

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MBEYA SUB - REGISTRY)

AT MBEYA

CIVIL APPEAL NO. 04 OF 2023

(Arising from Civil Appeal No.43 of 2022 of the District Court of Mbeya and Originating from Civil Case No. 75 of 2022 in the Mbeya Urban Primary Court.)

PLATINUM CREDIT LTD.....APPELLANT

VERSUS

KELVIN YOSIA MAHAVA.....RESPONDENT

JUDGMENT

8/12/2023 & 29/02/2024

POMO, J

The appellant herein, PLATINUM CREDIT, being dissatisfied with the decision of the District Court of Mbeya in Civil Appeal No. 43 of 2022 Hon. M.S. Mtengeti - RM, appeals to this court having the following grounds of appeal: -

- 1. That the Honorable Magistrate erred both in law and in fact in dismissing the appeal while an incompetent appeal warranted to be struck out and therefore denying the appellant an opportunity to file a competent appeal.*
- 2. That the appellant's appeal having not been determined on merit the Honorable Magistrate erred both in law and fact to dismiss it.*

The facts of the case, albeit briefly, gathered from the lower court record are as follows. The Respondent obtained a loan of TZS 9,180,000/- from the Appellant. He used his car make Toyota Harrier T. 157 DLZ to secure the loan. It was the terms of the agreement that the Respondent will make good the loan within a year and the amount payable was set at TZS 15,509,517/-. That is to say, the loan being advance to the Respondent on 29.03.2021 the same was repayable in no more than 20.03.2022. The Monthly repayment installments schedules was set at TZS 1,292,459.67/-.

Further, it is on record that, the respondent's car which was used as security for the advanced loan, by then it was also on hire agreement with an organization called Action for Development Programmes-Mbozi (ADP-MBOZI). That hire agreement was from 1/11/2021 to 30/09/2022, which was for transportation services.

In repaying the loan, the respondent failed to meet the scheduled monthly instalments save for the first three months. He paid the rest out of the schedules. Following that, the appellant attached the Respondent's loan security car to recover his money. To rescue his car from being sold, the respondent cleared the loan and the car was released. Having handed back his car, the Respondent inspected it and observed defects in it, implying the Appellant was using it. He informed the appellant's officials to repair the defects but failed to heed to the same. Following the refusal, the

respondent, opted to use his own costs to repair his car at a garage called BOB GARAGE & AUTO SPARES costing him TZS 1,100,000/-. Few months later the respondent was informed by his wife that the appellant's brokers had again attached the very car on allegations that he did not fully repay the loan. Following that, the respondent against the Appellant instituted Civil Case No. 75 of 2022 before Mbeya Urban Primary Court claiming for, firstly, his car make Toyota Harrier worth TZS 23,000,000/- be released by the Appellant, and secondly, a compensation to the tune of TZS 6,000,000/- making a total of TZS 29,000,000/-. The trial court granted the Respondent's prayers

Dissatisfied, the appellant, through Civil Appeal No.43 of 2022, appealed to the District Court of Mbeya. Against it, the Respondent raised a preliminary objection that it time barred. The District Court sustained the objection. In view of that, the district court dismissed the appeal. Unhappy with the decision, the Appellant has approached this court armed with two grounds of appeal as listed above.

I ordered disposal of the appeal be by way of written submissions. Whereas Mr. Chapa Alfred, learned counsel represented the Appellant, the respondent's reply submission was through the service of Mr. Isack Chingilile, learned counsel. Both sides adhered to the scheduled date of filing their respective submissions.

Submitting on the first ground, Mr. Chapa argued that the Appellant's appeal before the district court was filed out of time hence incompetent before it. That, the remedy available for an incompetent appeal was for the district court to struck out the appeal instead of dismissing it under section 3 of the Law of Limitation Act, Cap. 89 R.E. 2019. In support of his stance, Mr. Chapa referred this court to the following decisions: **Ngoni Matengo Co-operative Marketing Union Ltd vs Ali Mohamed Osman** [1959] EA 577 and **Ramadhani Rajabu @ Kule versus Republic**, Criminal Appeal No. 553 of 2021 CAT at Mtwara (unreported).

