30/08/2021, after he had filed the application through e-filing. This court in the case of **Chris George Kasalile Vs. Tanzania Institute Education and another**, Miscellaneous Course No. 26 of 2022, explained the intention of having the electronic filing rules and the observation which I am persuaded with. The Court said and I quote:

*It is apparent that, the intention of having the rules in place is to facilitate **efficiency and speedy delivery of justice in handling cases**. Despite the fact that on the face of it, the reading of rule 21 of the rules seems to be plain, yet there is a lacuna since the law doesn't provide for instance when the applicant or claimant file a case electronically well in time but he doesn't pay the necessary fees timely, as is in the present case. **Evidently, filling the case electronically, and staying dormant defeats the purpose of the law**. it is my view that, to fill in the gap we should look at the purpose of the law and other legal requirements. (Emphasis supplied).*

The court in the above cited case, further quoted with approval the case of **Emmanuel Nakundize and Others Vs. Aloysius Benedicto Rutaihwa**, Land Case Appeal No. 26 of 2020 (HC), the case which followed the principle in the case of **John Chuwa Vs. Antony Cisa** [1992] TLR 223 where it was held that:

a document is deem filed, when requisite fees have been duly paid.

Applying the above principle to the fact of the present appeal, in absence of evidence to prove the alleged online filing on 23/08/2021, I am satisfied that the application sought to be reviewed was filed on 30/08/2021, the date

in which the necessary fees were paid and four (4) days late. Thus, I hold the similar view to that of Mr. Kagirwa that, the application was filed out of time. In the upshot, I find the first ground of appeal with merit.

Having so found, though the first ground disposes of the appeal, but I find myself moved to determine the second ground of appeal too where the appellant faults the trial court for allowing the application for review in absence of the grounds for review and in total disregard and violation of the clear provisions of Order XLII Rule 1 read together with section 78(1) of the CPC. It was Mr. Kagirwa's submission that, under Order XLII Rule 1 of the CPC the circumstances under which application for review can be preferred are limited to discovery of new or important matters or evidence not within the knowledge of the applicant at the time of the decision or where the order or decree was made on account of injustice or error apparent on face of record. He supported his stance with the decision of the East Africa Court of Justice (Appellate Division at Arusha) in the case of **Angella Amundo Vs. The Secretary General of the East African Community**, Civil Application No. 4 of 2015 (unreported) and the decision of this court in the case of **Francis Nyerere Said Vs. Bunda Town Council and 4 Others**, Civil Review No. 3 of 2021 (HC-unreported) and **Furahini Joseph Lema**

and 2 Others Vs. Raymond Focus Mlay and 2 Others, Consolidated Misc. Application No. 222 and No. 239 of 2022.

Mr. Kagirwa went on stating that, when entertaining review application the reviewing court does not sit as appellate court as it has to be satisfied that the application meets the conditions set out in Order XLII Rule 1 of the CPC. In the impugned ruling he argued, the application was allowed as the court thought there are new issues to be determined without due regard to the fact that, the decision subject of review had ruled that, Civil Case No. 46 of 2021 was an abuse of court process hence struck out. He therefore invited the Court to find merit on the ground and allow the appeal.

In rebuttal submission Mr. Nassoro while agreeing that, the decision sought to be reviewed ruled the suit was in abuse of court process, the respondent discovered that there were new important facts calling for trial court determination that the two cases that formed the basis of decision were different hence it was right for the trial court to accord parties with the opportunity of being heard on that new facts which called for evidence. In alternative he argued the appeal is not tenable for challenging the matter which did not determine the matter to its finality for not going into merits of the application. Hence this court was invited to find the same incompetent.

In brief rejoinder Mr. Kagirwa submitted that, the order allowing an application for review is appealable under Order XLII Rule 7(1) of the CPC. On the submission that, there was discovery of new facts, it was his rejoinder that this Court should ask itself whether the respondent's grievances were subject of review or appeal as one of the condition for new facts is that, the same should have not been in the applicant's knowledge at the time of the decision. Otherwise he reiterated his submission in chief and prayed the Court to allow the appeal with costs.

