

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**  
**IN THE SUB- REGISTRY OF MWANZA**  
**AT MWANZA**

**PC CIVIL APPEAL NO. 32 OF 2021**

*(Arising from The Ruling of Hon. J.I. Ryoba in the DC Civil Appeal No.02 Of 2021 in the District Court of Nyamagana District at Mwanza Originating from the Decision of Mwanza Urban Primary Court at Nyamagana in Civil Case No. 326 Of 2020)*

**SAMWEL SIMON** ..... **APPELLANT**

**VERSUS**

**CHACHA MASYAGA** ..... **RESPONDENT**

**JUDGMENT**

*11<sup>th</sup> August, 2022 & 26<sup>th</sup> May 2023.*

**ITEMBA, J**

This is the second appeal whereas **Samwel Simon**, the appellant herein, is aggrieved by the decision issued by Nyamagana District Court in DC Civil Appeal No.02 of 2021.

The background leading to this appeal is that; initially, **Chacha Masyaga**, the respondent hereinabove, has sued the appellant in the Urban Primary Court of Mwanza. He was claiming for money amounting to TZS 13,109,700/=.

The respondent told the trial court that he was a tenant at the appellant's premises where he used the place for running a bar. That on 24.5.2020 the appellant went to the premises with a '*panga*' and locked it saying the building is his. That the respondent reported the matter to police and the appellant was charged, convicted and sentenced to a conditional discharge. That, when the bar was locked

by the appellant, the respondent suffered a loss of **TZS 13,109,700** as the employee ran away and some of the properties got lost. At the end, the Primary Court awarded the respondent a total of TZS 9,439,700/= **as.**

The appellant was aggrieved and filed a first appeal before Nyamagana District Court. The said appeal was dismissed following the respondent herein raising a preliminary objection and the same being sustained.

For ease of reference, I will quote the said points of preliminary objection raised: -

- i. The appeal is time barred.*
- ii. That appeal is bad in law for containing annexures contrary to rule 4 of the Civil Procedure (appeals in Proceedings Originating in Primary Court) Rules, 1964.*
- iii. That in absence of proper application before this court prayer (i) cannot be granted.*

In replying to the 1<sup>st</sup> ground of preliminary objection, the District Court held that the appeal was time barred because proceedings shows that the impugned judgment was read on 14.12.2020 and the appeal was lodged on 20<sup>th</sup> of January and not 8<sup>th</sup> of January as claimed by appellant. That, there is also no certificate of authenticity presented to

show that the appellant filed the appeal on 8<sup>th</sup> January, 2021 and that due to network challenges it was admitted on 20/1/2021.

Based on this ground the appeal was dismissed. The appellant was aggrieved and filed the present appeal complied with four grounds of appeal which are:

- 1. That, the Appellate Court erred both in law and in fact hence misdirected itself on the legal requirement on submission.*
- 2. That, the Appellate Court erred in law and in fact hence misconceived (sic) to evaluate the evidence and its finding in the matter.*
- 3. That the Appellate Court erred in law and in fact by not considering evidence and explanation on the date of filling an appeal.*
- 4. That the Appellate Court erred in law and in fact by dismissing the suit which was not determined on its merits.*

At the hearing, the appellant was present. Both parties were represented by learned counsels. Ms. Beatrice Paul for the appellant and Mr. Masoud Mwanaupanga for the respondent.

Arguing in support of the appeal, Ms. Paul informed the court that she will argue the first 3 grounds jointly. She submitted that the District Court magistrate erred by stating that the appellant could not prove that the appeal was filed on time on 8<sup>th</sup> January and not on 20<sup>th</sup> January as argued before the court. She added that, the District Court was

unjustified by stating that the appellant was to file a certificate of authenticity to prove their allegations because under normal circumstances when filing cases online after a case is submitted and payment is done, the next step is to handle the physical copies of the appeal.

That, it is not a practice to support the filing of appeal by certificate of authenticity because these copies of application are already in the court premises and can be traced there.

She complained that while the District Court admitted that the judgment of Primary Court was issued on 14.12.2020 but it failed to agree that the appeal was filed on 8/1/ 2021, the information which was found in the same court records.

The learned counsel submitted that the District Court insisted on the certificate of authenticity, however, based on the raised preliminary objections which were argued by way of written submissions, the appellant could not have brought any evidence. She stated further that the District Court Magistrate referred to **section 18 of Electronic Transaction Act**, which is not at all relevant and does not require the issuance of certificate of authenticity. That, in filing cases online, the governing law is the The Judicature and Application of Laws Act (JALA) Rules 2018 GN 148/2018. She moved the court to the case of

**Mohamed Hashil v NMB** Revision application no. 106/2020 which has cited Rule 21 (1) of the said Rules and stated that the proper date for submission is the one which the applicant has submitted online on the said date, before midnight.

