

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY**

AT MOSHI

CIVIL APPEAL NO. 7 OF 2022

(Originating from Civil Case No. 16 of 2020 of Moshi District Court)

THE HERITAGE INSURANCE CO. TANZANIA LTD.....APPELLANT

VERSUS

MARY OSWARD CHUWA.....1ST RESPONDENT

OSCAR LUKAS KIMARO2ND RESPONDENT

DIDAS RAPHAEL KARIA 3RD RESPONDENT

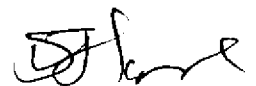
RULING

27.12.2022 & 17.02.2023

SIMFUKWE, J

Before the District Court of Moshi (the trial Court) the 1st respondent herein instituted a case against the appellant, 2nd and 3rd respondents claiming for actual costs at the tune of Tshs 2,600,500/= being medical expenses and transport costs and Tshs 150,000,000/= as general damages for pain and psychological suffering.

At the end of the trial, on 12/5/2022 the trial court entered judgment and decree against the 3rd respondent (appellant herein). The appellant was aggrieved, he filed the instant appeal. However, the 1st respondent



through her advocate raised the following grounds of preliminary objection on point of law:

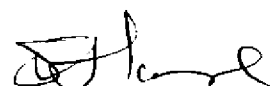
- 1. That the appeal is fatally defective for being time barred.*
- 2. That, the appeal is fatally defective for want of date and endorsement of the appellant nor her advocate.*

The hearing of the Preliminary Objection was conducted through written submissions. The appellant was represented by Mr. Julius Semali and Karoli Tarimo, learned counsels, while the 1st respondent was represented by Benedict Bagiliye, learned counsel.

Supporting the first ground of objection that the appeal was filed out of time, Mr. Bagiliye submitted that the proceedings from which the appeal arises is tortious liability case which is governed by **the Motor Vehicle Insurance Act** and **Law Reform (Fatal Accidents and Miscellaneous Provisions) Act**. He argued that, these laws do not provide for time limit within which one may lodge the appeal arising therefrom. He was of the view that the law which provides for time limit is **Part II Item 2 of the Schedule to the Law of Limitation Act** which provides for 45 days for one to lodge an appeal of this nature.

It was further submitted that, in the instant matter, the decision was delivered on 16/5/2022 while the appeal was lodged on 6/07/2022 which is equal to 51 days from the date the decision was certified. Thus, the appeal was filed out of time for 6 days.

He explained that the appellant ought to have first sought and obtained leave to lodge the appeal out of time which the appellant did not. Thus,



this court has no jurisdiction to entertain an appeal filed out of time without leave of the court hence, ought to be dismissed with costs.

Mr. Bagiliye elaborated further that the issue of time limitation goes to the jurisdiction of the court and has no mercy. He emphasized the point by citing the case of **John Cornel vs A. Grevo (T) Ltd, Civil Case No. 70 of 1998** in which it was held that:

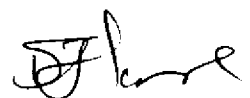
"However unfortunate it may be for the Plaintiff, the law of limitation on actions knows no sympathy or equity. It is a merciless sword that cuts across and deep into all those who get caught in its web."

The learned counsel also cited **section 3 of the Law of Limitation Act Cap 89 R.E 2019**; which provides that:

"Subject to the provisions of this Act, every proceeding described in the first column of the schedule to this Act and which is instituted after the period of limitation prescribed therefor, opposite thereto in the second column, shall be dismissed whether or not limitation has been set up as a defence."

It was opined that since the appeal was filed out of time and without seeking leave to appeal out of time, then the only option is to dismiss the appeal with costs.

On the 2nd point of preliminary objection which is to the effect that the appeal is fatally defective for want of date and endorsement of the appellant nor her Advocate; Mr. Bagiliye submitted that the copy of memorandum of appeal has no date and is not endorsed by the appellant nor her advocate. Thus, it lacks authenticity.