That, in **Ngoni Matengo** case (*supra*), the Court of Appeal held thus:

"This Court, accordingly, had no jurisdiction to entertain it. what was before the court being abortive, and not a properly constituted appeal at all. What this court ought strictly to have done in each case was to strike out the appeal as being incompetent rather than to have dismissed it; for the latter implies that a competent appeal has been disposed of, while the former phrase implies that there was no proper appeal capable of being disposed of."

While in **Ramadhani Rajabu** case (*supra*) the Court of Appeal, at page 9, held that: -

"Nevertheless, we asked ourselves, assuming the appeal was time barred, whether it was proper for the High Court Judge to dismiss it, particularly so, when taking into account that it was not heard on its merits. In answering this issue, we are mindful

that dismissal and striking out are distinct and their consequences are not similar. While dismissal connotes that there was competent appeal which was heard and determined, the striking out implies the appeal was incompetent and therefore could not have been heard”.

Mr. Chapa went ahead by referring at page 10 in **Ramadhani Rajabu** case (supra) where the Court of Appeal had this to state: -

“... in this regard we are settled in our mind that, it was wrong for the High Court Judge to dismiss the appeal which was not heard on merit for being out of time. In that situation, the best option was to strike it out which would have enabled the appellant to come back subject to time limitation.”

Basing on the above, Mr. Chapa prayed this court be pleased to find out that this ground is merited and allow it

As regards to the second ground, Mr. Chapa argued that since the appeal was not heard on merit, the only option the district court had was to strike it out. He referred this court to what was held in **Yahya Khamis versus Hamida Haji Iddi**, Civil Appeal No. 225 of 2018 CAT at Bukoba (unreported), at page 7, that:

“We are of the view that, upon being satisfied that the appeal was incompetent for the reason it had assigned, it ought to struck out the appeal instead of dismissing it. The reason is clear that by dismissing the appeal, it implies that there was a competent appeal before it which was heard and determined on merit which is not the case.”

In a further reference to **Yahya Khamis** case (**supra**) Mr. Chapa quoted page 8 where the Court of Appeal stated as follows: -

"...we have cited all these authorities so as to emphasize that ordinarily, the remedy of a matter which is incompetent before the court is to struck it out. The reason for striking it out is that such matter is abortive or rather is incompetent of being heard or even adjourned. In other words, it carries the implication that there is no matter at all before the court."

Having so submitted, Mr. Chapa asked this court to allow this appeal by quashing the district court decision with costs

In reply, as regards to the first ground of appeal, Mr. Isack right away supported the district court's decision dismissing the time barred Appellant's Appeal as the only remedy which was available to him under section 3 of the Law of Limitation Act [Cap. 89 R.E. 2019] rather than striking it out as suggested by the Appellant. In support of his position, he referred this court to the case of **Hezron M. Nyachiya versus Tanzania Union of Industrial and Commercial Workers and Another**, Civil Appeal No. 79 of 2001 CAT at Dar es Salaam (unreported) where, at page 9, it held thus:

*"Generally speaking, the Law of Limitation plays many roles including the following: **one**, to set time limit within which to institute proceedings in a Court of Law. **Two**, to prescribe the consequences where the proceedings are instituted out of time without leave of the court. **Where a period of limitation for any proceeding is prescribed by any other written law,***

the provisions of the Law of Limitation apply as if such period of Limitation had been prescribed by the Law of Limitation Act."

Amplifying his stance further, Mr. Isack referred this court to the case of **Barclays Bank Tanzania Limited versus Phylisiah Hussein Mcheni**, Civil Appeal No. 19 of 2016 CAT at Dar es Salaam (unreported) where, at page 7, having reproduced sections 43 and 46 of the Law of Limitation Act, had this to state: -

*"The language of the two provisions is very clear in our view. **It is clear that the Act applies to all proceedings except those mentioned under section 43(a)-(f).** It is clear again that under section 46 even those proceedings whose time limit is prescribed by other statutes as mandated by section 43(f), **the time limit set by those statutes are deemed to be prescribed by the Act**, Consistent with the rules of statutory interpretation referred to earlier, there should not come a point when section 43 and section 46 of the Act are in conflict."*

Having referred to the cases supra, Mr. Isack argued that rightly the district court invoked section 3(1) of the Law of Limitation Act [Cap. 89 R.E.2019] because under section 20(3) of the Magistrate's Courts Act, [Cap.11 R.E. 2019] (the MCA) sets time limits for filing an appeal to the district court in matters originating from the primary court, the same is deemed to be prescribed by the Law of Limitation Act. And, since the MCA

doesn't provide for consequences of a time barred appeal then the Law of Limitation Act comes into play of which section 3(1) provides for dismissal of a time barred appeal.

