

IN THE COURT OF APEPAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUSSA, J.A., LILA, J.A. And MKUYE, J.A.)

CIVIL APPEAL NO. 37 OF 2014

FORTUNATUS NYIGANA PAUL..... APPLICANT

VERSUS

**1. PERMANENT SECRETARY,
MINISTRY OF HOME AFFAIRS } RESPONDENTS
2. ATTORNEY GENERAL }**

**(Appeal from the decision of the High Court of Tanzania
at Dar es Salaam)**

(Rugazia, J.)

dated the 24th day of May, 2011

in

Misc. Civil Cause No. 87 of 2009

JUDGMENT OF THE COURT

27th June & 26th July, 2018

MUSSA, J.A.:

The appellant was an employee of the Government, under the auspices of the first respondent, up until the 22nd October, 2003 when he was dismissed from employment.

A good deal later, on the 26th January, 2006 the appellant instituted Miscellaneous Civil Cause No. 5 of 2006 through which he sought leave to apply for the prerogative orders of certiorari and mandamus so as to vacate

the decision which dismissed him from employment. The application was un- assailed and, consequently, the same was granted (Oriyo, J. as she then was) on the 14th March, 2009.

A month later or so, on the 13th April, 2006 the appellant instituted Miscellaneous Civil Cause No. 27 of 2006 through which he sought the following orders:-

- "1. The decision of the 1st respondent summarily dismissing the applicant from police force be quashed.*
- 2. The 1st respondent be ordered to treat the applicant as if he had never been summarily dismissed by the former vide his letters dated 22/10/2003 and 27/7/2005."*

This application was resisted by a preliminary point of objection which was upheld (Mwarija, J., as he then was) and, accordingly, on the 24th July, 2009 the application was struck out.

In the wake of the foregoing order, on the 8th September, 2009 the appellant instituted another application which was, ironically though,

similarly captioned: "**Miscellaneous Civil Cause No. 27 of 2006.**" In the application, the appellant sought a litany of orders thus:-

- "1. For enlargement of time within which to file Application for prerogative orders of certiorari and mandamus against the first respondent;*
- 2. That leave to file application for prerogative orders of certiorari and mandamus against the first respondent be granted;*
- 3. An order as to costs; and*
- 4. Any other relief(s) that this Honourable court may deem just and / or fit to grant."*

On the 26th November, 2009 the application was called for hearing before Nyerere, J. and, as it were, the same was unopposed by the respondents, whereupon this is what transpired:-

"Applicant: *Madam Judge, I pray if the court pleases, I be allowed to file my application within 14 (fourteen) days.*

Court: *The fact that the learned Principal State Attorney concedes to the Applicants' application, the same is granted as prayed and applicant is ordered to file his application for certiorari and mandamus within 14 from today.*

Order: *(1) Application granted and Applicant to file*

*application for certiorari and mandamus
14 (fourteen) days from today.*

(2) Costs to follow the events.

Signed

A.C. Nyerere

Judge

26/11/2009."

Thereafter, it is beyond question that the appellant did not file the application within the 14 days prescribed by the court up until the 29th December, 2009 when he formally filed it. In the immediate aftermath, the respondents greeted the application with two preliminary points of objection:-

- "1. The application is time barred contrary to court
Order dated 26th November, 2009; and*
- 2. The affidavit is defective for containing
argumentative statements contrary to Order XIX
Rule 3 of the Civil Procedure Code."*

Having heard either side on the foregoing preliminary points of objection, the presiding Judge (Rugazia, J.) upheld the first preliminary point of objection and, accordingly, dismissed the application with costs. As

regards the second point of objection, the Judge said he would have struck out the application on that ground, that is, had he not held the view that the same was time barred.

The appellant was aggrieved and, presently, he seeks to impugn the decision of the High Court upon two grounds, namely:-

- "1. That the honourable court erred in law and in fact when it held that the appellants' Application for certiorari and mandamus was time barred and dismissed the Application without considering the time spent by the Appellant in securing the order which granted him time to file the Application.*
- 2. That the honourable court erred in law when it held that it would have struck out the Application out for being supported by affidavit which is defective for containing argumentative paragraphs without considering the remaining paragraphs which are not offensive."*

At the hearing before us, the appellant was fending for himself, unrepresented, whereas the respondents had the services of Mr. Killy Mwitasi, learned Senior State Attorney. As it turned out, the appellant fully

adopted the written submissions which he had earlier filed in support of the appeal.