Responding to the first ground of objection on time limitation, Mr. Karoli Valerian Tarimo for the appellant argued that **Part II Item 2 to the Law of Limitation Act** is not applicable in appeals against any decree passed by the Court of a Resident Magistrate or a district court exercising original jurisdiction. He argued that what is challenged on appeal is not proceedings but a judgment and decree of the lower court.

The learned counsel also pointed out that the time limit to lodge an appeal before the High Court from the decision of the district court or court of Residents Magistrate is not governed by the law which was applicable to the subject matter of the appeal or the nature of cause of action. Rather, it is based upon the fact that the decision subject of the appeal had originated from the primary court or the district court or Resident Magistrate Court exercising its original jurisdiction. Mr. Tarimo was of the opinion that the time limit to appeal against the decree passed by a court of Resident Magistrate or District court exercising original jurisdiction is provided under **section 70(1) of the Civil Procedure Code**, Cap 33 R.E 2022 which provides that:

*"70 (1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, **an appeal shall lie to the High Court from every decree passed by a court of a Resident Magistrate or a District Court exercising original jurisdiction.** (Emphasis supplied)*

Mr. Tarimo clarified that, there is no dispute that the judgment and decree the subject matter of this appeal was from the district court exercising its original jurisdiction. In that respect, he said the law applicable and the exact provision is **item 1 of Part II of the Schedule to the Law of**

Limitation Act which provides a period of limitation of ninety days. Thus, since the judgment was delivered on 12/5/2022 and the appeal was filed on 6/7/2022 then, the appeal was not time barred.

He further argued that the manner in which the appeal from the original decree has to be instituted and filed is provided for under **Order XXXIX rule 1 of the Civil Procedure Code**; that the memorandum of appeal must be accompanied by a copy of the decree appealed from and the judgment on which it is founded. That, failure to abide with this provision will make the appeal defective and the same should be struck out by the court.

Mr. Tarimo further explained that **part IV of the Law of limitation Act** under **section 19(2)** governs the computation of period of limitation to the effect that the time spent in obtaining a copy of decree or order appealed from or sought to be reviewed shall be excluded. He quantified that the time from the date of judgment and the date when the certified copies of the judgment and the decree of the court were supplied to the appellant must be excluded in computing time to file an appeal. However, he opined that such provision is not applicable to their case since they filed their appeal on time as per **Part II Items 1** (supra) which provides for ninety days to file an appeal. To buttress his position, Mr. Tarimo referred to the decisions of this court in the cases of **Akiba Commercial Bank vs Silas Katemi, Civil Appeal No. 101 of 2011** and **Juma Abdallah Chembea and Consolidated Transport Ltd vs David Majola, Civil Appeal No. 106 of 2012** (HC).



Also, he referred to the decision of the Court of Appeal in the case of **Mohamed Salimini vs Jumanne Omary Mapesa, Civil Appeal No. 345 of 2019** which held that:

*"...In the present case, in his pursuit for justice, that is, the preferred appeal, the appellant was one, **duty bound to seek for the proper decree at the earliest possible time so as to meet the timeline of ninety days as required by Paragraph 1 of Part II of the Schedule to the Limitation Act** because he had already been served with a decree regardless of whether or not it was defective."*Emphasis Supplied

Mr. Tarimo also cited the case of **Registered Trustees of the Marian Faith Healing Centre @Wanamaombi vs The Registered Trustees of the Catholic Church Sumbawanga Diocese**, Civil Appeal No. 64 of 2007 which held that:

*"In this case, there is no dispute that **under Item 1 of Part II of the Schedule to the Law of Limitation Act (Cap 89 R.E 89) the appellants ought to have appealed against the decision of the Resident Magistrate within a period of ninety days.**"*
(Emphasis provided)

From the above cited authorities, the learned advocate concluded that the appellant's appeal which was filed just after 51 days from the date of judgment is within time. Thus, the first ground of preliminary objection ought to be dismissed with costs.

Responding to the 2nd ground of objection which is to the effect that the appeal is fatally defective for want of date and endorsement of the appellant nor her advocate; Mr. Tarimo stated that the 1st respondent did

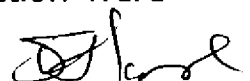


not clarify where the signature and dates are lacking and he did not support his submissions with any authority.

