

**IN THE HIGH COURT OF TANZANIA  
(DAR ES SALAAM DISTRICT REGISTRY)  
AT DAR ES SALAAM**

**MISC. CIVIL APPLICATION NO. 189 OF 2021**

(Arising From Misc. Civil Application No. 333 of 2020, Hon Mlyambina, J)

**JUDITH PHILBERT BAYEKELA** (Administratrix of the estate  
of the late Philbert Sweetbert Bayekela) .....**APPLICANT**

**VERSUS**

- 1. THOMAS PHILBERT BAYEKELA.....1<sup>ST</sup> RESPONDENT**
- 2. DIANA PHILBERT BAYEKELA .....2<sup>ND</sup> RESPONDENT**
- 3. JEFFERSON PHILBERT BAYEKELA.....3<sup>RD</sup> RESPONDENT**
- 4. GRACE PHILBERT BAYEKELA.....4<sup>TH</sup> RESPONDENT**

**RULING**

Date of Last Order: 11/2/2022

Date of ruling: 18/2/2022.

**Masabo J.:-**

The application before me is for leave to file an appeal to the Court of Appeal against the decision of this court in Misc. Civil Application No. 333 of 2020 delivered on 11<sup>th</sup> December, 2020. Having been served, the respondents filed their counter affidavit accompanied by a notice of preliminary objection premised on the following two points; **One**, that the application is hopelessly time barred and that it is fatally defective and incompetent for being supported by a defective drawn order.

During the hearing, Mr. Chingota, learned counsel appeared for the applicant and the respondents enjoyed the service of Mr. Richard Mafolo, learned counsel.

Submitting in support of the first point of the preliminary objection that the application is barred in law, Mr. Mafolo submitted that the application for leave is made under section 5(1) (c) of the Appellate Jurisdiction Act [Cap 141 RE 2019] and as per Rule 45(a) and (b) of the Court of Appeal Rules, 2009 it ought to be filed within 30 days from the date of judgment. The delay is any, should be substantiated by a certificate of delay a requirement which was not met in the instant application. Exemplifying his point further, Mr Mafolo argued that the judgment was delivered in 12<sup>th</sup> December 2020 and whereas this application was filed in 3<sup>rd</sup> May, 2021, hence the application is time barred.

On the second limb of the preliminary objection he submitted that there are discrepancies of dates on the judgment and drawn order. The judgment was delivered on the 17<sup>th</sup> December, 2020 but the decree indicates that judgment was delivered on 11<sup>th</sup> December 2020. Mr Mafolo referred the court to Order XX rule 7 of the Civil Procedure Code [Cap 33 RE 2019] which provides that the decree shall bear the same date with the judgment. Further, he cited the case of **Tanzania Air Service LTD vs Registered Trustees of the Precious Blood Fathers**, Civil Appeal No. 90 of 2006 where the court struck out the application for being wrongly dated.

In reply Mr. Chingota sternly resisted the preliminary objection. He argued that the application was filed on 21//4/2021 well within the time prescribed time. In the alternative he apportioned the blame, if any, to the court whereby he argued that the delay was occasioned by the delay to be supplied with the proceedings and copies of judgment. Regarding the second limb, he casually submitted that the objection is light weight as it can easily be rectified.

In the rejoinder, Mr Mafolo reiterated even if it was true that there was delay in obtaining the proceedings, the applicant ought to have applied for certificate of delay under Section 45 (a) of the Appellate Jurisdiction Act which requires a party to get a certificate from the Registrar. He maintained that his preliminary objection has merit and the court should be struck out with cost.

I have heard the submissions from both parties. Two issues await my consideration and determination. The first is whether the application is time barred and second, whether the application has been rendered fatally defective by the discrepancy of dates. In regard to the 1<sup>st</sup> point, the law expressly provides that where the appeal to the Court of the Appeal is with leave of court granted under Section 5(1) (c) of the Appellate Jurisdiction Act provides, as the case in point, the application for leave should be lodged in 30 days as stated under Rule 45 (a) & (b) of the Court of Appeal which reads thus;

In civil matters:-

- (a) notwithstanding the provisions of rule 46(1), where an appeal lies with the leave of the High Court,

application for leave may be made informally, when the decision against which it is desired to appeal is given, or by chamber summons according to the practice of the High Court, within thirty days of the decision;

In the present case, the parties agree that the impugned judgment was delivered on 11<sup>th</sup> December, 2020 and the instant application was filed on 21<sup>st</sup> April, 2021 which is 130 days after the impugned decision. Thus, there is no any flicker of doubt that it was filed after the lapse of 30 days prescribed by the law. In his reply submission, Mr. Chingota has assigned the blame to the court for delay to supply the applicant with the requisite documents, that is, the ruling, order and proceedings. Much as I am aware of the provision of section 19(2) of the Law of Limitation Act [Cap 89 RE 2019] which provides that the time during which the applicant was waiting to be supplied with the judgment should be exempted from the computation of time and the liberal stance by this court in similar circumstances, the affidavit filed in support of the application is silent on this issue such that, it is unknown whether there was any delay in furnishing the applicant with the said application and if so, on which date was she supplied with the said documents. Assuming just for the sake of argument that the alleged delay is actual, it is unclear from the record who, between the court and the applicant, is to blame for the delay. Did the applicant request for the copies and if so, when did she submit her application? Having assessed all the facts and especially the manner in which this point was raised, I am strongly convinced that it is an

afterthought made with a sole intention of exculpating the application from the impending consequences.

Considering the importance to which the law attaches to time limitations for institution of matters and taking of certain legal actions, it would certainly be a serious misdirection for this court to overrule the objection based on unsubstantiated averments made by the counsel from the bar. Accordingly, I uphold the objection and pronounce the matter to be incompetent. Having upheld this point, I will not proceed to the next point and the first limb of the preliminary objection sufficiently disposes of the application. The application is hereby dismissed under section 3(1) of the Law of Limitations Act [Cap 89 RE 2019]. Costs shall be on the applicant.

**DATED at DAR ES SALAAM** this 18<sup>th</sup> day of February 2022

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Signed by: J.L.MASABO

**J.L. MASABO**

**JUDGE**

