IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB- REGISTRY OF MANYARA

AT BABATI

PC CIVIL APPEAL NO. 2 OF 2022

(Appeal from the decision of the District Court of Hanang' in Civil Application No. 6 of 2022)

GIDAMANDARIRDA GILBA.....APPELLANT

VERSUS

MARY JOSEPH BADUDE.....RESPONDENT

JUDGMENT

Date: 6/3/2023 & 11/5/2023

BARTHY, J.

The above-named appellant filed his petition before Katesh Primary Court (hereinafter referred to as the trial court) for letters of administration of the estate of the late Joseph Badude Diyaydanyi.

It is on record that, before hearing of the matter had commenced before the trial court, the respondent raised an objection against the appointment of the appellant as the administrator of the deceased's estate.

The reason put forward by the respondent being that she was never notified the date of the family meeting in which the appellant was appointed to petition for letters of administration of the deceased's estate.

The trial court determined the objection raised by the respondent and at the end, it ruled in favour of the respondent and ordered another family meeting to be convened to appoint another person for petition of the letters of administration of the deceased's estate.

The appellant aggrieved with the decision of the trial court, he intended to challenge the said decision, but he was unable to do so within time. He therefore lodged Miscellaneous Civil application No. 3 of 2022 at Hanang' district court seeking for an extension of time to appeal against the decision of the trial court.

The application was dismissed for want of prosecution on 16/5/2022. The appellant then lodged Misc. Civil Application No. 6 of 2022 to restore Misc. Civil application No. 3 of 2022.

The respondent contested the application by filing counter affidavit as well as preliminary objection on point of law that the application was

time barred and that it was preferred under the wrong enabling provision of the law.

Upon hearing the parties on the preliminary objections raised, the district court found merit on them and proceeded to dismiss the application. The appellant aggrieved with the decision of the district court; he preferred the present appeal with three grounds as follows;

1. *That the trial court [district court] erred in law for receiving and determining the preliminary objection on point of law while in the eyes of law there was no preliminary objection.*
2. *That the trial court erred both in law and facts for dismissing the application on alleged preliminary objection on point of law which has no merits at all.*
3. *That the trial court erred in law and facts for failure to observing (sic) the law in determining the application before the court.*

The appellant therefore prayed for this appeal be allowed and the decision of the district court be quashed and set aside.

On the hearing date Mr. Tadey Lister learned advocate appeared for the appellant, while the respondent fended for himself. By consent of the parties, the appeal was disposed of by way of written submission.

The appellant duly lodged his submission in chief as schedule, but the respondent did not file her reply submission instead she filed a reply to the grounds of appeal. Therefore, only the appellant's submission will be considered in determination of this appeal.

In determining the merits of this appeal or otherwise, the court having gone through the appellant's submissions in support of the grounds of appeal, I will begin tackling of the grounds of this appeal one after another.

On the first ground, the appellant is faulting the district appellate court for entertaining the preliminary objections raised that was not on the point of law.

Submitting on the first ground of appeal, Mr. Lister on this ground had argued that, the notice on the preliminary objection raised before the district court was not proper and should be struck. He added that, without

the preliminary objections then the remaining application ought to be determined on merit.

With respect to this ground, it is not an established principle that, the preliminary objection needs to be on point of law and not facts that will require proof of further evidence. See the case of **Karata Ernest and Others v. Attorney General**, Civil Revision No. 10 of 2010 (Unreported), Court of Appeal of Tanzania.

The limitation of time and citing wrong provision of law are clearly the points of law. The two will be well elaborated when dealing with the remaining grounds.

The second ground it is centred on whether Misc. Civil Application No. 6 of 2022 was time barred and whether it was preferred under wrong enabling provision of the law.

Mr. Lister, the learned advocate for the appellant faulted the district court for dismissing the application for being time barred. He argued that the proper provision ought to be Item 11 of Part III to the LLA which provides for the period of 45 days.

He added that, the provision of law ought to have moved the court on Misc. Application No. 3 of 2022 had to be Section 20 (4) of the Magistrates' Courts Act [CAP 11 RE 2019] (hereinafter referred to as the MCA), he thus argued that Item 4 of II of the Schedule to LLA was not relevant.

On further submission Mr. Lister contended that, even if the district court were to hold that the time frame was indeed 30 days as provided for under Item 4 part III of the Schedule to the Law of Limitation Act [CAP 89 R.E 2019] (the LLA); still the application was filed within time.

He went on to argue that Misc. Application No. 3 of 2022 was dismissed on 16/5/2022 and the appellant applied for the certified copy of the order on 23/5/2022. In terms of Section 19 (2) of the LLA the period from 16/5/2022 up to 23/5/2022 is 9 days which need to be excluded.

It was his submission that, filing application No. 6 of 2022 on 22/6/2022 was well within time.

On the issue whether the application was preferred under the wrong enabling provision of the law, Mr. Lister was of the view that, Section 95 of the Civil Procedure Code [CAP 33 R.E 2022], (the CPC) was the correct

provision of the law because, there is no provision provided under the MCA, CPC or Civil Procedure (Appeal in Proceedings Originating from Primary Court) Rules G.N. No. 312 of 1964 (hereinafter referred to as the Rules) which provides for the manner of setting aside dismissal order or restoring a dismissed application for want of prosecution originating from primary court.