The learned counsel insisted that the document in the court file or court record are the governing documents in making court decision and not the documents in possession of the parties. That, the 1st respondent did not tell the court if the memorandum of appeal filed in court does not contain the signature or endorsement complained of. He said, the said memorandum filed in court was duly signed and dated and the duplicate memorandum of appeal was served to the Respondents.

In rejoinder to the first point of objection, it was explained that the cases cited by Mr. Tarimo are distinguishable and inapplicable to the circumstances of this case for two reasons: that in all cases cited by the respondent the issue for determination was whether the law applicable was **the Magistrates Court Act** or **the Law of Limitation Act**. That, one side of the case was seeking to rely on **section 25 (1) (b) of the Magistrates Courts Act** which provides for 30 days while the other one sought to rely on the Law of Limitation Act which provides for 90 days. That is where the Courts in the cited cases ruled out that the 30 days in the Magistrates Court Act applies where the District Court is exercising its appellate or revisional jurisdiction for proceedings arising from the Primary Courts. Thus, the issue in those cases was not whether the provision applicable is **Part II Item 2 of the Schedule** to the **Law of Limitation Act** which provides for 45 days or **Item 1 Part 11 of the Schedule** to the Law of Limitation Act which provides for 90 days as in this case.

The second reason for distinguishing the cited cases with the present case was stated to be that, in all the cited cases the causes of action were



those whose procedures are mainly governed by the **Civil Procedure Code**. That, in the case of **Akiba Commercial Bank** (supra) the cause of action arose on unlawful detaining of the Motor Vehicle by the appellant whose cause of action and the procedures of instituting the suit are governed by the **Civil Procedure Code** unlike our case. Also, in the case of **Mohamed Salimin** (supra) the cause of action arose from the eviction of the appellant from the house claimed to have been purchased by the defendant, which is governed by the Civil Procedure Code.

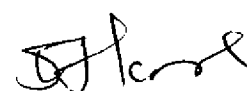
It was the argument of Mr. Tarimo that, the argument by the appellant that all cases from the district court in its original jurisdiction are subjected to the 90 days' time limit for appeals is misconceived and misleading this court. That, had that been the position, then the presence of **Part II Item 2 of the Schedule to the law of Limitation Act** which provides for 45 days would be of no essence, since it would not apply to any appeal from the district court to the High Court. That, the law applicable in the case at hand for the cause of action and the procedures for instituting the suit is governed by the **Motor Vehicle Insurance Act** and **Law Reform (Fatal Accidents and Miscellaneous Provisions) Act**. Thus, **Part II Item 2 of the Schedule to the Law of Limitation Act** which provides the time limit of 45 days is applicable to the situation at hand.

Regarding the 2nd point of objection, it was maintained that the copy of memorandum of appeal served to the respondent has no date and not endorsed by the appellant nor her advocate. It was insisted that it is trite law that all documents filed in court and those served to the other party are the same and uniform in contents and form. Reference was made to the case of **SGS SOCIETE GENERALE DE SURVEILLANCE LTD & ANOTHER vs VIP ENGINEERING & MARKETING LTD AND**

ANOTHER, Civil Appeal No. 124 of 2017 at page 18 where the copies of appeal served to the respondents were found to have not been signed and endorsed by the Registrar and the appellant came up with the same argument that his copy was properly signed and endorsed by the Registrar. The Court of Appeal declined to agree with him and proceeded to struck out the appeal for being incompetent. He argued that in this case since the copies served to the 1st respondent are not dated and endorsed as already submitted, the appeal should be struck out for being incompetent for lack of authenticity.

That marked the end of the submissions for and against the raised grounds of objection.

