

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR-ES-SALAAM DISTRICT REGISTRY)

AT DAR-ES-SALAAM

MISCELLANEOUS CIVIL APPLICATION NO. 406 OF 2022

PATROKIL PETER KANJE APPLICANT

VERSUS

LIDIA WILSON KIVUYO RESPONDENT

(C/F from Civil Appeal No. 292 of 2020 of the High Court originating from Matrimonial
cause No. 22 of 2019 at the District Court of Kinondoni)

RULING

Date: 25/04 & 16/06/2023

NKWABI, J.:

Under the provisions of section 5(1) (c) and section 5(2) (c) of the Appellate Jurisdiction Act, Cap. 141 as amended, and Rule 45(a) of the Tanzania Court of Appeal Rules, as amended the applicant is before this Court, asking to be availed with the following orders as follows:

1. Certificate on point of law to the applicant to appeal to the Court of Appeal of Tanzania against the decision of the High Court of Tanzania (Dar-es-Salaam registry) dated 17th day of May 2022 in Matrimonial Appeal No. 292 of 2020.
2. Certificate on point of law to the effect that a point of law involved in the intended appeal.
3. Costs of this application be in the cause; and
4. Incidental orders as may be necessary be made.

On 14th March 2023, the counsel for the respondent stated that the application is time barred. I directed the preliminary objection be argued by way of written submissions. Mr. John J. Lingopola, learned counsel drew and filed the written submission in chief and the rejoinder submission for the respondent. Ms. Regina Herman, also learned counsel, drew and filed the reply submission.

It was Mr. Lingopola's contention that leave to appeal to the Court of Appeal could be sought informally or by chamber summons according to the practice of the High Court within 30 days under Rule 45(a) of the Court of Appeal Rules, 2019. This application was filed on 19 September 2022 while the decision was delivered on 17th May 2022 thus after 145 days from the date of judgment. Time to file the application for leave had lapsed since 16th June 2022. Else, he ought to have sought extension of time. It was also asserted that there is no legal requirement to attach a copy of the judgment and decree or ruling and drawn order in order to seek for leave to appeal to the Court of Appeal. Among other cases he cited **Executive Secretary Wakful and Trust Commission v. Saied Salimini Amber** [2001] TLR 160 CAT where it was stated that:

"As there is no provision under Rule 45(a) for the exclusion of the time taken in obtaining the copy of the ruling and order we think that the learned judge erred in entertaining an incompetent application on account of it being time barred. There be no legal requirement for attachment of copy of ruling and order to the application there was no reason whatsoever for the learned Judge to hold that the application needed to be seized with the copy of the ruling and order."

The counsel for the respondent prayed for the dismissal with costs of the application for leave insisting that limitation has to be observed so that litigation should come to an end. He exemplified the case of **Night Support (T) Ltd v. Benedict Komba**, Civil Revision No. 254 of 2008 CAT (unreported) but did not provide a copy, where it was stated that:

"That limitation is material point in the speedy administration of justice. Limitation is there to ensure that a party does not come to court as when he chooses."

In reply submission, the counsel for the applicant argued that the application for leave to appeal to the Court of Appeal is not time barred because it is

trite law that leave to appeal to the Court of Appeal must be accompanied by the copies of judgment and order which is desired to be appealed against. That is under Rule 49 (3) of the Court of Appeal Rules. Despite follow-up, it was until 22nd August 2022 when the copies were ready and the application filed on 19th September, 2022.

It was added that section 19(2) of the Law of Limitation Act Cap. 89 R.E. 2019 excludes in computing time within which one can file an application for leave to appeal to the Court of Appeal, spent in obtaining a copy of the judgement. The counsel for the applicant backed her view with the case of **Alex Senkonko & 3 Others v. Eliambuya Lyimo**, Civil Appeal No. 16 of 2017 CAT (unreported) without providing a copy and **Benedicta Vicent v. Kambi ya Simba Village Council**, Misc. Land Application No. 153 of 12016 HC (unreported) without also supplying a copy where it was stated that:

"It is mandatory to attach the copies of the order/decreed intended to be appealed against. So, the submission that attaching the document was not necessary is misconceived and does not hold water. That means one cannot file application for leave without having those documents."

The counsel for the applicant was also minded to cite **Mohamed Salimini v. Jumanne Omary Mapesa**, Civil Appeal No. 345 of 2019, CAT (unreported) which in his view the Court of Appeal held that time within which the judgment and decree have not been issued should be excluded when computing time to appeal.