He pointed out further that, on Order IX Rule 35 and 6 of the CPC it provides for consequences of non-appearance of parties on a day fixed for hearing. He went on arguing that, Misc. Civil Application No. 3 of 2022 was dismissed on a date fixed for mention as there was no hearing date that was ever fixed before.

He added that, Rule 17 (2) of the Rules provides for the procedure of restoration of an appeal which was dismissed for non-appearance of parties. However, the said provision does not cover for matters of applications. That marked the appellant's submission.

In determining the issues framed above, I will begin my deliberation in determining as to whether or not Misc. Application No. 6 of 2022 was preferred under the wrong provision of the law.

It is not in dispute that the said application was preferred under Section 95 of the CPC. The district court sustained the objection raised on the ground that, the application was preferred under wrong provision of the law and ruled that the proper provision of the law should have been Rule 17 of the Rules.

Rightly as submitted by Mr. Lister that, Rule 17 of the Rules is applicable to appeals originating from primary court and not from applications. There is also no specific provision of the law to move the court to restore the application that was dismissed for want of prosecution from the primary court

On the other hand, the CPC is not applicable on matters originating from the primary court. This position has been so determined by court in a number of cases including the case of **Julius Madaraka Mashauri v. Musa Mashauri Makaranga**, Civil Appeal No. 27 of 2021, High Court of Musoma (unreported) my brother Judge held that, the CPC has no provision catering for matters originating from primary court as per Sections 2 and 3 of the same Act when defining the term 'court' it does not include the primary court.

Therefore, it is equally not proper for the application to be preferred under Section 95 of CPC as so rightly determined by the district court. However, Rule 17 of the Rules provides for a room to restore an appeal dismissed for want of prosecution, I am of the settled view that the provision can be safely extended to cover applications.

Turning to the issue of time limitation, it is not in dispute that Misc. Application No. 6 of 2022 was filed on 22/6/2022 aiming to restore Misc. Application No. 3 of 2022 which was dismissed on 16/5/2022. Therefore, the later was filed after 37 days since the order to dismiss it was made. On the issue of time limit, the district court had this to say;

> *The issue is whether the application is time barred or not and whether it supposed to be filed within 30 days or 45 days. In fact the law is clear (law of Limitation Act) that application for setting aside dismissal order must be filed within 30 days from the date such application was dismissed and not otherwise.*

It is unfortunate that the learned district court magistrate never mentioned the specific provision on application to set aside dismissal order to be made within 30 days, as he referred to LLA in general.

It is on record that in disposing of the preliminary objection before the district court, parties had different opinion on what is the time limit for filing an application for restoration of an application dismissed.

Even before this court Mr. Lister had maintained his argument that, the time frame provided by law is 45 days. He added that, even if the law provides for 30 days, still the application would have been within time. Since there was an exemption of 9 days, when the applicant was waiting to be supplied with the record from the district court.

I have gone through the order dismissing Misc. Application No. 3 of 2022 and it states clearly that the said application was dismissed for want of prosecution and not for non-appearance as claimed by Mr. Lister. The law governing applications for setting aside dismissal orders is the LLA [Cap 89 R.E 2019] and in particular Part III, Item 4 of the Schedule to the said law which provides that;

For an order under the Civil Procedure Code or the Magistrates Courts Act, to set aside a dismissal of a suit- 30 day.

The record reveal that Misc. Civil Application No. 3 of 2022 was dismissed on 16/5/2022, the appellant therefore requested for the copy on 23/5/2022 and he was supplied with the same on 25/5/2022. Mr. Lister insisted the court ought to deduct 9 days when the appellant was waiting for the copy and claimed the later application was filed within time on 22/6/2022.

It is now the settled law that the exclusion of time will be automatic only when there is the proof on record of the dates of the critical events for the reckoning of the prescribed limitation period, as decided in the case of **Alex Senkoro & 3 others v. Eliambuka Lyimo (as the administrator of the estate of Fredrick Lyimo deceased),** Civil Appeal No. 17 of 2017 Court of Appeal of Tanzania (unreported).

Going through the records of the trial court, there is nowhere the appellant had stated or attached any record requesting the copy of the order of the district court for Application No. 6 of 2022 to allow the

exclusion of the said time. As it was the duty of the applicant to move court properly. However, the record show that the record was ready for collection on 23/5/2022, on the day it was requested.

Without the exclusion of delayed days, the applicant ought to have filed his application on or before 15/6/2022. Since the said application was filed on 22/6/2022 it was therefore out time.

Having considered that Misc. Civil Application No. 6 of 2022 was brought under wrong provision of the law but it was also filed out of time, I am therefore of a firm mind that, the district court was right in its findings. However, the proper recourse was to dismiss the application under section 3(2)(c) of the LLA. With the nature of this matter and the parties being related, each party to bear its own costs.

It is so ordered.

Dated at **Babati** on 11th day of May, 2022.

G. N. BARTHY,

JUDGE

Delivered in the presence of the appellant in person, Mr. Phillemon Maige the counsel for the appellant and the respondent in person.