I have duly considered the parties' submissions and noted that it is not disputed that the judgment of the District Court was delivered on 12.05.2022 and the appellant filed the memorandum of appeal in this court on 06.07.2022. Thus, under the first ground of objection, the contentious issue is which law should be applied between **Item 2 Part II to the Schedule to the Law of Limitation Act** (supra) and **item 1 part II to the Schedule of Law of Limitation Act** (supra). The learned counsel for the 1st respondent was of the view that since the matter is tortious liability and since the **Motor Vehicle Insurance Act** and **Law Reform (Fatal Accidents and Miscellaneous Provisions) Act** does not provide for time limit to appeal, then, **Part II item 2 of the Schedule to the Law of Limitation Act** which provides for 45 days should be applied. Thus, the appeal was filed out of time.



Opposing the objection, the learned counsel for the appellant was of the view that the time frame for lodging the appeal is based on whether the decision subject matter of appeal had originated from District Court and Resident Magistrate's court while exercising original jurisdiction. Thus, since the impugned decision originated from the district court while exercising original jurisdiction then **Item 1 of Part II** (supra) which provides for 90 days' time to appeal to the High Court is applicable.

I wish to quote the said provisions referred by the learned counsels for easy reference:

"1. An appeal under the Civil Procedure Code where the period of limitation is not otherwise provided for by any written law..... ninety days

2. An appeal for which no period of limitation is prescribed by this Act or any other written law.....forty-five days."

Also, **section 70 of the Civil Procedure Code** (supra) provides that:

"70.- (1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed by a court of a resident magistrate or a district court exercising original jurisdiction."

As rightly submitted by the learned counsel for the appellant, the district court was exercising original jurisdiction in the said case. That being the case, then, the law applicable as envisages under **section 70(1)** of the **Civil Procedure Code** (supra) is the **Civil Procedure Code** since there is no any other law which provides for appeal to this court. Thus, since the applicable law is the **Civil Procedure Code**, then the provision which



fits this matter is **Item 1 Part II to the Schedule of the Law of Limitation Act** which explicitly provides a time limit for an appeal under the **Civil Procedure Code** to be 90 days. At this juncture, I concur with the learned counsel for the appellant that the appeal was filed on time as 51 days only had elapsed from the time when the judgment was delivered.

The learned counsel for the 1st respondent tried to persuade this court that since this is a tortious liability case and its law does not provide for time limit to appeal, then the specific law is **Item 2 Part II to the Law of Limitation Act** (supra) which provides for 45 days to appeal. With due respect to Mr. Bagiliye, the said provision is applicable in cases where there is no any other specific law which provides for such matter.

Section 42 of the Magistrates' Courts Act, Cap 11 R.E 2022 provides that:

"42. -(1) Subject to the provisions of any law for the time being in force the powers of district courts and courts of resident magistrate shall be limited and their practice and procedure regulated-

- (a) In the exercise of their original criminal jurisdiction, by the Penal Code and the Criminal Procedure Act;*
- (b) In the exercise of their original civil jurisdiction, in accordance with the principles and provisions of the Civil Procedure Code so far as the same shall be applicable and suitable."*

In the instant matter, as prescribed in the quoted provision herein above, since the District Court was exercising its original jurisdiction then the specific law applicable is the **Civil Procedure Code** of which the time limit to appeal to this court is 90 days. Having said that and done, I hereby overrule the first point of objection.



On the 2nd point of objection, the learned counsel for the 1st respondent argued that the appeal is defective for want of date and endorsement of appellant and or their advocate. On the other hand, the learned counsel for the appellant argued that the memorandum of appeal was duly signed and dated by the appellant's advocate.

In determining this objection, I am guided by what is on record and not otherwise. What is on record is the memorandum of appeal which is duly signed and dated by the learned counsel for the appellant. The learned counsel for the 1st respondent did not attach the impugned memorandum of appeal to the preliminary objection nor support his submission in chief with the said memorandum of appeal. Attaching it to the rejoinder submission is considered by this court as an afterthought. Therefore, I find the 2nd point of preliminary objection has no merit.

For the reasons I have given herein above, I hereby overrule both Preliminary Objections raised for lack of merits. The objections are dismissed with costs. The main suit should proceed on merit.

It is so ordered.

Dated and delivered at Moshi this 17th day of February 2023.




S. H. SIMFUKWE

JUDGE

17/02/2023