

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**LAND APPEAL NO. 220 OF 2022**

(Originating from the Judgment and Decree in Land Application No. 105 of 2012 at Ilala District Land Housing Tribunal delivered on 01 November 2021, Hon. L.R Rugarabamu, Chairman)

**MIKIDADI MOHAMED KIAMBWE**

**(Administrator of the estate of the late Mariam Amir**

**Mkangama).....APPELLANT**

**VERSUS**

**ALLY MOHAMED SALIM.....RESPONDENT**

**RULING**

*Date of last Order:22/02/2023*

*Date of Judgment:28/02/2023*

**K. D. MHINA, J.**

This is the first Appeal. It arose from the proceedings commenced in the District Land and Housing Tribunal ("the DLHT") for Ilala, where the Appellant, vide Land Application No. 105 of 2012, lost the case after the DLHT entered a judgment in favour of the respondent.

Dissatisfied with that decision, the appellant found himself out of the prescribed time to file an appeal to this court; therefore, he decided first to seek an extension of time to file an appeal by filling Misc. Land Application No. 337 of 2022. This Court (Mwenegoha, J), on 13

September 2022, granted the application for an extension of time and ordered the appellant to file his appeal within 21 days from the date of that Ruling. Hence this appeal.

After being served with the memorandum of appeal, the respondent confronted it with a notice of a preliminary objection (p.o) canvassed on two grounds, namely;

- i. *The appeal is hopelessly time barred since was filed out of time extended by the Court in Misc. Land Application No. 337 of 2022.*
- ii. *The memorandum of appeal is not accompanied by the judgment and decree; hence, the appeal is bad in law for contravening Order XXXIX Rule 1 (1) of the Civil Procedure Code, Cap 33 R: E 2019.*

At the hearing of the preliminary objection, the appellant was represented by Mr. Samuel Silana, learned advocates, while the respondent was represented by Mr. Reginald Shirima, also a learned advocate.

In arguing the first limb of the p.o, Mr. Shirima submitted that the appeal is time-barred because in Misc. Land Application No. 337 of 2022,

the appellant was granted 21 days from 13 September 2022, while he filed this appeal on 7 October 2022.

He further argued that from 13 September to 7 October 2022, a total of 24 days lapsed as the appeal was supposed to be filed on 4 October 2022; therefore, the appeal was out of time for three days.

On the date taken into account that it is the date of registering and filing the appeal, he submitted that it is when the document is endorsed, and appropriate fees are paid. To cement his argument, he cited **Ahmed Mohamed Suud and Another vs. Mohamed Suud and three others**, Civil Application No. 12/17 of 2019 (Tanzlii), where the Court of Appeal pointed out;

*"... this application was lodged on 23 January 2019 as shown at the end of the notice of motion where the Registrar endorsed that the same was lodged in the Registry of the Court of Appeal.*

*At Dar es Salaam on 23 January 2019. This is signified by the stamp affixed at the top of the front page of the record of application showing the same was filed on 23 January 2019 at the Court of Appeal Registry of Dar es Salaam. Moreover, even the exchequer receipt bears out*

*that the fees were paid on the date when the same was lodged.*

On the remedy, Mr. Shirima submitted that since the appeal is time-barred, it should be dismissed as per section 3 of the Law of Limitation Act.

On the second limb of the objection, Mr. Shirima briefly submitted that the memorandum of appeal was filed contrary to Order 39 Rule 1 (1) of the CPC. That provision of law requires the memorandum to be accompanied by a copy of the judgment and decree.

He stated that the memorandum of appeal filed in this court was not accompanied by the copy of the judgment and decree sought to be appealed.

Therefore, the appeal is incompetent before this court.

In response, Mr. Silana admitted that it was true that they were granted 21 days from 13 September 2022 to lodge an appeal.

He submitted that, after preparing the memorandum of appeal, the appellant approached the Court on 4 October 2022, intending to file an appeal, but he was told he should file electronically. On 6 October

2022, he obtained the control number to enable the payments, and on 7 October, he paid the requisite fees for admission to the appeal.

Therefore, he submitted that the delay was because of the Court processes. He cited article 107 of the Constitution of the United Republic of Tanzania and stated that under that article, the courts are urged to deal with substantive justice and not bound by technicalities.

On the second limb of the objection, he submitted that they forgot to attach the DLHT decision as they expected the case file would be brought to this court with that judgment.

In a brief rejoinder, Mr. Shirima submitted that the counsel for the appellant knew about electronic filing and that a case could be registered electronically within one day. Further, there was no evidence that the appellant brought the appeal on 4 October 2022.

On the second limb of the objection, he submitted that the law is instructive that the memorandum of appeal must be accompanied by the judgment. He further submitted that Article 107 of the Constitution could not help a person who is time-barred in filing an action.

