IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

MWANZA

MISCELLANEOUS LAND CASE APPEAL NO. 53 OF 2010

(From the Decision of the District Land and Housing Tribunal of Geita District at Geita in Land Case Appeal No. 16 of 2008 and Original Ward Tribunal of Busolwa Ward in Application No. 1 of 2007)

THOMAS KUNOGOLEKA ..... APPELLANT

VERSUS

JOSEPH ELIAS ..... RESPONDENTS

RULING

MWAMBEGELE, J.:

When this appeal came up for hearing this morning, the Appellant was absent. The Respondent was absent as well but had the services of Mr. Mhingo, learned Advocate. I asked Mr. Mhingo two questions: whether the appeal was filed within time and whether or not it was proper to use the the title "Memorandum of Appeal". On the first question, Mr. Mhingo responded that

the appeal was filed out of time as it was filed on 15.04.2010 while the judgment which is appealed against was delivered on 29.10.2012. On the second question, he responded that the heading appeal should have been "Petition of Appeal" as provided for by the land Disputes courts Act, Cap 216 (hereinafter Cap 216) rather than "Memorandum of Appeal" as appearing in the present appeal. I reserved the ruling to this afternoon.

I will start with the second question. The provisions of subsection (2) of Section 38 of the Land Disputes Courts Act, Cap. 216 (hereinafter Cap 216) read:

> *"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."*

The practice has always been filing a "Petition of Appeal" in respect of appeals originating from the Ward Tribunal. Those which come to this court by way of appeal from decisions of the District land and Housing Tribunal in their exercise of original jurisdiction, the practice followed has been the filing of a "Memorandum of Appeal". But what is in a name? To me I do not see any

difference whether one uses Petition of Appeal or Memorandum of Appeal. To me, they just are different names meaning one and the same thing intended to serve the same purpose. This point was adequately canvassed by this court in ***Basil Masare Vs Petro Michael*** 1996 TLR 226 in which, cconfronted with a similar situation, Mroso, J. (as he then was) had this to say:

> *"What substantive distinction can one make from the use of the words `petition' or `memorandum' when referring to grounds of appeal to a higher court? I must confess, I can see no such distinction although I would say that it would be preferable if an intending appellant uses the word adopted by the legislature for the relevant type of appeal. In my view, if an appellant uses the word `memorandum' instead of the word `petition' in connection with his grounds of appeal in a case originating in the primary court, that alone cannot render the appeal incompetent. That would be making a mountain out of a mouse mound unnecessarily"*

Earlier, this court through Munuo, J. (as she then was) had dealt with this problem in ***Naigise Likimbalunye Vs Naibele Loibuke*** Civil Appeal No 65 of 1993 (unreported). The court was interpreting Section 25(3) of the

Magistrates' Courts Act, Cap. 11 of the Laws (henceforth Cap 11) which is *in pari materia* with subsection (2) of Cap 216. It 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 ..."*

Munuo, J. (as she then was) held that grounds of appeal in a cases originating in the primary court which bear a heading "Memorandum of Appeal" instead of the words "Petition of Appeal", which words are found in Section 25(3) of Cap. 11, renders the appeal incompetent and must be struck out.

It is obvious from the foregoing that above are two conflicting decisions of this court. I am also alive to the fact that the Judge who made the latter judgment was not bound by the earlier decision. So am I; both decisions do not bind me. I am free to adopt one of them or even to have a different stance against both, if need be. But I am aware that the law is not stagnant. It develops. The material conditions that might have existed at the time when Munuo, J. (as she then was) delivered the judgment in the ***Naigise Likimbalunye*** case, might have been changed at the moment Mroso, J. (as he then was) decided the ***Basil***

Masare case. I am convinced that the latter decision must have taken into consideration some new factors that might have not existed when the earlier judgment was being pronounced. In these premises, I am persuaded by the judgment that came later. As pointed out earlier, the use of the title "Memorandum of Appeal" instead of "Petition of Appeal" as provided for by Section 38 (2) of Cap. 216 cannot *ipso facto* render the appeal incompetent. It is desirable, though, that the hand drafting the document uses the words adopted by the legislature for the relevant type of appeal. In the meantime, the practice has been to use "Memorandum of Appeal" in appeals originating from the District Land and Housing Tribunal dealt with it in its original jurisdiction and "Petition of Appeal" in appeals under Section 38 of Cap 216; that is, appeals originating from the Ward Tribunal. I think this practice is worth adopting. I will therefore adopt the decision of this court in the ***Basil Masare*** case.

I now turn to the first question. I have had an opportunity to deal with a problem of this nature in some of my previous Rulings. I will reiterate my position in this Ruling. It is my argument that the appeal was filed out of time in contravention of the provisions of Section 38 (1) of the Cap 216 (as

amended). This appeal was filed on 15.04.2010. The judgment of the District Land and Housing Tribunal which is appealed against is dated 29.10.2008. The appeal ought to have been filed sixty days after the date of judgment; that is by 27.12.2008. 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 therefore 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 and given the fact that the judgment of the District Land and Housing Tribunal intended to be impugned was delivered on 29.10.2008, the Petition of Appeal ought to have been filed within sixty days after the date of decision; that is, 27.12.2008. 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).

In appeals under Section 38 (1) of Cap 216, time does not start to run from the date the Appellant receives copies of proceedings, judgment and/or decree. Copies of proceedings, judgment and decree are not documents 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, ruling, order or decree 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 the 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. (as he then was) 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, judgment or decree 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.

The appeal was filed after eighteen 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.

DATED at MWANZA this 25th day of October, 2012

J. C. M. MWAMBEGELE

JUDGE