

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

(PC) CRIMINAL APPEAL NO. 28 OF 2022

(Arising from the decision of the District Court of Tarime in Misc. Criminal Application No.28 of 2022)

SIMION WEREMAAPPELLANT

VERSUS

SIMION JOHN PETRO1st RESPONDENT

MERRY CHACHA FARES2nd RESPONDENT

JUDGMENT

14 & 22 March, 2023

M. L. KOMBA, J.:

This is an appeal from the decision of the District Court of Tarime (the trial court) in Misc. Criminal Application No. 08 of 2022 which overruled the Objection for denial of extension of time and allowed hearing of the appeal on merit. Initially, before the Primary Court of Sirari the respondents herein were charged and convicted of an offence of maliciously damage to property contrary to section 326 of the Penal Code, [Cap 16 R. E. 2022]. They were sentenced to pay fine to the tune of 2,000,000/ each. Dissatisfied by that decision, respondents appealed to

the District court of Tarime at Tarime via criminal Case No. 47 of 2021 which was dismissed. Tirelessly, respondents filed an application No. 8 of 2022 at the same District court of Tarime at Tarime requesting for extension of time to file an appeal out of time.

Application No. 8 was objected by the appellant on the ground that District court of Tarime at Tarime was *functus officio* to entertain that application as Criminal Appeal No. 47 of 2021 was dismissed by the same court. When the court heard the application, it overruled the Objection for denial of extension of time and allow hearing of the appeal on merit.

That finding was not saluted by the appellant who has now lodged the appeal at hand with three grounds intended to challenge the said decision (No. 8 of 2022). The three grounds of appeal advanced by the appellant reads as follows;

- 1. That court erred in law for failure to notice that no application for extension of time is allowed for the case which was dismissed for being time barred.*
- 2. That the court was **functus officio** to entertain Miscellaneous application no. 08 of 2022 as the same was dismissed in Criminal Appeal No. 47 of 2021 dated 11/03/2022 for being time barred.*
- 3. The magistrate misdirected herself for allowing an appeal which is not in records to be heard in merits instead of going on hearing*

Miscellaneous application No. 08 of 2022 after overruled the preliminary objection.

At the hearing of the appeal, the appellant was represented by Mr. Tumaini Kigombe whilst the respondents were represented by Mr. Dominick Jeremiah both learned advocates.

Mr. Kigombe joined the first and second ground and prayed to argue them jointly. It was his submission that this appeal originated from the Criminal Case No. 224 of 2021 from Sirari Primary Court then respondents appealed in Criminal Appeal no. 47 of 2021 which was dismissed under section 3(1) of the Law of limitation Act, Cap 89. Thereafter before the same court and before the same Magistrate respondents file an application No. 8 of 2022 for extension of time so that they can appeal. He informed the court appellant filed the objection which was overruled and the Magistrate ordered the appeal to be determined on merit. He prays this court to read ruling so that can understand what he was insisting.

It was his submission that the position of the law is that when the case is dismissed for it being time bared, it becomes final for that court which dismissed that particular case and extension of time can not be entertained. He said, the only remedy to aggrieved party is to challenge it to higher court by way of appeal. To boost his argument, he refers this

court to the case of **Olam Uganda Ltd (suing through its attorney United Youth Shipping Ltd) vs. Tanzania Harbours Authority**, Civil App. 95/2000 unreported where the Court of Appeal directed that where the case is dismissed that judgement becomes final to that court. He succumbed that in this appeal the District court dismissed Criminal Appeal No. 47 of 2021 and the aggrieved party filed application in the same court which, according to him that was not right as was decided in the case of **East Africa Development Bank vs. Blueline Enterprises Ltd**, Civil Appeal No. 101 of 2009 (unreported) and insisted this court should declares that to be illegal and allow this ground of appeal.

In the 3rd ground it was his submission that the District court erred to allow the hearing of appeal which was not before that Court as depicted at page 6 of the ruling. It was his submission that the Magistrate was supposed to entertain application No. 8 of the 2022 which was properly filed. He said after overruling objection the application for extension of time was to proceed on merit and not an appeal. He prays this court to find his appeal is meritorious and allow it by nullifying proceedings and quash the ruling.

Mr. Jeremiah while contest the appeal submitted for the first and second grounds that the appeal which was dismissed was not heard on merit that's why respondent in this instant appeal applied for the extension of

time so that rights of parties can be determined. It was his submission that this court should need to know whether the dismissal order issued by the Magistrate was proper. He said for the case which was filed out of time the remedy therein is struck out in order to allow party to access the court for other remedies and refer this court to the case of **Mary Agnes Mpelumbe (Administratrix of the estate of the late Simon Mpelumbe) vs. Shekha Nasser Hamad** Civil Appeal No. 136 of 2021 CAT at Dar es salaam that an appeal which is time barred shall be struck out and not dismissed.