Having examined the record of appeal and the submissions advanced by the learned counsel for the parties for and against the preliminary objection, the main issue for our determination is whether the objection raised is meritorious.

There is no doubt that the issue raised in the first limb of the preliminary objection based on the decision of this Court in Misc. Land Application No.337 of 2022, which granted an extension of time.

From that decision, there is no dispute that the decision was handed down on 13 September 2022, and the appellant was granted 21 days to file the appeal.

Further, there is no dispute that the instant appeal was filed on 7 October 2022, and this fact was admitted by the counsel for the appellant. Also, the exchequer receipt with no 25006456 for the payment of the requisite fees for instant appeal indicated that the payment was made on 7 October 2022 as well as the endorsement of the memorandum of appeal was done on the same date. Therefore, as per the cited case of **Ahmed Mohamed Suud** (Supra), the above facts signify that the appeal was lodged on 7 October 2022.

Flowing from above, as correctly argued by the learned counsel for the respondent, the appeal ought to have been lodged latest by 4 October 2022. This is so because, mathematically, 21 days counted from 13 September 2022 expired on 4 October 2022; therefore, the appellant is out of time for three days.

The Court of Appeal in **Mwanaasha Seheye v. Tanzania Ports Corporation**, Civil Appeal No. 37 of 2003 (unreported) emphasized that an appeal must be instituted within prescribed time unless the exception applies.

In his submission, Mr. Silanda prayed for the indulgence of this Court, and he submitted that the delay was because of the court procedures of filing cases electronically. He further suggested that the Court remedy that irregularity by applying Article 107 of the Constitution, that technicalities should not be allowed to defeat substantive justice.

On the reason why he filed the appeal out of time, from his submission, Mr. Silanda was convinced that reason could exonerate him of the statutory requirement to appeal within time. But with respect,

that is not the correct position of the law because since the memorandum of appeal was lodged on 7 October 2022, after the lapse of three (3) days from the date the 21 days granted to him to file an appeal expired, then the appeal is hopelessly time-barred. Second, he failed to explain why he failed to file the appeal electronically on 4 October 2022 after he was informed to do so.

Therefore, this appeal is time-barred for being filed after the lapse of 21 days granted to the appellant. Further, Article 107 of the Constitution cannot cure a time-barred action because it is not a mere technicality or irregularity. Time limitation touches the jurisdictional issues of the court, therefore fatal to the proceedings. The Court of Appeal in **Yusuf Khamis Hamza vs. Juma Ali Abdalla, Civil Appeal No. 25 of 2020** (Tanzlii), held that: -

*"We are alive with the settled position of the law that time limitation goes to the Jurisdiction issue of the Court, and it can be raised at any time."*

On the remedy, section 3 (1) of the Law of Limitation Act, Cap 89 [R: E 2019] is instructive that any proceeding instituted after a period of limitation shall be dismissed.

Last, I wish to add one issue, which is quite briefly. The issue is on an act of Mr. Silanda invoking the Article of the Constitution and arguing that technicalities should not be allowed to defeat substantive justice. By the amendment of the Civil Procedure Code by introducing sections 3A and 3B (Overriding objective) by Act No 8 of 2018, the issue of substantive justice over technicalities can be resolved without recourse to the Constitution. This position was stressed by Mwambegele, J. (as he then was) in **Bank of Africa (T) Ltd vs. Intersales (T) Ltd and two others**, Commercial Case No 61 of 2015 (Tanzlii) that;

*"Much as it is the practice of courts in this jurisdiction to ignore procedural irregularities which are formal and cause no prejudice to the other party, it is my considered view that the Constitution should be resorted to only in circumstances where there is no clear provision in the law that can cater for a particular situation. In the instant case, the issue under dispute can be resolved*

*without making a resort to the Constitution as the matter, as correctly put by the learned counsel for the plaintiff, was adequately dealt with in the George Humba case (supra). It will therefore be inappropriate to involve the Constitution in the circumstances. The Constitution, as the highest law of our land and grand norm, is "sacred." It should, in my considered view, be resorted to sparingly. The learned counsel in this jurisdiction are asked to jealously guard this principle".*

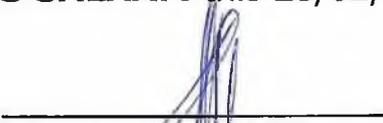
Flowing from above, since the first limb of the objection alone disposes of the appeal, I see no reason to deliberate and determine the second limb of the objection.

In the event, I sustain the first limb of the preliminary objection that the appeal is time-barred, and consequently, I dismiss it with costs.

I order accordingly.

**DATED** at **DAR ES SALAAM** this 28/02/2023.



  
**K. D. MHINA**  
**JUDGE**