In the last ground, she argued that the court was not justified in dismissing the appeal based on the preliminary objection raised because the appeal was not determined on merit. She referred the court to the case of **Cyprian Mamboleo Hiza v Eva Kioso and others** Civ. Appeal No. 3/2010 where the Court was clear on the difference when the court struck out and or when it dismisses a matter and if the matter is not determined on merit, it should not be dismissed. She argued that, the preliminary objection did not determine the appeal because it was not based on a pure point of law. She stated that the issue of time limitation is not purely based on law as it need to be proved by evidence of the dates of filing. That, they tried to prove the same but the court did not consider the said proof. She also cited the case of **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd** [1969] 1 EA 696 which provides among others that a point of preliminary objection should be on pure points of law.

In reply, Mr. Mwanaupanga started with the last ground. He stated that the District Court was justified in dismissing the appeal because

section **3 (1) of the Law of Limitation Act** directs that when the appeal is out of time it should be dismissed. That, the issue of not hearing on matter of merit is irrelevant when it comes to time limitation because the law is clear and in that, the case of **Cyprian Hiza** is inapplicable.

On the fact that the preliminary objection raised by the respondent required evidence, he referred to the same case of **Mukisa Biscuit** stating that time limitation is a pure point of law although in deciding the same, the court will look on facts and the time which the disputed arose. That, the appellant was supposed to prove if the appeal was filed within time and he did not. That, what he explained was just in the submissions while the law is clear that submission is not evidence. To support that, he cited the case of **Rosemary Chambe v David K Jairo** Civil Ref No. 6/2018 (CAT) Dar es salaam.

The learned counsel for respondent added that the appellant was supposed to apply for extension of time and give their evidence of filing on 8.1.2021 and that it would not have been proper to bring those arguments in the submission. He reiterated his position that the District Court was justified because the appeal was out of time.

In her rejoinder, Ms. Paul stated that, it is true that the one who alleges must prove and that's what the appellant did. Regarding the Law

of limitation Act, she stated that section 3 (1) provides that if the matter is actually out of time it is not to be dismissed.

Upon being probed by the court, both parties agreed that whether the preliminary objections were argued by oral or written submissions they could not have possibly bring the evidence. Considering that situation, under **Order XXXIX rule 27 of the CPC**, the court ordered the appellant to submit the copy of JSDS online print out which shows the appeal was filed on 8<sup>th</sup> January 2021 as claimed. They complied with and the copy shows that the appeal was filed on 11<sup>th</sup> January 2021.

The issue to be determined is whether the appeal is meritorious. As stated above, in responding to the 1<sup>st</sup> ground of preliminary objection the District Court held that the appeal was time barred because proceedings shows that the impugned judgment was read on 7<sup>th</sup> of December 2020 and the appeal was lodged on 20<sup>th</sup> of January and not 8<sup>th</sup> of January because there was neither proof nor certificate of authenticity to show that the appellant filed the appeal on 8<sup>th</sup> January, 2021 but due to network challenges it was admitted on 8/1/2021.

As mentioned above, for clarity of records, this court ordered the appellant to bring the online copy of any showing that on 8/11/2021 they attempted to file their appeal and were unsuccessful due to technical errors. The appellant managed to bring the said copy, a

printout of JSDS e. case registration which reflects that on 11.1.2021 at 11.26.07 hrs an appeal no. 2/2021, the parties being **Samwel Simon v Chacha Masyaga** was filed. It is without doubt that the appellant filed his appeal on 11/1/2021. The next question is when was the judgment issued by the Primary Court. As mentioned earlier, the relevant judgment is dated 7<sup>th</sup> of December 2020 but it was not delivered on that date. I have gone through the Primary Court proceedings and it appears that, at first, the judgement was scheduled for 7<sup>th</sup> December 2020 and then on the 7<sup>th</sup> the case was adjourned with the order for judgment on 14<sup>th</sup> December 2020. Then, there are no proceedings at all featuring 14<sup>th</sup> December. The next proceedings are dated 15<sup>th</sup> December 2020 where the respondent was applying for execution of the judgement. However, the 1<sup>st</sup> appellate court concluded, and I am in agreement that, the judgment was issued on 14<sup>th</sup> December 2020. This date was not disputed by the respondent either. Considering that the time limitation from Primary Court to District Court is 30 days, in terms of section 20 (3) of the Magistrate Court Act and that the Judgement was read on 14<sup>th</sup> December, 2021 and the appeal was filed on 11<sup>th</sup> January, 2021 which is less than 30 days then the appeal was within time. Therefore, the contention that the matter was time barred is, in my considered view, misconceived.

I would like to point out that, in respect of **Mukisa Biscuits** (supra) as it can be seen, the issue of time limitation at this case, was way more than a preliminary objection because it was not based on pure point of law. Obviously, was a need to examine evidence including the records of the date of filing the appeal online. If the District Court has to go through records to be able to make a decision, this will no longer be a preliminary objection worth a name.

I will not go to the 4<sup>th</sup> ground of appeal as the first three grounds determines this appeal.

Consequently, I find merit in the appeal and allow it. Accordingly, I quash the proceedings of the 1<sup>st</sup> Appellate court, and set aside the appellate court decisions. The appellant is to have her costs.

The file should be remitted to District Court so that both parties will proceed with their appeal on merit.

It is so ordered.

DATED **at MWANZA** this **26<sup>th</sup>** day of May, 2023.

  
**L. J. ITEMBA**  
**JUDGE**