As to the Appellant's cited cases, Mr. Isack argued that, **Ramadhani Rajabu @ Kules vs Republic** (supra) is a criminal case thus distinguishable to the case at hand.

Replying the second ground on the allegation that as long the appeal was not heard on merit, ought to have been struck out by the district court instead of dismissing it, Mr. Isack submitted that this ground is argued by the appellant misdirecting himself because the time barred appeal was rightly dismissed by the district court. On this, he referred this court to page 15 of **Barclays Bank Tanzania Limited** case he cited (supra) where it was held thus: -

*"Finally, therefore, there was no basis for the learned High Court Judge to strike out the complaint that has been presented in court after expiration of 60 days. In a similar situation in the case of **Hezron M. Nyachiya versus Tanzania Union of Industrial and Commercial Workers and Another**, Civil Appeal No. 79 of 2001 (unreported), cited to use by the appellant's counsel, this court held that, although the Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance **set the time limit for instituting action to be six months, but did not provide for the consequence of filing a matter out of time**, section 3 of the Act was applicable in*

*dismissing the petition. In view of that provision of the law, it is our conclusion that the learned High Court Judge **should have resorted to section 3(1) of the Act** to dismiss the complaint instead of striking it out as she did".*

Also, Mr. Isack cited to this court the case of **Weges Lameck Mwita vs Juma Adam Ng'wadi**, Civil Appeal No. 53 of 2010 High Court at Dar es Salaam (unreported) an appeal which originated from primary court but upon discovering that it was filed out of time, this court dismissed it.

Having so submitted, Mr. Isack prayed this ground be dismissed too for being unmerited. This marked the end of the parties' submissions as the appellant didn't file a rejoinder submission

Having considered both sides rivalry submissions for and against the appeal, now what I am called to determine is whether the appeal is merited.

I will begin with the first ground. In this ground, the appellant challenges the district court to dismiss his time barred appeal against Civil Case No. 75 of 2022 Mbeya Urban Primary Court, the appeal which was preferred under the Magistrate's Court Act [Cap.11 R.E. 2019] which does not provide for option of dismissing a time barred appeal.

Mr. Chapa submitted, correctly in my view, that the MCA does not provide for consequences of a time barred appeal before the district court in matters originating from the Primary Courts. However, it is settled position of the law, as expounded in the case of **Barclays Bank Tanzania Limited**

versus Phylisiah Hussein Mcheni cited (supra), where at page 7, the Court of Appeal held, the time limit set in other laws, the same is deemed to be prescribed by the Law of Limitation Act, [Cap. 89 R.E. 2019] (the **LLA**). Therefore, section 20(1) of the MCA setting limitation of filing an appeal to the district court in matters originating from primary courts is deemed to be prescribed under the LLA. Consequently, section 3(1) of the LLA come into play when such appeal is caught into being time barred. Therefore, I find nothing to fault the district court in applying section 3(1) of the LLA to dismiss the Appellant's time barred appeal.

The second grounds of appeal hinges on the same thing though in different approach, that is to say, dismissing the appeal found incompetent instead of striking it out. Whether the consequence of an incompetent is to be struck out or not, in my considered view, the determinant factor is the kind of incompetent in which the matter was caught in. Here, it was for being time barred. As above said in the 1st ground of appeal, basing on the court of appeal findings in **Barclays Bank Tanzania Limited versus Phylisiah Hussein Mcheni** case, the only remedy is to dismiss it. Therefore, on the basis of what I have endeavored to state, I find this ground also unmerited.

That said and done, I find both grounds of the Appellant's appeal to be unmerited.



In the upshot, the appeal is hereby dismissed with costs

It is so ordered

Right of Appeal explained to an aggrieved party


MUSA K. POMO

JUDGE

29/02/2024

Judgment delivered in chamber in present of both parties who are
unrepresented




MUSA K. POMO

JUDGE

29/02/2024