

**IN THE HIGH COURT OF TANZANIA**

**(LAND DIVISION)**

**MWANZA**

**MISCELLANEOUS LAND CASE APPEAL NO. 13 OF 2008**

**(From the Decision of the District Land and Housing Tribunal of Mwanza  
District at Mwanza in Land Case Appeal No. 71 of 2006 and Original Ward  
Tribunal of Bukanda Ward in Application No. 1 of 2006)**

**LEONARD NTOGWA ..... APPELLANT**

**VERSUS**

**ENOCK MABAGALA ..... RESPONDENTS**

**RULING**

**MWAMBEGELE, J.:**

When this appeal came up for hearing this morning, I asked the parties whether this appeal was filed within time. The Appellant was represented by a seasoned lawyer, Mr. Magongo, learned Advocate while the Respondent appeared in person and unrepresented. Mr. Magongo submitted that the appeal was not filed out of time. He demonstrated that the letter asking the

court to supply the Appellant with copies of proceedings, judgment and decree was written on 08.03.2007. He submitted further that the appeal was filed in time as they received copies of proceedings and judgment on 31.07.2007. Mr. Magongo concluded that the appeal was filed on 13.08.2007 while the judgment intended to be impugned was pronounced on 26.01.2007.

I have had an opportunity to deal with a problem of this nature in some of my rulings. I will reiterate my position in this ruling. It is my argument that the appeal was filed out of time in clear contravention of the provisions of Section 38 (1) of the Land Disputes Courts Act, Cap 216 of the Laws of Tanzania (hereinafter referred to as Cap 216) as amended by the Written Laws (Miscellaneous Amendments) Act, 2010. This appeal was filed on 13.08.2007. The judgment of the District Land and Housing Tribunal which is appealed against is dated 26.01.2007. The appeal ought to have been filed by 24.03.2007. In the absence of any order of this court enlarging time within which to file the same, I find myself not properly seized or vested with the requisite jurisdiction to entertain it. The rest of this Ruling is demonstrating why this appeal is incompetent and therefore should be struck out.

This appeal is an appeal from the decision of the District Land and Housing Tribunal given in exercise of its appellate jurisdiction. It is controlled by the provisions of Section 38 (1) of Cap 216. This subsection provides for time within which a party aggrieved by the decision or order of the District Land and Housing Tribunal in exercise of its, *inter alia*, appellate jurisdiction may appeal to this court. It reads:

*“Any party who is aggrieved by a decision or order of the District Land and Housing Tribunal in the exercise of its appellate or revisional jurisdiction, may within sixty days after the date of the decision or order, appeal to the High Court:  
Provided that the High Court may for good and sufficient cause extend the time for filing an appeal either before or after such period of sixty days has expired”.*

Having been commenced in the Ward Tribunal (Bukanda Ward Tribunal), and given the fact that the judgment of the District Land and Housing Tribunal intended to be impugned was delivered on 26.01.2007, the Petition of Appeal ought to have been filed within sixty days after the date of decision; that is, by 24.03.2007. For the avoidance of doubt, I have computed the period of

limitation as stipulated by Section 19 (1) of the Law of Limitation, Cap 89 (hereinafter Cap 89).

I am not ready to subscribe to Mr. Magongo's argument that the time should start to run from the date the Appellant received copies of proceedings, judgment and decree; that is 31.07.2007. Copies of proceedings, judgment and decree are not papers that must be accompanied by a petition of appeal at the time of filing. In appeals under this section, time starts to run against an aggrieved party on the date on which the judgment appealed against is pronounced. Unlike in appeals under the Civil Procedure Code, Cap 33 of the Laws of Tanzania, Section 38 (1) of Cap 216 does not put as mandatory any document to accompany it (the Petition) at the time of filing. That is to say; a copy of judgment or ruling or order appealed against must not necessarily be accompanied by a petition of appeal at the time of filing. Actually, the way subsections (2) and (3) of Section 38 of Cap. 216 (as amended) are couched, it suffices if only a Petition of Appeal is filed in the District Land and Housing Tribunal and the requisite fees paid. After the filing of a petition and requisite fees paid, the Tribunal will dispatch the petition together with the record of

the proceedings of the District Land and Housing Tribunal to this Court within fourteen days. Let the subsections speak for themselves:

*“(2) Every appeal to the High Court shall be by way of petition and shall be filed in the District Land and Housing Tribunal from the decision, or order of which the appeal is brought.*

*(3) Upon receipt of a petition under this section, the District Land and Housing Tribunal shall within fourteen days dispatch the petition together with the record of the proceedings in the Ward Tribunal and the District Land and Housing Tribunal to the High Court”.*

This problem was canvassed at some length by Luanda, J. (as he then was) in ***Gregory Raphael Vs Pastory Rwehabura***, 2005 TLR 100. Luanda, J. was faced with an identical situation when grappling with the interpretation of a sister provision pertaining to appeals to the High Court on matters originating from the Primary Court. This is Section 25 (3) of the Magistrates’ Courts Act, Cap 11 (hereinafter Cap 11). Subsection (3) of Section 25 of Cap 11 reads:

*"Every appeal to the High Court shall be by way of petition and shall be filed in the district court from the decision or order in respect of which the appeal is brought:"*

His Lordship, after asking himself as to when does time of appeal to the High Court start to run against an appellant who seeks to contest the decision of the District Court on matters originating from Primary Courts, held at p. 105 that:

*"Attachment of copies of decrees and judgment is a condition precedent in instituting appeals originating from District Courts and courts of resident magistrate."*

His Lordship went on:

*"But the position is different in instituting appeals in this court on matters originating from Primary Courts. Attachment of copies of decree or judgment along with petition of appeal is not a legal requirement. The filing process is complete when petition of appeal is instituted upon payment of requisite fees"*

His Lordship concluded that time starts to run against an intended appellant from the date the judgment appealed against is pronounced. He held further that in computing the time of limitation, no time is excluded as attachment of judgment and decree are not a mandatory requirement.

The position in respect of appeals under Section 38 of Cap 216 was well expounded by Mgetta, J. in a recent decision in the case of ***Fadhila Ally Vs Alex Holela***, Miscellaneous Land Case Appeal No. 5 of 2011 DSM (unreported) in the following terms:

*“... the appellant is not necessarily required to attach copies of decree and judgment to petition of appeal as the attachment of such copies is not a condition precedent in instituting appeals originating from Ward tribunals. The filing process of the petition of appeal to the High Court is complete upon presenting it and payment of the requisite fees in the Tribunal”.*

In the light of the above two cases, it is clear therefore that in instituting appeals to this court on matters dealt with the District Land and Housing Tribunal in exercise of its appellate jurisdiction, attachment of copies of

proceedings, decree or judgment is not a legal requirement. The filing process is complete when a petition of appeal is instituted in the District Land and Housing Tribunal and requisite fees paid. In computing the time of limitation, save for the application of Section 19 (1) of Cap 89, no time is excluded. Time starts to run against an aggrieved party right from the date of judgment of the District Land and Housing Tribunal which the intended appellant seeks to challenge.

Coming back to the instant case, it is evident therefore that the appellant wasted his precious time waiting for copies of proceedings, judgment and decree so as to file the appeal. He could have filed the appeal without them and it could be fine before the eyes of the law.

The appeal was filed more than six months after the expiry of the period of limitation. It was filed belatedly out of time. In the absence of any order of this court enlarging time within which to file this appeal, this court finds itself not properly seized or vested with the requisite jurisdiction to entertain it. A question of jurisdiction is a question of competence. It can be raised at any time before judgment - [see include *Michael Leseni Kweka Vs John Eiliafe*,



Civil Appeal No. 51 of 1997 (unreported), ***Faustine G. Kiwia and Another Vs Scolastica Paulo***, Civil Appeal No. 24 of 2000 (unreported) and ***Nicomedes Kajungu & 1374 Others Versus Bulyankulu Gold Mine (T) LTD*** Civil Appeal No. 110 of 2008 (unreported)].

