

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR-ES-SALAAM DISTRICT REGISTRY)

AT DAR-ES-SALAAM

CIVIL APPEAL NO. 100 OF 2022

TEMEKE MUNICIPAL COUNCIL APPELLANT

VERSUS

GLOBAL OIL LIMITED 1st RESPONDENT

UNIFREIGHT TANZANIA LTD 2nd RESPONDENT

(Appeal from the Judgment and Decree of the District Court of Temeke at Temeke)

(Karimu Twahir Mushi, SRM)

Dated 14th day of December 2021

In

(Civil Case No. 4 of 2020)

RULING

Date 01 & 27/03/2023

NKWABI, J.:

The appellant was aggrieved with the decision of the trial court and preferred this appeal to this Court seeking the appeal be allowed, the judgment of the trial court be quashed and set aside. It was also sought that the respondents be ordered to pay T.shs 191,008,871/= as the amount which was supposed to be paid to the appellant as a city service levy and business license required by law, costs of the appeal and any other relief(s) deemed just and fit to grant. The appellant had her case dismissed for want of merit.

The respondents quickly raised a preliminary objection on points of law as follows:

1. That the appeal is hopelessly time barred since the judgment and decree subject of this appeal were delivered by the trial magistrate K. T. Mushi on 14th December, 2021 and signed by the same trial magistrate on 17th January, 2022 and hence ready for collection by 17th January, 2022.
2. That the trial magistrate having signed the judgment and decree in civil case No. 4 of 2020, the successor magistrate had no jurisdiction to sign another judgment and another decree (on the same case) which was attached with the memorandum of appeal.

Based on the above points of preliminary objection, the respondents are praying this Court to dismiss with costs the appeal for being time barred.

The counsel for the respondents prayed, and I granted, that the preliminary objection be argued by way of written submissions. Mr. R. Bernad Shirima, learned counsel for the respondents argued the preliminary objection for the respondents. The reply submission on the preliminary objection was prepared by Ms. Elizabeth Nyamko, learned State Attorney for the appellant.

In his submissions, in support of the preliminary objection on the point that the appeal is time barred, Mr. Shirima argued that the appeal was filed in this Court on 28th day of July 2022 while the trial court's judgment was delivered on 14th December, 2021 and signed on 17th day of January 2022. More than six months (180 days) 90 days had elapsed by 16 April, 2022. It had exceeded more than 100 days without extension of time to file appeal out of time. Hence the appeal is incompetent. It was added that even section 19(2) of the Law of Limitation Act Cap. 89 R.E. 2019 cannot help the appellant because the copies necessary for filing appeal were ready for collection on 17th January, 2022.

As to the remedy of proceedings filed out of time, Mr. Shirima proposed that the appeal ought to be dismissed in terms of section 3(1) of the Law of Limitation Act. He cited **Mayira B. Mayira v. Kapunga Rice Project & 4 Others**, Civil Appeal No. 359 of 2019 CAT (unreported). In this case however, the Court stated:

"In the premises, we are of firm view that the appeal before us is incompetent for being time barred. In the end, the first preliminary point of objection is sustained. Consequently,

we strike out the appeal with costs for being time barred."

Ms. Nyamko, learned State Attorney, in reply submission, conceded that the appeal was filed on 2nd September, 2022 while the Court record bears that the appeal was filed in Court on 28th July 2022 but yet insisted it was not time barred. She explained that after the judgment was pronounced on 14th December, 2021 and attributed the delay to making follow-ups at the registry and wrote letters on 22nd December, 2021 and 13th January 2022 with no avail and yet was not ready. That Hon. Mushi vacated office before signing the judgment and Hon. Mbadjo signed as successor magistrate. The same were supplied to the appellant on 1st July, 2022. She said, the 90 days should count from the date the copies of judgment and decree were supplied, thus filing this appeal on 2nd September, 2022 was within time. She cited **Valerie Mcgivern v. Salim Farkru Balal**, Civil Appeal No. 386 of 2019, CAT (unreported) where it was stated that:

"We find no reason to doubt the fact that the appellant obtained the documents to support his appeal on the 19/07/2011 in the absence of any evidence on record to controvert this fact, it will be venturing on speculations to

rely on assumption that because the judgment was certified on 24/05/2011, then failure of the appellant to obtain requisite documents on that date or sooner than when she obtained them is evidence of negligence especially where there is no evidence that there were efforts from registry to inform the appellant on the availability of the certified judgment ...”