Elaborating his first ground of appeal, the appellant contended that soon after the delivery of the High Court decision on the 26th November, 2009 he presented the required application on the 9th December, 2009 but the registry officer refused to acknowledge it for the reason that it was not in the company of the November 26th High Court Order. He, accordingly, retreated to seek the Order which was, eventually, availed to him on the 28th December, 2009. Having obtained the Order he filed the application giving rise to this appeal on the 29th December, 2009.

Thus, in the light of the foregoing backdrop, the appellant further contends that his inability to file the application within the time prescribed by the November 26th Order, was on account of the fact that he was not availed with the requisite order in time. The appellant argues that his delay is permissible under section 19(2) of the Law of Limitation Act, Chapter 89 of the Revised Edition 2002, which stipulates:-

" In computing the period of limitation prescribed for an appeal, an application for

*leave to appeal, or an application for review of judgment, the day on which the judgment complained of was delivered, and the period of time requisite for obtaining **a copy of the decree or order appealed from** or sought to be reviewed, shall be excluded."*

[Emphasis supplied.]

Thus, in the mind of the appellant; having excluded the time he expended in wait for the November 26th Order and, given the fact that he filed the impugned the application on the 29th December 2009, that is, almost immediately after being availed with the order; the impugned application was filed in time.

Coming to the second ground of appeal, the appellant, in the first place, refuted the respondent's contention that the affidavit in support of the impugned application was defective for being comprised of argumentative paragraphs. In any event, he added, even assuming such was the, case, the alleged infractions are inconsequential and thus, it was still open for the trial court to overlook or expunge the offensive paragraphs and proceed to

act on the substantive paragraphs. To buttress his contention, the applicant referred us to the unreported Civil Reference No. 15 of 2007 and 3 of 2002.

Phatom Modern Transport (1985) Ltd Vs. D. T. Dobie (Tanzania) Ltd.

In reply, Mr. Mwitasi submitted that the appellant's plea to the effect that he delayed the filing of the application on account of being constrained to wait the delivery of the November 26th Order, was, at best, unsubstantiated. The irony is, he contended, the appellant neither secured the affidavit of the court clerk to confirm that detail, nor did he apply to the court to avail him of that order. The learned Senior State Attorney forcefully urged that the only viable option open to the appellant was to seek an extension from the trial court within which to file the application beyond the 14 days prescribed by the court.

As regards the second ground of appeal, Mr. Mwitasi reminded us that in dismissing the impugned application, the Judge did not act on that ground, rather, he simply stated, *obiter*, that he would have struck out the application on that ground, that is, had he not formed the view that the application was time barred. In the premises, the learned Senior State Attorney reiterated his plea for the dismissal of the appeal.

Having heard the submissions from either side, we think that the issues of contention are easily disposable to which we need not be detained a bit. To begin with, from the factual setting, it is beyond question that having heard the appellant on the application for leave to file the prerogative orders, the High Court was obliged in consequences of which he was ordered to lodge the requisite application within 14 days thereof. Equally commonplace, is the fact that the appellant did not file the application within the 14 days prescribed by the court; rather, he lodged it much later beyond the 14 days which were prescribed by the court. The issue which present itself is whether or not the delay was permissible under section 19(2) of chapter 89 of the Revised Laws.

To express at once, the answer is a resolute "No" inasmuch as section 19(2) exclusively contemplates periods of limitation prescribed by that particular Act with respect for lodging an appeal, an application for leave to appeal, or an application for review of judgment. Thus, the time which is excluded therein only relate to a copy of the decree or order sought to be appealed from as distinguished from the November 26th Order which merely granted leave to lodge an application for prerogative Orders. Furthermore, the provisions of Chapter 89 relate to the periods of limitation prescribed by

the Act and other written laws, whereas the prescription under our consideration resulted from a court order.

That being the position, we entirely subscribe to the submission of Mr. Mwitasi who advised that in the wake of the belated filing of the application, the viable option open to the appellant was not to lodge the same in defiance to the Court's Order. More appropriately, he should have sought enlargement of the period of limitation upon the invocation of section 93 of the Civil Procedure Code, Chapter 33 of the Revised Edition 2002 which provides thus:-

"Where any period is fixed or granted by the court for the doing of any act prescribed by this code, the court may, it is discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired."

That would conclude our negative determination of the first ground of appeal. We need not decide this matter more than is necessary for its disposal and, for that reason, we need not venture into the second ground which seeks to criticize the trial Judge for an *obiter* remark.

All said, we so find this appeal to be devoid of any merits. It is, accordingly, wholly dismissed but, being a matter which arose from an employment dispute, we give no order as to costs.


DATED at DAR ES SALAAM this 6th day of July, 2018.

K. M. MUSSA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

I certify that this is a true copy of the original.


B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL