

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

AT DAR ES SALAAM

CIVIL APPEAL NO. 348 OF 2021

(Originating from Ilala District Court at Samora in Misc.Civil Appl.No.4 of 2020)

JOACHIM LORY..... APPELLANT

VERSUS

MAGRETH PETER (JUHUDI B) RESPONDENT

Date of Last order:28/10/2022

Date of Judgment:17/02/2023

JUDGMENT

MGONYA, J.

Being aggrieved with the decision of the District Court of Kinyerezi in **Misc. Civil Application No. 4 of 2020**, where the court dismissed his application for extension of time, Appellant herein filed this appeal to challenge the impugned decision on the following grounds:

- 1. That, having found as undisputed fact that judgment of the primary court was delivered on 27/2/2018 and the Appellant requested for a copy on 5/3/2018 for appeal purpose and that the requested copy of the judgment was made available and supplied to the Appellant on 9/4/2019, the Honourable Magistrate erred both in law and fact by***

failing to hold that failure to supply the appellant in time with a requested copy of judgment constitutes sufficient reason for extension of time.

2. That the Honourable Magistrate erred both in law and fact by holding that the Appellant did not prove that he was sick.

3. That, the Honourable Magistrate erred both in law and fact by his failure to find that proceedings and judgement of the primary court are tainted with illegality as the Respondent "Juhudi B" who instituted the case before the primary court is not a registered entity hence non existing as such cannot legally sue or be sued.

On the strength of the above grounds of appeal, Appellant argued this court to allow his appeal by reversing, quashing and setting aside the decision of District Court of Ilala.

Hearing of this appeal proceeded by the way of filing written submission which I will not reproduce as I will be referring to in determination of the filed grounds of appeal.

To start with the first ground where the Appellant faulted the trial Magistrate that she erred in law and facts for not holding that failure to supply the appellant in time with a requested copy of judgment constitutes sufficient reason for extension of time.

The Appellant contention is that; the judgment of the Primary court was delivered on **27/2/2018** but the copy of it was not made available to the Appellant within time. The Appellant wrote two letters demanding the same but all the efforts were fruitless. It is the appellant's submission that, it is the legal principle of the law that you cannot punish a person for the act that he has not been the causative.

Therefore, the District court could have taken concern on this reason for the delay which were not in the Appellant's negligence. To support his argument the Appellant referred this court the case of ***MOBRAMAGOLD CORPORATION LTD VS MINISTER ENERGY AND MINERAL AND THE ATTORNEY GENERAL AND EAST AFRICAN GOLDMINES LTD AS INTERENOR (1998) TLR 425.***

With regard to the second ground of complaint, the Appellant stated that, while processing to procure his legal right after the judgment of the Ukonga Primary Court, he was not well with his health. He was admitted at Muhimbili National Hospital where he was examined and revealed that he has defect of Lower Motor Neuronea, disease which attacked his central Nervous System. After being released he was medically advised to have bed rest at home. He attached the medical report from Muhimbili National Hospital but the trial Magistrate did not take any concern while

sickness has been among the reasons to extend the time. To fortify his stance the case of **JOSEPHAT M MBISO AND 32 OTHERS VS D. T. DOBIE COMPANY LTD, MISC APPLICATION NO. 27 OF 2006 High Court of Tanzania, Labour Division**, was referred.

On the last ground where the Appellant raised the issue of illegality in the impugned judgment. Submitting on this ground he stated that, Respondent does not exist under the law to trade as financial Institution rendering loans. There was no prove of registration from BRELA which were tendered before the Primary court of Ukonga. By referring to the cases of **CHANGE TANZANIA LTD VS REGISTRAR OF BUSINESS REGISTRATION AND LICENCE AGENCY, MISC, COMMERCIAL CASE NO. 27 OF 2019, HIGH COURT OF TANZANIA COMMERCIAL DIVISION AT DAR ES SALAAM**, and **TENESCO VS MUFUNGO MAJULA AND 15 OTHERS, CIVIL APPLICATION No. 94 of 2016** (CAT unreported) he contended that, the Respondent had no any right under the eye of the law to sue or bring any legal action. The act of Primary Court to allow illegitimate person to bring action and proceed to grant his prayer rendered to irregularity.

In addition to that, the Appellant submitted that even if the Respondent could have been existing under the eye of the law,

still there was neither the minutes nor any other document that give mandate to the Respondent to take such legal action on behalf of the registered entity. Therefore, the Respondent had no locus stand. To bolster his argument, he referred this court to the case of ***STANBIC FINANCE TANZANIA LTD VS GIUSEPPE TRUPIC AND CHIARA MARAVASI (2002) TLR 217.***

On the other side the Respondent while opposing the appeal she opted to argued on the 1st and 2nd grounds jointly. She stated that in his affidavit the Appellant contended the reasons for delay were the late supply of the copy of judgment and decree as well as sickness. No explanation was rendered as to how the disease affected his ability to appeal. The medical chit appended to the application as annexure A4 which purports to show that the applicant was admitted for treatment is not legible as the date on when he was admitted and discharged from hospital is not ascertainable. The Respondent referred this court to its decision which was delivered by Masabo. J which is the case of ***JOACHIM LORY V MAGRETH PETER (JUHUDI B), Misc. Application No. 655/2020*** and the case of ***LYAMUYA CONSTRUCTION COMPANY LTD V BOARD OF REGISTERED TRUSTEE OF YOUNG WOMEN'S CHRISTIAN ASSOCIATION OF TANZANIA, CIVIL APPLICATION No. 2 of 2010.*** In her view the Honourable Magistrate was right to hold that the

Appellant failed to prove that he was sick and no good cause has been shown by the Appellant to deserve extension of time.

Responding to the third ground of complaint, the Respondent submitted that, neither in the affidavit filed on 7th January 2020 nor submission which was filed on 24th April 2020, the Appellant raised the issue of illegality. The respondent admitted that, the institution must be registered and went on to state that JUHUDI B exist under the law since it was registered under Jumuiya ya kukuza Uchumi Ilala (JUKUILA), hence it was trading as financial institution under JUKUILA. The said JUKUILA has a certificate of registration from BRELA. The copy of the said certificate of registration was tendered in court.

Responding to the issue of minutes to appoint the Respondent, she stated that there was a meeting to appoint the Respondent and the minutes was tendered in Primary court. During the said process the Appellant was a chairman of the said institution.

On the premise of what she submitted; the Respondent argued this court to dismiss the appeal with costs.

I have dispassionately considered and weighed the rival arguments from both parties. The issue for determination before this court is whether this appeal is meritorious or not.

I shall begin my discussion by reiterating the legal position on the role of a first appellate court. It is trite law that, the first appellate court has a duty to re-evaluate the evidence on record and in doing so, the first appellate court may concur with the finding of fact made by the trial court or come to its own findings. See. ***GAUDENCE SANGU VS REPUBLIC (CRIMINAL APPEAL 88 OF 2020) [2022] TZCA 784 (07 December 2022); www.tanzlii.org.***

With regard to the first ground of appeal where the Appellant faulted that, the Honourable Magistrate did not consider the delay to be availed with a copy of judgment as a good reason for the delay. As the first appellate court, I had enough time to go through the lower court's record so as to re-evaluate the evidence on record. To start with the filed affidavit in support of an application in **Misc. Civil Application No.4 of 2020**, the Appellant deponed that he was the Respondent in **Civil Case No.492 of 2018 which was decided on 27th February, 2018 by Ukonga Primary court**. He was availed with a copy of the said judgment on 9/04/2019 while he was out of the time to challenge the impugned judgment. He deponed further that up to now he has suffered several diseases like (kuparalaizi miguu) that is always facing him. Therefore, the delay was not due to his negligence rather it is because the copy of judgment was not supplied to him on time and also due to the process of

finding the money of Advocate to help him to prepare the application.

On her side the Honourable Magistrate at paragraph 5 of the ruling considered that the Appellant was supplied with the requisite document on 9/4/2019 but he did not appeal by that time because he was sick.

