

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(TEMEKE HIGH COURT SUB-REGISTRY)**

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

CIVIL APPEAL NO. 3568 OF 2024

*(Originating from the judgment and decree of the District Court of
Ilala at Kinyerezi in Matrimonial Cause No.22/2022)*

ASHURA HUSSEIN KAPELA.....APPLICANT

VERSUS

MOHAMED AHMEID SOLI.....RESPONDENT

RULING

19/04/2024 & 15/05/2024

SARWATT, J.;

This is a ruling as regards to preliminary objections on a point of law filed by the respondent herein. The notice, as filed on 15th April 2024, states that;

1. This present appeal is hopelessly time-barred.

2. The appellant has no locus stand/ cause of action to sue the respondent under his personal capacity.

3. The present appeal contains procedural irregularities.

Before the hearing commenced, the respondent counsel prayed to abandon point no 3 of the preliminary objection and remained with the first and second points of objection. During the hearing, the appellant was represented by Adinan Abdallah Chitale, learned counsel, while Tully Kaundime, learned counsel, represented the respondent. The preliminary objections were argued orally.

On the first point of objection, the respondent counsel argued that the present appeal arises from the decision of the District Court in probate case no 10/2023, which was decided on 7th November 2023. From the date of that decision, there was no any case involved the parties until they were summoned to appear before this Court on 12th March 2023. According to the counsel, the records reveal that the appellant filed the present case on 23rd February 2024.

The counsel further stated that the law under section 25(1) b of the Magistrates Courts Act gives a period of 30 days to file an appeal for the

decision which originates from the Primary Court. According to the counsel, sections 3 and 56 of the Law of Limitation Act provide that all cases filed after the limitation period have to be dismissed. To support her assertion, she cited the case of **Hashim Madongo & 2 others v Minister for Industrial and Trade and two others**, Civil Appeal No. 27/2003, **Yussuf Vuai Zyuma v TPDF and two others**, Civil Appeal no 15 of 2019.

On the second point of preliminary objection, the counsel averred that, in the memorandum of appeal, it is shown that the appellant is Ashura Hussein Kapela, and the respondent is Mohamed Ahmed Soli. The said Mohamed Ahmed Soli is an administrator of the estate of Shani Mohamed Kapela. According to the counsel, having been appointed by the Primary Court and confirmed by the District Court during the appeal, the appellant was supposed to institute the appeal against the respondent in the capacity of administrator of the deceased and not in his personal capacity. She thus referred to the case of **Lujuna Shubi Balonzi v Registrar Trustees of CCM** (1996) TLR 203.

Further, the counsel submitted that the appellant has no cause of action against the respondent in his personal capacity since the root of the present appeal is probate. Therefore, the proper person to sue is the administrator

and not the respondent in his personal capacity. To support her assertion, she cited the case of **Godfrey Samson v Principal Secretary Ministry of Health and Another**, Civil case no.62 of 2019. Thus, she prayed for the point of preliminary objection to succeed.

On his part, as far as the first point of objection is concerned, the appellant counsel submitted that the decision of the District Court was delivered on 7th November 2023, and the 30 days lapsed on 7th December 2023. According to the counsel, the appellant filed the appeal electronically and was issued with control No. 991401020722, which was stamped and bore the signature of the Court officer of 23rd November 2023. After filing the petition of appeal, he was informed by the Deputy Registrar that the appeal documents were not seen in the system. He directed him to refile it on 23rd February 2024, using the same exchequer receipt. Therefore, under the circumstances, it would be unfair to punish the appellant for errors beyond her control. He added, as per rule 21 of the Judicature and application of Laws (electronic files) Rules of 2019 (GN no 148), the appeal was filed within the time, and the appellant managed to get the control number.

Further, the learned counsel submitted that, unlike what the appellant counsel has submitted, the present appeal is not governed by the law of

limitation. As regards the counsel prayer of the appeal to be dismissed, the learned counsel argued that the present appeal could not be dismissed because the said order is given only when the case is decided on merit. Thus, he referred the Court to the case of **Mohamed Hashill v NMB**, revision No. 106 of 2020.