Having found that the appeal was filed out of time and therefore incompetent, what then should I proceed to do? This is the question to which I now turn. I think I have two options. The first one is to have the appeal dismissed in the light of the provisions of subsection (1) of Section 3 of Cap 89. This subsection reads:

*“... every proceeding ... which is instituted after the period of limitation ... shall be dismissed whether or not limitation has been set up as a defence”.*

The second option is to strike it out according to the directions of the Court of Appeal as articulated in ***Ngoni-Matengo Cooperative Marketing Union Ltd Vs Alimamohamed Osman***, (1959) EA 577, and ***Abdallah Hassan Vs VODACOM (T)***, Civil Appeal No. 18 of 2008, (unreported) and ***Thomas Kirumbuyo and Another Vs Tanzania Telecommunications Co. Ltd.***, Civil Application No. 1 of 2005 (CA - unreported). These cases direct that in situations, as in the present

one, where the appeal is incompetently before the court, the proper course to take should be to strike the appeal out rather than dismissing it. The distinction between dismissing and striking out an appeal was well pronounced by the ***Ngoni-Matengo*** case (supra). At page 580, Windham, J.A speaking on behalf of Sir Kenneth O'Connor, P. and Gould, J.A had this to say:

*"When the appeal came before this court it was incompetent ... 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 ... was to "strike out" the appeal as being incompetent, rather than to have "dismissed" it; for the latter phrase 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". (Emphasis supplied).*

The above quotation in the ***Ngoni-Matengo*** Case was quoted with approval by the Court of Appeal in ***Abdallah Hassan Vs VODACOM (T)*** (supra). The Court of Appeal reiterated and emphasised the well structured explanation of the ***Ngoni-Matengo*** case in respect of the distinction between "dismissing" and

“striking out” an appeal. The defunct Court of Appeal for East Africa had sat on 21.05.1959 and 11.06.1959 at Dar es Salaam deciding Civil Appeal No. Dar. 2 of 1959.

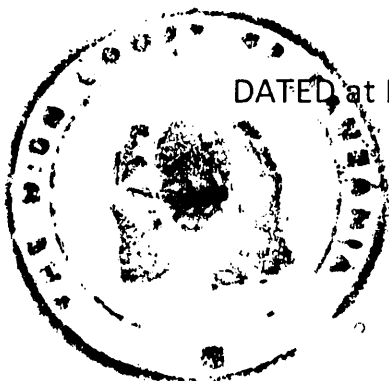
The Court of Appeal of Tanzania in the *Abdallah Hassan* case (supra) also referred to its decision in the *Thomas Kirumbuyo* case (supra), in which, speaking through Lubuva, J.A held:

*“From the outset, and without prejudice, it is to be observed that the learned judge having upheld the preliminary objection that the application was hopelessly out of time, and therefore incompetent, should have proceeded to strike it out. Dismissing the application as happened in this case, presupposes that the application was competent and that it was heard on merits”. (Emphasis supplied).*

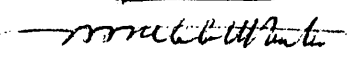
With these binding decisions of the court of appeal, my way forward becomes simple. It is crystal clear therefore that there is a clear distinction between dismissing and striking out an application, a suit or an appeal as the case may be. Dismissing an application, a suit or an appeal, as the case may be, would

signify that the matter has been entertained on merits. While striking out an application, a suit or an appeal, as the case may be, would imply that there was no matter before the court to be entertained on merits. I have declined to entertain this appeal on merits it being incompetent for being filed out of time. I find and hold that this appeal was filed out of time as a result of which, having not sought and obtained leave of this court to appeal out of time, the appeal is incompetently before me. In the light of the authorities cited above, the appeal deserves the punishment of being struck out as incompetent rather than having it dismissed:

In the end result, this appeal is struck out as incompetent for being filed belatedly out time. In view of the fact that this appeal is disposed of on an issue raised by this court *suo motu*, I make no order as to costs. It is so ordered.



DATED at MWANZA this 18<sup>th</sup> day of October, 2012

  
**J. C. M. MWAMBEGELE**

**JUDGE**