Ms. Herman pointed out that the case of **Executive Secretary Warkful** (supra) cited by the counsel for the respondent was decided prior to the amendment of the rule, so it is dead law. She thus prayed the preliminary objection be overruled with costs.

In rejoinder submission, the counsel for the respondent prayed that the submission in reply be disregarded as it was filed outside the schedule issued by the Court. He cited **Simbo Eben mbasha v. Joseph Martine Mrema**, Misc. Land Case Application No. 45 of 2018, HC (unreported) which quoted **NIC (T) Ltd & Another v. Shengena Ltd**, Civil Application No. 20 of 2007 CAT Dar-es-Salaam where it was ruled that:

"The applicant did not file submission on due time as ordered, naturally, the court could not be made impotent by a party's inaction. It had to act ... it is trite law that failure

to file submission(s) on due date ordered is tantamount to failure to prosecute one's case."

He insisted that there is no legal requirement to attach copies of judgment and decree in an application for leave to appeal. He argued that rule 49 of the Court of Appeal Rules is applicable to an application for leave in the Court of Appeal in a second bite and not in the High Court.

It was the opinion of Mr. Lingopola that section 19(2) of the Law of Limitation Act does not remove the duty of the aggrieved party wishing to appeal to the Court of Appeal to appeal within the prescribed time. He fortified his view with the case of **Mohamed Salimini v. Jumanne Omary Mapesa**, Civil Appeal No. 345 of 2019 CAT (unreported) where it was underscored that:

"Suffice to state, having in mind the duty to ensure there is a decree and judgment attached to the record of appeal as stated in section 19(2) of the LLA falls on the appellant, there is also a duty to apply for a decree within the time prescribed for appeal. In the present case, after the trial court decree was struck out by the Court, the duty to procure a correct and proper decree was upon the appellant, and this duty was expected to be exercised within

reasonable time while mindful of the time prescribed for lodging and appeal before the High Court ... is ninety (90) days.

Section 19(2) of the Law of Limitation Act, Cap. 89 R.E. 2019 does not remove the duty of the aggrieved party wishing to appeal within 90 days as specified under paragraph 1 part 11 of the schedule to the Law of Limitation Act ... under the circumstances, section 19(2) of the Law of Limitation Act would not any way have protected the applicant to the appeal.

... the 90 days prescribed by the law were still undisturbed when in pursuance of a proper decree, as alluded to earlier in this judgment, the duty to seek for a decree on time was on the appellant who was to benefit from this, and this duty was not absolved by reason that the decree which he was provided with was later found to be defective."

It is stressed, for the respondent, that the preliminary objection be sustained and the application for leave should be struck out with costs.

I have considered the vying arguments from both counsel, I am of the view that the applicant concedes that the application was filed outside the prescribed time but justifies that because of the delay of being supplied with the copy of the judgment and decree. I am of the view that the justification cannot be considered in this application because there are no materials on the record to indicate that the applicant was not to blame. There should also be evidence by affidavit. For instance, the claim that the applicant was making follow-up to get the necessary documents cannot be entertained by this Court because it is not evidence but it is a statement from the bar. That can only be done in an application for extension of time where the respondent too may be heard.

Much as I am aware that this application is not an application for leave to appeal to the Court of Appeal as the counsel of both parties have been referring to, it is an application for certificate on point of law. In the circumstances, it is elementary law that an application for certificate on point of law has to be filed within sixty (60) days from the date of delivery of the judgment. See for instance **Isaka Magalata v. Charles Lukago Masaba**, Misc. Civil Application no. 14 of 2022, HC (unreported) at Mwanza, where Kahyoza, J. had these to say:

"In the present case, since no time is prescribed for filing an application for a certificate that there exists a point of law, such an application ought to be filed within sixty days from the date of the decision."

Now the applicant's counsel concedes that the application was filed after 145 days from the date of the judgment of this Court. The counsel for the applicant justifies such delay under section 19(2) of the Law of the Limitation Act. I accept the view of the counsel for the respondent that that section does not assist the applicant, I having being guided by **Mohamed Salimini** (supra) though it was in different circumstances but the principle applies in the circumstances of this application.

All the above said and done, the preliminary objection is sustained. The application is, thus, struck out with costs because it is incompetent before this Court for being time barred.

It is so ordered.

DATED at **DAR-ES-SALAAM** this 16th day of June, 2023.




J. F. NKWABI

JUDGE