With regard to the second ground of objection, the learned counsel argued that, from the lower Court, the parties have been instituting the case through their personal capacities. Hence, the appellant could not file the appeal in another title apart from what is shown at the lower Court. The counsel referred to the case of **Izrael Maregesi and Another v Tanganyika Bus Service**, Civil Application no 172/2020, which held that it is not fatal if a party failed to indicate that he is the administrator of the estate.

The learned counsel prayed this Court not to let the respondent benefit from her own wrong since she is the one who started to style the title in the current manner. With regard to the issue of locus standi, the learned counsel submitted that it has no room in the present case because it is the capacity to sue and not be sued. As far as the cause of action is concerned, the counsel was of the view that it is not a point of law but rather a point of fact,

so it can not stand as a point of preliminary objection within the meaning of **the Mukisa biscuits** case.

On rejoinder, the respondent counsel maintained her earlier submission and added that what the appellant did in as far as filing the appeal in the system is concerned is contrary to section 25(3)(4) of the Magistrates Court's Act as it was not proper for the Deputy Registrar of the High Court to give directives to the appellant to file the case in the High Court registry instead of the District Court registry. The counsel also submitted that the appellant counsel had no any supporting document to prove that he was given directions from the deputy registrar. The counsel insisted that the law of limitation applies to the present case. Hence, the appeal be dismissed.

Furthermore, as for the control number produced by the appellant, she said that it does not show the details of the case, and it also indicates that the payments are for the petition of appeal and not for the memorandum of appeal, which is the document filed by the appellant.

Having considered the submissions of both parties' counsel, I'm tasked to determine if the raised points of preliminary objections are meritorious or not.

The submissions advanced by parties raise three issues for the determination, which are: first, if the present appeal is filed under the wrong registry; second, if it is proper for the respondent to be sued under his personal capacity rather than the administrator of the estate and third if the appeal is time-barred and what are the consequences thereto.

On the first issue, the respondent counsel submitted to the effect that, by filing the appeal in the High Court registry, the appellant contravened the provision of section 25(3)(4) of the Magistrates Court Act, which requires all appeals to be filed in the District Court.

However, since this issue was raised by the respondent counsel when making her rejoinder submission, I will not determine it, as by so doing, it will amount to condemning the appellant unheard, which is be contrary to the rules of natural justice.

Moving to the second issue, it is apparent that the respondent herein is the administrator of the estate, and from the lower Court, it was not disputed that the respondent was sued as an administrator. Though it is desirable when an administrator is suing or being sued to indicate in the title of the case that he is suing/sued under that capacity, however, it is trite law that

the omission to indicate the same is not fatal. The Court of Appeal of Tanzania, in the case of **Suzana S. Waryoba v Shija Dalawa**, Civil Appeal no 44 of 2017, when faced a similar issue, made the following remarks;

'We are of the considered view that the fact that Suzana Waryoba was suing in her capacity as an administratrix of the estate of the late Stanslaus Waryoba should have been reflected in the title of the case. However, we haste to remark that the omission is not fatal given that it is was clear throughout that she was suing in that capacity, and the judgment of the primary Court which appointed her was tendered in evidence at the very outset. We only wish to accentuate that when a litigant sues as an administrator or administratrix of the estate, it is desirable that the same should be reflected in the title.'

In another case of **Izrael Maregesi & Another v Tanganyika Bus Service**, Civil Application no 172 of 2020, the Court of Appeal of Tanzania was of the view that, since the person indicated in the affidavit was the administrator of the deceased estate, the omission to indicate that he is administrator is not fatal to render the application incompetent.

Turning to the second issue, it was the argument of the respondent counsel that the present appeal is time-barred since the decision appealed against was delivered on 7th November 2023, and the appellant filed the present appeal on 23rd March 2024 after the lapse of more than three months, contrary to the requirement of section 25(1) (b) of the Magistrates Courts Act which requires all appeal originating from primary Court to be filed before the expiration of 30 days from the date of the decision appealed against.

It should be borne in mind that section 25(1)(b) of the Magistrates Court Act provides that a party aggrieved by the decision or order of the District Court when exercising its appellate jurisdiction may appeal to the High Court within 30 days from the date of the decision or order. The law reads;

'In any other proceedings, any party, if aggrieved by the decision or order of the district court in the exercise of its appellate or revisional jurisdiction, may, within thirty days after the date of the decision or order, appeal therefrom to the High Court, and the High Court may extend the time for filing an appeal either before or after such period of thirty days has expired.'