Having considered the rival submissions by the parties on this ground, the issue for determination is whether the raised two grounds for review qualified to entitle the trial court entertain the said review application. There is no dispute that, at the trial Court the respondent's suit in Civil Case No. 46 of 2021 was struck out on the ground of abuse of court process for including matters that were decided by the same court in Civil Case No. 12 of 2019. The grounds raised by the respondent for review were that:

1. That, Hon. Court erred in deciding the preliminary objection by going into merits and demerits of the suit.
2. That, the Hon. Court erred in striking out the suit with costs.

Mr. Nassoro is trying to convince this Court that out of those two grounds the respondent was intending to address the Court on the new facts which were not considered and probably not known to the respondent at the time of the decision sought to be reviewed, hence in compliance with the dictates of the provision of Order XLII Rule 1 of the CPC. Order XLII Rule 1 of the CPC provides thus:

1.-(1) Any person considering himself aggrieved-
(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
*(b) by a decree or order from which no appeal is allowed, and who, **from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge** or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the court which passed the decree or made the order.*

Glancing at the two grounds raised by the respondent with due respect ,I am not prepared to agree with Mr. Nassoro's proposition that, the respondent was intending to raise new facts which were not in her

knowledge before as the two preferred grounds do not support such proposition. The said grounds suggest that, the respondent was intending to invite the trial Court to review its decision and determine whether it acted not in error to go into merits and demerits of the suit when entertaining the preliminary objection which in my firm view is a sound ground of appeal. Likewise in the second ground the respondent was seeking the court's intervention to determine whether it acted in error to strike out the suit with costs. While I am alive to the fact that, the trial court can review its own decision under Order XLII Rule 1(1) of the CPC, I detach myself from Mr. Nassoro's proposition that, the trial court acted properly to entertain the application under the two grounds raised by the respondent as to so do is tantamount to inviting it to sit as the court of appeal on its own decision, the practice which is prohibited under the law in our jurisdiction. It was held in the case of **Angella Amundo** (supra) that:

"A court will not sit as a court of appeal from its own decision, nor will it entertain application for review on the ground that one of the parties in the case conceived himself to be aggrieved by the decision. It would intolerable and most prejudicial to the public interest if cases once decided by the court could be re-opened and re-heard..."

In view of the above, I am satisfied that the trial Court wrongly reviewed its own decision under the circumstances. Next for determination is the assertion by Mr. Nassoro that, this appeal is untenable for being one of the appealable matter in which Mr. Kagirwa submits in the contrary that, it is appealable under Order XL Rule 1 of the CPC. I think this point need not detain this Court as I shoulder up with Mr. Kagirwa's submission that the same is appealable. I say so as under Order XL Rule 1(v) of the CPC the order granting application for review is appealable. Order XL Rule 1(v) of the CPC reads:

1. An appeal shall lie from the following orders under the provisions of section 74, namely-

(v) an order under rule 4 of Order XLII granting an application for review.

In this case the order of the trial court in Misc. Civil Application No. 121 of 2021 subject of this appeal reads:

"I therefore allow this application to the extent above said."

To me the above order meant nothing than to grant the application for review, thus, conclusively determined the application. I therefore find the raised point by Mr. Nassoro that, the appeal is untenable is wanting in merit

hence dismiss it. In the end I find the second ground of appeal meritorious too.

That said and done, I allow the appeal. The trial court ruling of 20/01/2022 rejecting or overruling appellant's preliminary objection on the filing of Misc. Civil Application No. 121 of 2021 out of time is set aside and substituted with an order for dismissal of the application for being preferred out of time. Further to that, the ruling and drawn order dated 23/02/2022, allowing the application in Misc. Civil Application No. 121 of 2021 are hereby quashed and set aside. For avoidance of doubt the application in Misc. Civil Application No. 121 of 2021 stands dismissed.

I order each party to bear its own costs.

It is so ordered.

Dated at Dar es salaam this 02nd day of September, 2022.



E. E. KAKOLAKI

JUDGE

26/08/2022.

The Judgment has been delivered at Dar es Salaam today 02nd day of August, 2022 in the presence of Mr. Mvano Mlekano, advocate for the

appellant, Ms. Fauzia Kajoti, advocate for the Respondent and Mr. Asha Livanga, Court clerk.

Right of Appeal explained.



E. E. KAKOLAKI
JUDGE

02/09/2022.

