

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA

CIVIL APPEAL NO.24 OF 2020

(Arising from the decision of the District Court of Shinyanga in Civil Appeal No. 05 of 2020 originating from Civil Case No 3 of 2020 in Mjini Primary Court)

MAKUBI DOGANIAPPELANT

VERSUS

AK LAW CHAMBER

(AUDAX CONSTATINE).....RESPONDENT

RULING

25th May & 10th June 2022

MKWIZU, J:

The appellant was dissatisfied with the decision of the District Court in Civil Appeal No. 05 of 2020 originating from Shinyanga Urban Primary Court in Civil Case No. 3 of 2020 where his appeal was struck out on 16/7/2020 hence this appeal on the following grounds: -

- 1. That, the learned erred in law and facts for failure to realize that the appeal before her based mainly on the point of jurisdiction and that the only remedy available was to appeal*
- 2. That the learned magistrate erred in law and fact for failure to realize that the court without jurisdiction cannot entertain any application on the object matter of whatsoever including an application for setting aside the ex parte decision.*

Before hearing of the appeal, respondent raised two points of preliminary objection that;

- 1. That this second of appeal is hopelessly time barred; and*
- 2. That this second appeal was directly filed in this honourable Court instead of first being filed in the District Court of Shinyanga at Shinyanga where a first appeal was heard and determined contrary to requirement of law.*

Arguing in support of the preliminary objections Audax Constantine, counsel for the respondent said the decision in Appeal No. 5 of 2020 was delivered on 16/7/2020 and this appeal was filed on 15/12/2020 in an aggregate period of five months contrary to section 25 (1) (b) of the Magistrate Court Act Cap 11 R:E 2019 where attachment of the copy of the decision appealed against is not a requirement. Citing the decision of **Isack Kahwa vs Bandora Salum**, PC Appeal No. 6 of 2020 and **Sophia Mdee and Andrew Mdee & another**, Civil Appeal No. 5 of 2015 CAT (all unreported), respondent counsel insisted that the appeal is time barred.

Regarding the second preliminary point of objection, respondent counsel contended that the memorandum of appeal was filed in this court on 15/12/2020 directly instead of being filed before the District Court under section 25 (3) of the Magistrate Court Act (Cap 11 R:E of 2019) read together with Rule 5 (3) of the Civil Procedure (Appeals and proceedings originating in Primary Court) Rules, GN 312 of 1964. He finally prayed for the striking out of the appeal with costs.

In response, Mr. Frank Samwel counsel for the appellant refuted the assertion that this appeal originated from the decision of the Primary Court. To him, the appeal emanates from the original jurisdiction of the district sustaining the preliminary objection raised and therefore the appealing period in 90 days under Item 1 Part II of the schedule to the Law of Limitation Act (Cap 89 RE 2019). He said, since the requirement of attaching the copy of the decision to the memorandum of appeal is mandatory, they first wrote a letter requesting to be supplied with the required copies which was served on them on 8/12/2020 followed by the filing of the appeal on 15/12/2020 well within time.

Mr. Frank also was in opposition of the second preliminary point of law raised arguing that this appeal is not governed by the MCA and the decision in the case of **Isack Kahwa** and **Sophia Mdee** cases are distinguishable as they were heard on merit at the district court. He urged the court to overrule the objections raised.

I have considered both parties' submissions for and against the preliminary objections raised. It is a fact that, the appeal before me is a second appeal as the matter originates from the Shinyanga Urban Primary Court in Civil Case No 3 of 2020. Mr Frank Samwel has invited this court to find that, in determining the preliminary objections placed before it, the district court was acting on its original jurisdiction. With due respect to Mr. Frank advocate, before the District Court was a Civil appeal registered as ***Civil Appeal No 05 of 2020*** with a memorandum of appeal by the appellant containing three grounds faulting the trial primary court's decision in Civil Case No 3

of 2020. The District Court was therefore invited to sit on the matter on as an appellate court and not as a court of first instance. A mere fact that the striking out of the appeal was on preliminary points does not change the stage of the matter and the jurisdiction of the court over it. It is therefore obvious that, the matter before me, is a second appeal from District Court's decision on its appellate jurisdiction.

Appeals of such a nature are regulated by section 25 (1) (b) of the MCA, (Cap 11 R:E 2019) stating that;

*"1.(b)- in any other proceedings any party, if aggrieved by the decision or order of a district court in the exercise of its **appellate** or revisional jurisdiction may, **within thirty days after the date of the decision or order, appeal there from to the High Court;** and the High Court may extend the time for filing an appeal either before or after such period of thirty days has expired."*

The appealing period prescribed in the above provision is only 30 days from the date of the decision and the attachment of the copy of the decision and or the decree is not a mandatory requirement. This position was well elaborated in the cited case of **Sophia Mdee vs Andrew Mdee & 3 others** (supra) and **Isack Kahwa vs Bandora Salum**, cited by the respondent counsel where making reference to Rule 2 and 4 (1) of the Civil Procedure (Appeal in Proceedings Originating in Primary Courts) Rules, 1963, Government Notice No. 312 of 1964, the Court said attachment of a copy of judgment or decree along with the petition of

appeal is not a legal requirement in instituting appeals to the High Court on matters.

It is true that Item I, Part II of the Law of Limitation Act (Cap 89 RE 2019) relied upon by the appellant counsel prescribes for 90 days period within which to appeal against any decision under the Civil procedure code. But that provision is specific to appeals where the period of limitation is not provided for by any written law. The appeal before us is guided by section 25 of the MCA. Thus, the arguments by Mr. Frank that the appeal was to be filed within 90 days with a copy of the decision and 'or decree attached is for that reason a misconception as the Law of limitation provisions cited is not applicable.

The appellants appeal filed five months after the decision of the district court on its appellate jurisdiction is barred by limitation. The first preliminary objection is for that reason sustained. This point alone suffices to dispose of the matter. I will for that reason end here and mark the appeal dismissed under section 3 of the law of Limitation Act (Cap 89 RE 2019) with costs. Order accordingly.

DATED at **SHINYANGA** this 10th day of June 2022.


E.Y. MKWIZU
JUDGE
10/6/2022

Court: Right of Appeal explained.


E.Y. MKWIZU
JUDGE
10/6/2022