From the wording of the law, since the decision appealed against was delivered on 7th November 2023, the appellant ought to have filed her appeal on or before 7th December 2023. Rule 24(4) of the Electronic Filing Rules provides;

"Where electronic filing is done, the rules relating to time for the purposes of limitation shall be the same as those applicable to a conventional filing."

The appellant's counsel argues that he filed the appeal in time and was issued with the control number to pay the filing fees, and having paid the same, it was stamped and signed by the Court officer on 23rd November 2023, but because his document was not seen in the system. Following that, he was directed by the Deputy Registrar of the High Court to refile the same. Pursuant to those directives he refiled the appeal on 23rd February 2024 using the same payment receipt that he submitted before the Court.

Despite the learned counsel argument, the Law under Rule 24 (1) of the electronic filing rules provides for the exclusion of the time when the system is not working for whatever reasons. The learned counsel seems to suggest that there was a problem in the system, as the document he filed could not

be seen online. From the cited provision of the law, the period within which the system was not working for whatever reasons should be excluded from computing the time of filing. Rule 24(1) reads;

"The period during which the electronic filing system is not in operation for any reason shall be excluded from the computation of time for filing."

However, for the period to be excluded, the party shall move the Registrar or the Magistrate in charge for the appropriate relief. If the Deputy Registrar or the Magistrate in charge is satisfied that there is a good cause that made the party miss the deadline, he might grant the request in writing as provided under Rule 24(5) and (6) of the electronic filing rules. It reads;

"(5) Where the party misses a filing deadline due to technical problems referred to in sub-rule (1), the party shall move informally and ex parte the Registrar or the magistrate in charge not later than 15:00 hrs of the following working day for appropriate relief."

(6) Where the Registrar or magistrate in-charge is satisfied that there was good cause for missing the deadline, he shall grant the request under sub-rule (5) in writing”.

In the present case, although the appellant’s counsel alleges that the Deputy Registrar instructed him to refile the case, there is no document to the Deputy Registrar substantiate the same. In the absence of the document, I agree with the respondent’s counsel that there is no proof that the Deputy Registrar authorized the appellant to refile as the counsel alleges. Since the appeal was filed on 23rd February 2024, I agree with the respondent’s counsel that the appeal was filed out of time.

Having seen that the present appeal was filed out of time, it is now important to determine its fate. While the respondent counsel argued that the appeal should be dismissed as per the provision of section 3, read together with section 46 of the Law of Limitation Act, the appellant counsel contested by arguing that a dismissal order can not be issued when the case is not decided on merit.

In my view, this issue should not detain me since there are plenty of authorities on limitation of time. The Court of Appeal of Tanzania, in the case

of **Nbc Limited & Another v Bruno Vitus Swalo**, Civil Appeal no 331 of 2019 the Court made the following remarks,

"...courts are enjoined not to entertain matters which are time-barred. Limitation period has an impact on jurisdiction. Courts lack jurisdiction to entertain matters for which the litigation period has expired".

In the case of **Sarbjit Singh Bharya & Another v Nic Bank Tanzania Limited**, the Court of Appeal of Tanzania cited with approval its decision in the case of **Hezron M. Nyachiya v. Tanzania Union of Industrial and Commercial Workers and Another**, Civil Appeal No. 79 of 2001 (unreported), in which in the latter case the Court emphasized that;

"under section 3 (1) of the Law of Limitation Act, the consequence for any proceedings instituted out of time without leave of the Court is dismissal whether or not limitation has been set up as a defence."

Guided by the aforementioned decisions, I hold that the remedy for a time-barred matter is none other than dismissal, as the Court has no jurisdiction

to determine the case. In the event, the appeal is dismissed for being time-barred.

Dated at Dar es Salaam this 15th day of May, 2024.



A handwritten signature in blue ink, appearing to read "S. S. Sarwatt", is written over the printed name.

S. S. SARWATT

JUDGE

Delivered in the presence of the applicant, respondent and Adrian Chitale advocate for the respondent.

Right of appeal is fully explained.