The counsel for the respondent further submitted that cases of **Olam Uganda Ltd (suing through its attorney United Youth Shipping Ltd)** (supra) and **East Africa Development Bank vs. Blueline Enterprises Ltd** (supra) as cited by counsel for the appellant are distinguishable to the extent that in those case rights of parties were determined on merit and the application was time barred but in the instant appeal right of parties were not determined.

On the third ground it was his submission that it is true the ruling accepted entertaining an appeal which was not on court record. The counsel was in agreement with the counsel for the appellant that after she overruled the objection, honorable Magistrate ought to entertain the application for extension of time which is not heard till the time they arguing for this

appeal. In alternative, he submitted that parties should be given time so that the matter be determined as applied.

While utilizing his right of rejoinder Mr. Kigombe distinguish the case of **Mary Agnes Mpelumbe (Administratrix of the estate of the late Isaya Simon Mpelumbe vs. Shekha Nasser Hamad** (supra) in account that the cited case dealt with irregularity in appeal which the remedy was struck out but the appeal which was resulted into instant appeal it was dismissed for being time bared and was not based on irregularities. He prayed the proceedings to be nullified and quash the ruling.

Upon submissions by both parties, it is now the duty of this court to determine whether the legal points raised by the appellant's counsel has merit. In this judgement I will discuss and analyse all grounds together as I find them relate each other.

Both counsels were in agreement that there is no appeal in court record which the Magistrate wanted to entertain after she overruled the preliminary objection. This court too find the same because the only appeal in connection with this appeal which I am dealing with is Criminal Appeal No. 47 of 2021 which was dismissed and the counsel for the respondent discussed its legality. In his submission he said, dismissal was

not correct path as the parties were not heard on merit that's why he applied for extension of time. It was his submission that the correct path was for magistrate to struck out and refer this court to the case of **Mary Agnes Mpelumbe (Administratrix of the estate of the late Isaya Simon Mpelumbe vs. Shekha Nasser Hamad** (supra) at page 16. This case discussed in length different scenarios when the matter can be dismissed and when to struck out and provide both positions as is at page 15 when discussed the case of **Hezron Nyachia vs. Tanzania Union of Industrial and Commercial Workers and Another**, Civil appeal No. 79 of 2001 where it was held that;

'In view of that position of the law, it is our conclusion that the learned High Court Judge should have resorted to section 3 (1) of the Act to dismiss the complaint instead of striking it out as she did'.

The above quotation carries the message that the proceedings which is instituted after the prescribed period has to be struck out. The court further in the same case at page 16 provides that;

'That practice has now acquired the force of law and it is the current legal position in the country that an appeal filed in contravention of Rules 90 of the Rules is normally struck out and not dismissed'.

Counsel for the respondent relied on the later quotation. I am of the different position and my position is in agreement with the counsel for the

appellant that circumstances in the quoted case is different from the circumstance in the instant appeal that the discussed appeal in this case at hand was filed out of time and there is no illegality in it and therefore the proper remedy was dismissal as the Magistrate did and as was discussed in **Boniface Inyansi vs. Amani Hussein Rukoba and Another**, Miscellaneous Civil Application No. 55 of 2019 (unreported) where honorable Siyari (now the principal Judge) faced with similar issues had this to say;

*'Taking a leaf from the above authority (Olam Uganda Limited), it is apparent that **since the applicant's appeal was dismissed for being time barred, the remedy cannot be returning to the same court by way of an application for extension of time.** In my considered opinion, the principle set out in the case of Olam Uganda Limited suing through its Attorney United Youth Shipping Limited Vs Tanzania Harbor Authority, **cuts across all the proceedings regardless of the law applicable because when a matter is dismissed for being time barred, such dismissal order becomes final in that court as far as time limitation is concerned**'.*

Once there was dismissal the remedy was appeal to higher courts and not extension of time. From record, the dismissal order was not appealed to any competent court and therefore the order was and still valid and therefore the District court becomes functus officio. The aggrieved party

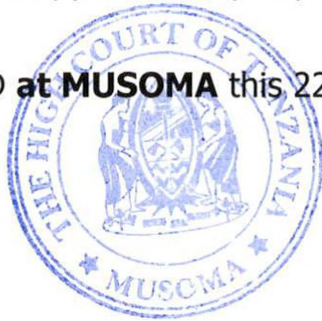
was supposed to challenge it in higher courts instead of applying for the extension of time.

After all that discussion I find the appeal with merit and I therefore allow the appeal and I proceed to nullify proceedings of the district court in Misc. Criminal Application No. 08 of 2022 and I set aside ruling resulted there off.

It is so ordered.

Right of appeal is fully explained.

DATED at **MUSOMA** this 22nd day of March, 2023.




M. L. KOMBA

Judge

Judgment delivered in chamber in the presence of Tumaini Kigombe, the learned Advocate, for the appellant and Mr. Dominic Jeremiah, the Learned Advocate for the respondent who corrected via telephone.


M. L. KOMBA

JUDGE

22 March, 2023