

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MANYARA

AT BABATI

MISC. CIVIL APPLICATION NO. 7 OF 2023

(Arising from the decision of Hanang' District Court in Bill of Cost No. 3 of 2023
which originated from Civil Appeal No. 9 of 2021)

MWAJUMA ABDALA.....APPLICANT

VERSUS

KATARINA PORINI.....RESPONDENT

RULING

23/5/2023 & 28/7/2023

BARTHY, J.

The above-named applicant aggrieved with the decision of Hanang' District Court (the district court) in Bill of Costs No. 3 of 2023, intended to challenge the same but unable to do so timely, she preferred the present application under Section 14 (1) of the Law of Limitation Act, [CAP 89 R.E 2019], (hereinafter referred as the Act), seeking for the following reliefs namely;

- 1. That, the honourbale court be pleased to extend time to file an appeal out of time.*
- 2. Costs be borne by the respondent.*

3. Any other reliefs this honorable court mad deem fit and just to grant.

This application is supported by an affidavit affirmed by the applicant herself. On the other hand, the respondent lodged a counter affidavit to contest the application.

At the hearing of the application, the parties appeared in person without any legal representation. By the consent of the parties the court ordered the application be disposed of by way of written submissions.

However, I must point out that the applicant being a lay person, she did not file her submission in support of the instant application, rather she filed a submission in support of appeal against the decision of the district court.

Thus, there was no proper submission filed in support of the application before this court. Since it is now the settled law that failure to file written submission according to the order of the court, it is as good as the having failed to appear and prosecute or defend the case.

This has been re-stated in a number of times by this court, as decided in the case of **Abisai Damson Kidumba v. Anna N. Chamungu and 3 Others**, Miscellaneous Land Application No. 43 of

2020 District Registry of Mbeya at Mbeya (unreported).

The remedy was for this court to dismiss the application. Nevertheless, with the nature of this matter, I wish to address the propriety of this application basing on information contained on the affidavit and counter affidavit respectively.

The applicant on her affidavit in support of the application she deposed that she was the respondent in Civil Appeal No. 3 of 2022 which was decided in favour of the respondent herein.

The applicant aggrieved with the said decision she lodged an appeal before High Court at Arusha through online admission system and duly paid her filing fees on 5/1/2023.

After a few days the applicant was called by the court clerk and she was informed that the appeal should have been lodged before the district court which should have forwarded the record to the High Court.

She further deposed that, the applicant complied with the instructions given by the clerk of the High Court and proceeded to take her appeal in order to lodge the same before the district court. However, the court refused to process her appeal without any reason and it

proceeded with execution its decree.

She further deposed that, her failure to lodge her appeal within time was not intentionally, but she was refused by the court clerk to process her appeal.

On the other hand, the respondent on her counter affidavit, she essentially disputed the applicant's claim. Although she admitted that there was an appeal lodged by the applicant.

Having gone through the parties' arguments, I have carefully gone through the record of the courts below. I think, to appreciate the matter a brief background is necessary.

The applicant herein was arraigned before Endasak Primary Court (the trial court) for two counts. The first count being the allegations of malicious damage to property in which it was claimed that, on 15/11/2020 at Lambo village within Hanang' District the applicant damaged 8 banana trees the property of the respondent herein.

It was stated that the said banana trees were damaged with applicant grazing cattle on the respondent's farm.

On the second count the applicant was charged with the offence of

threatening to kill the respondent. After a full trial the applicant was convicted and sentenced to pay fine at the tune of Tsh. 70,000/= or two months imprisonment on default for the first count and on the second count she was sentenced to pay fine at the tune of Tsh. 100,000/= or three months imprisonment in default.

The record is silent as to whether the applicant challenged the conviction and sentence meted against her.

The respondent herein then lodged a civil suit before the district court claiming for compensation for the crops damaged by the applicant. Upon hearing the parties, the district court awarded the respondent herein Tsh. 80,000/= as compensation for the damaged crops.

The applicant herein aggrieved with the decision of the trial court, lodged Civil Appeal No. 9 of 2021 to the district court, but it was dismissed with costs on 28/9/2021.

The respondent herein then lodged a Bill of costs No. 3 of 2021 arising from Civil Appeal No. 9 of 2021. In total the applicant was claiming a sum of Tsh. 635,000/= being incidental costs incurred in prosecuting Civil Appeal No. 9 of 2021. Upon hearing the bill of costs, the taxing master awarded the respondent a sum of Tsh. 380,000/=.

Hence, the applicant intends to challenge the decision in the Bill of Costs No. 3 of 2021, but being out of time she has made this application for extension of time.

Upon going through the instant application there are two important legal issues pertaining this matter. First question which this court poses is; what is the remedy available to a party aggrieved in a bill of cost matter?

The right to pursue reference is provided under Rule 7(1) of The Advocates Remuneration Order, GN. No. 263 of 2015 (hereinafter referred to as the Order). Wherefore, under Rule 7(2) of the Order requires an aggrieved party to lodge reference to this court within 21 days.

Equally important is that, where a party fails to lodge Reference within time, he/she may apply for extension of time in terms of Rule 8(1) of the Order and the High Court may grant an extension of time upon good cause shown.

It follows that, in the instant application, the applicant is seeking for an extension of time to file an appeal against the decision of the district court on Bill of Costs matter. Without going to the merits of the application itself, appeal is not an appropriate remedy. Thus, the applicant pursued

wrong application for her recourse.

The second important issue is that, the applicant preferred this application under Section 14(1) of the Act instead of Rule 8(1) of the Order. It is therefore clear that, the applicant has preferred her application for extension of time under wrong enabling provision of the law.

It is settled law that an application preferred under the wrong enabling provision of the law should be rendered incompetent.

This position was fortified by the decision of this court in the case of **Valerian Moses Bandungi v. Gozbert Cleophae & another**, Misc. Land Application No. 89 Of 2021 (Unreported) this court making reference to the case of **Hussein Mgonja v The Trustees of the Tanzania Episcopal Conference**, Civil Revision No. 02 of 2002, when the Court of Appeal struck out an application for being incompetence had this to say;

"If a party cites the wrong provision of the law, the matter becomes incompetent as the court will not have been properly moved".

Taking into account the two anomalies pointed out above, I am of the settled mind that the application is not properly before the court. The only remedy is to strike out the instant application. In the circumstance I

will not make an order as to costs.

It is so ordered.

Dated at Babati this 28th July 2023.



G. N. BARTHY,

JUDGE