

IN THE HIGH COURT OF TANZANIA

MUSOMA SUB-REGISTRY

AT MUSOMA

CRIMINAL APPEAL

REFERENCE NO. 20231120000037556

(Arising from the Decision of the District Court of Tarime at Tarime in Criminal Appeal No. 47 of 2021)

SIMON JOHN PETRO 1ST APPELLANT

MERRY CHACHA FARES 2ND APPELLANT

VERSUS

SIMON WEREMA..... RESPONDENT

JUDGMENT

20th & 24th May, 2024

M. L. KOMBA, J.

I am invited to decide whether it was correct for the 1st appellate court to dismiss the matter which was wrongly filed and not heard on merit. above named appellants were aggrieved by the decision of the Tarime District Court (the 1st appellate court) in Criminal Appeal No. 47 of 2021 where it dismissed the appeal. From record, the first appeal was alleged to be filed out of time and the Preliminary Objection raised by respondent was upheld. Magistrate was satisfied and find out court lacks jurisdiction and dismissed the matter. Dissatisfied, appellants filed this appeal with two grounds which read;

- 1. That the Hon Trial (sic) Magistrate erred in law and in fact having dismissed an appeal while it was improper before the appellate court.*
- 2. That the Hon Trial (sic) Magistrate grossly erred both in law and fact by dismissing an appeal which was not heard on merit.*

When the appeal was due for hearing, appellants hired Mr. Dominic Jeremia Chacha while respondent was represented by Ms. Lilian Makene both being advocates.

It was Mr. Dominic who shield his appeal by joining the two grounds that the 1st appellate Magistrate did not hear the appeal on merit but it was dismissed instead of struck out as he submitted that these terms has two different meaning, dismissal is when the matter was heard in merit while struck out is happen when the matter is not heard and referred me to **Cyprian Mamboleo Hizza vs Eva Kioso & Another (Civil Application 3 of 2010) [2011] TZCA 40 (28 March 2011).**

Elaborating further, the counsel submitted that the matter which was at the first appellate court was improper and incompetent as it was not heard on merit and the remedy was supposed to be struck out. He cited **Yahya Khamis vs Hamida Haji Idd & Others (Civil Appeal 225 of 2018) [2019] TZCA 116 (16 May 2019)** and **Mary Agnes**

Mpelumbe vs Shekha Nasser Hamad (Civil Appeal No. 136 of 2021) [2021] TZCA 667 (5 November 2021) where the Court discussed whether it was proper for the court to dismiss the appeal which was incompetent and it was decided that for incompetent appeal the remedy is struck out. He said so far as the appeal was filed out of time means it was not properly before the court. Doing otherwise is to infringe appellants their constitutional right as provided under Article 13 of Constitution of United Republic of Tanzania.

He finalized by promising that no party will be prejudiced if this court will allow the appeal and gave chance to parties for them to be heard on merit. He prayed this court to allow the appeal, quash the ruling of the 1st appellate court and order case filed be remitted to 1st appellate court to proceed with determination of appeal on merit.

Contesting the appeal Ms. Lilian had a brief submission that the appeal was filed out of time and the remedy for matter filed out of time is dismissal as provided under section 3 (1) of the Law of Limitation Act, Cap 89. She urges this court to note that, the counsel for appellant did not dispute that the appeal was filed out of time and therefore it was her submission that the 1st appellate court did not error when dismissed it. She further submitted that when there is a matter of law and facts,

the matter of law has to be dealt first that's why the issue of law was determined first, it was the law of limitation Act. To boost her submission, she cited **Intafere East Africa AS vs Band International** (1999) EALR 422.

Ms. Lilian distinguished the case of **Yahya Khamis vs Hamida Haji Idd** (supra) to be irrelevant to the matter at hand as what was dismissed was application when the chairman found two wills of the deceased and decided to dismiss. While in **Mary Agnes Mpelumbe vs Shekha Nasser Hamad** (supra) she said that case is about rule 90 of the Court of Appeal Rules and they are only applicable to Court of Appeal and therefore it is distinguishable. About Article 13 of the Constitution, she agreed with the submission by Mr. Dominic on the provision of rights, however, she said the article should not be abused. She prayed the appeal to be dismissed with costs.

In rejoinder Mr. Dominic insisted that the only remedy for the 1st appellate court was to strike out in order to allow parties to look for proper remedies. He further submitted that respondents did not deny the facts that appeal was not heard on merit.

My duty is to determine if the appeal has merit. As submitted by Mr. Dominic there is different between dismiss and strike out and I subscribe

to the definition or rather differentiation made in **Cyprian Mamboleo Hizza vs Eva Kioso & Another** (supra). The appeal originated from the trial court where there was Preliminary Objection (PO) raised on point of law. As rightly submitted by Ms. Lilian, the PO was on point of law that the appeal was filed out of described time. It is trite that when there is PO it has to be determined first. See **Khaji Abubakar Athumani vs Daud Lyakugile Ta D.C Aluminium & Another (Civil Appeal No. 86 of 2018) [2021] TZCA 32 (24 February 2021)**.

In the case at hand, the Point of law was upheld that the matter was filed out of time. At this juncture, I cannot say that parties were not heard, the matter was heard and the ruling was delivered. The fact that parties were not heard on merit can be argued basing on the case of **Khaji Abubakar Athumani vs Daudi Lyakugile Ta D.C Aluminium & Another** (supra) that PO was to be entertained first and when the PO in the case at hand was dealt with, it was decided in line with section 3(1) of Cap 89. That legislation provides for the remedy on the matter of the nature of appeal complained by Mr. Dominic that any proceeding which is instituted after the period of limitation prescribed by law shall be dismissed. While I subscribe to the findings and position in **Yahya Khamis vs Hamida Haji Idd** (supra) and **Mary Agnes Mpelumbe**

vs Shekha Nasser Hamad (supra) as cited by Mr. Dominic, I maintain that the facts and scenario is different as in here, the provision of law is clear that a suit which is filed out of time the remedy is dismissal. Articles of Constitutions has to be read in line with other laws.

I don't find the reason to fault the 1st appellate court as the decision was rightly as provided under the law. In the foregoing, I find the appeal is devoid of merit and I hereby dismiss.

DATED in **MUSOMA** this 24 Day of May, 2024.



NK
M. L. KOMBA
Judge

Judgement delivered in chamber while Mr. Dominic advocate for the appellant and Ms. Lilian Advocate for the respondent was connected via teleconference.

NK
M. L. KOMBA
Judge
24 May 2024