She urged this Court to find the preliminary objection to have no legal value.

In rejoinder, the counsel for the respondents contended that the submission that the registry officer told her that the judgment was not yet prepared by trial magistrate until was transferred and statements that resident magistrate in-charge A. H. Mbadjo communicated with the trial magistrate who responded that the judgment was prepared by him but vacated office before signing it are statements from the bar since are neither supported with affidavits of the said registry officer nor affidavit of the said resident magistrate in-charge. It was added that failure by the appellant to make follow up and obtain judgment on time on their side they see it as gross negligence on their party. He faulted the attachment of the dispatch book to the submission as improper to attach them in submissions.

It was also pointed out that the case of **Valerie** (supra) is distinguishable because there was no evidence to controvert while in this case there is evidence to contradict in that the documents were signed by the trial magistrate on 17th January, 2022.

I have considered the circumstances of this appeal. I am of the view that since in this appeal there is a judgment signed by A. Mbadjo, as successor Magistrate on the very date the judgment was delivered as per the petition of appeal, and Mbadjo added that the judgment was issued on 28th June 2022 and another signed by K. T. Mushi, on 17th day of January 2022 as per the reply to the petition of appeal which is signed on each page of the judgment leaves a lot to be desired which require evidence to know what truly transpired. There is a need of affidavits of the learned resident magistrate in-charge and of the registry officer, leave alone the affidavit of the officer of the appellant and any other relevant affidavit in the circumstances. For that position of the law, I exemplify **Jacqueline Ntuyabaliwe Mengi & 2 Others v. Abdiel Reginald Mengi & 5 Others**, Civil Application No. 332/01 of 2021, (unreported) where the Court stated:

"We note that paragraphs 8 and 14 of the 1st applicant's affidavit and paragraph 10 and 11 of Kahendaguza's affidavit contain hearsay not supported by evidence. For instance, in paragraphs 14 and 11 of the respective deponents affidavits they have averred an information obtained from the DR Fovo regarding how best they could deal with the so-called defective decree while the said DR has not sworn any affidavit to that effect." [Emphasis mine].

Thus, in my view, it is here that there is a need for explanation for each day of the delay through an application for extension of time within which to file an appeal out of time where every party will bring evidence and maybe clear the doubt. Explanation in submission is insufficient as per **Republic v. Donatus Dominic @ Ishengoma & 6 Others**, Criminal Appeal no. 262 of 2018, CAT, (unreported) quoted with approval the case of **Transafrica Assurance Co. Ltd v. Cimbria (EA) Ltd** [2002] 2 EA where it was stated:

"As is well known a statement of fact by counsel from the bar is not evidence and therefore, court cannot act on."

An attempt to bring the communication by way of letters and dispatch copy by attaching them to the submissions is unacceptable just as the counsel for

the respondent stated. The allegations raised by both parties cannot be lightly dealt with by attaching correspondences in the appeal, rather that ought to be in an affidavit in a proper application for extension of time. For that regard and for all fairness there is a need of evidence which cannot be obtained in an appeal rather an application for extension of time, in which case if it is established that there was delay in supplying copy of judgment and decree which is not to blame on the part of the appellant, then extension of time may be granted on the reason of technical delay as per **Napaya Kilevori v Ngida Loisule**, Misc. Civil Application No. 81 of 2019 the decision of the High Court.

Yet I think that it is worth to note here that the original record had not yet been brought from the trial court when I am determining the case on a preliminary objection as I found that there was no need of insisting the original record be brought. That said, however, as this civil appeal was filed out of time, I strike it out under the authority of **Mayira** (supra). Costs to follow the event.

It is so ordered.

DATED at **DAR-ES-SALAAM** this 27th day of March 2023



A handwritten signature in blue ink, appearing to read "J. F. Nkwabi".

J. F. NKWABI

JUDGE