The law is very clear that in computing the period of limitation the time requisite for obtaining a copy of Judgment or decree shall be excluded. **Section 19(2) of the Law of Limitation Act, Cap. 89 [R. E. 2019]** provides that:

19.-(2) In computing the period of limitation prescribed for an appeal, an application for leave to appeal, or an application for review of judgment, the day on which the judgment complained of was delivered, and the period of time requisite for obtaining a copy of the decree or order appealed from or sought to be reviewed, shall be excluded.

It is the above provision of the law in which the Appellant's first ground of appeal rooted. However, by re-evaluating the evidence on record, I also reject away this ground of appeal as the same has no merit. The reason for the decision is; it is

garnered from the filed application that the Appellant upon being served with the requisite document on 9/04/2019 he didn't take any action until 8th January, 2020 which is more than 200 days later, the delay which was inordinate. Therefore, even if the days spent in making follow up of the copy of judgment and decree was excluded still, he was out of the time. As result this court like the lower court finds that the delay to be supplied with the judgment as raised by the Appellant does not make a good /sufficient reason to attract the court to exercise its discretion power to enlarge the time.

Then turning to the second ground which the Appellant tries to justify the reasons for the delay for more than 200 days on the ground that he was sick. At the outset the honourable Magistrate admitted the issue of sickness as a good ground for granting extension of time so long as there is proof of it.

It was the Magistrate findings that, what the court needs to look at is whether the Applicant has advanced sufficient reasons to move the court to exercise its discretion, a thing which is lacking in the application since there was nothing to back up the Appellant's allegation that he fell sick after he was granted a copy of judgment.

It is trite law that for an application for extension of time to succeed, the bottom line is sufficient cause shown by the

Applicant. From the filed affidavit which contain the evidence as to why the Appellant delayed to file an appeal, there were two annextures attached. The first one was a copy of judgment which was marked as annexture **KT-1** and the second annexture was **KT-2** a letter requesting a copy of judgment. No proof was attached to prove that he was sick and attending medical attention, hence his failure to appeal within time. The Respondent herein in her submission talked about annexture A4 (medical chit) but in the lower court record the same is not among the annextures unless she mixed the facts of other application with the Application subject of this appeal.

Being aware that the affidavits are statements made on oath and the same is the basis upon which applications are decided, I agree with the Honourable Magistrate that failure of the Appellant to attach the documents to exhibit that he was sick, made his statement to be mere words which does not qualify to be considered as the sufficient reason for the court to grant the application.

Lastly is the ground of illegality raised by the Appellant. Before this court the Appellant faults the decision of the lower court on the ground that the Respondent was allowed to sue while it has no legal capacity to sue or be sued.

As far as the third ground of appeal is concerned, am aware of the settled principle of the law that, at the Appellate level, the court only deals with matters that have been decided upon by the lower court. There is plethora of authorities on this point. See. the cases of ***HOTEL TRAVERTINE LIMITED AND 2 OTHERS V. NATIONAL BANK OF COMMERCE LIMITED [2006] TLR 133 AND JAMES GWAGILO V. THE ATTORNEY GENERAL, CIVIL APPEAL NO. 67 OF 2001 (UNREPORTED)***. In Hotel Travertine Limited and 2 Others (Supra) the Court stated that:

"As a matter of general principle an appellate court cannot consider matters not taken or pleaded in the court below to be raised on appeal."

Also in the case of ***FARIDA AND ANOTHER VS. DOMINA KAGARUKI, CIVIL APPEAL NO. 136 OF 2006, CAT (Unreported)***, the Court of Appeal had this to say:

"It is the general principle that the appellate court cannot consider or deal with issues that were not canvassed, pleaded and not raised at the lower court."

As I have discussed above, the Appellant in his affidavit deponed that he failed to appeal within time due to the delay to be availed with the requisite document, sickness and financial

constraints. Nothing was stated on the issue of illegality of the decision being the reason for extension of time. It is my considered view that if the Appellant failed to raise such an alarm in the affidavit complaining the same, then this ground of appeal is an afterthought. With respect, I do not go along with the Appellant on this ground.

Basing on what I have discussed above, the raised issue is answered in negative. **This appeal has no merit hence forth; I proceed to dismiss it as I hereby do.**

Each party to bear its own costs.

It is so ordered.



L. E. MGONYA

JUDGE

17/2/2023