

IN THE HIGH COURT OF TANZANIA

(AT DAR ES SALAAM)

MISC CRIMINAL APPLICATION NUMBER 44 of 2011

ISSA JUMA @ ISSAYA JUMA.....APPLICANT

VS

REPUBLIC.....RESPONDENT

RULING

Date of last Order: 21-11-2011

Date of Judgment: 24-11-2011

JUMA, J.:

The Applicant ISSA JUMA @ ISSAYA JUMA brought this application by a Chamber Summons which he filed under section 14-(1) of the **Law of Limitation Act, Cap 89**. Apart from seeking more time to file his notice expressing his intention to appeal, the Applicant would also like this Court to allow him to file his petition of appeal out of the prescribed time against the Judgment and subsequent prison sentence imposed by the Resident Magistrate's Court of Dar es Salaam at Kivukoni in **Criminal Case No. 53 of 2008- Fimbo-RM**. The judgment of the learned trial Resident Magistrate was delivered on 14th January 2010 whereas this application was filed 18 months later on 22nd July 2011. This application is supported by an affidavit that was affirmed by Mr. Abdallah Gonzi, a learned Advocate.

Through a Notice of Preliminary Objection and a Counter Affidavit that was sworn to by Sunday Melkior Hyera a learned State Attorney, the Respondent Republic opposes this application on two grounds:

1. First, that the application is incompetent for non-citation of the relevant law.
2. Second, that this Court has been improperly moved as the law the applicant cited in his Chamber Summons (i.e. the Law of Limitation Act, Cap. 89) is inapplicable in criminal matters.

At the hearing of this application on 21st November 2011, Mr. Gonzi the learned Advocate represented the applicant whereas the Respondent was represented by Mr. Mkakatu, the learned State Attorney. The learned State Attorney submitted that section 14 (1) of the **Law of Limitation Act** read together with section 2 which define “appeals” and “applications” emphasize that the **Law of Limitation Act** applies to civil matters only. The relevant provisions state:

***14.-(1)** Notwithstanding the provisions of this Act, the court may, for any reasonable or sufficient cause, extend the period of limitation for the institution of an appeal or an application, other than an application for the execution of a decree, and an application for such extension may be made either before or after the expiry of the period of limitation prescribed for such appeal or application.*

***2.-(1)** In this Act unless the context otherwise requires—*

“...:

“appeal” means an appeal against a decree, order, award, judgment or decision passed, delivered or made in a proceeding of a civil nature;

"application" means an application made to a court, which is of, or in relation to any proceeding of, a civil nature;

According to the learned State Attorney, since the application before this Court is criminal, the Applicant should instead have employed section 361 of the **Criminal Procedure Act, Cap. 20 (CPA)**. Mr. Mkakatu referred me to the Court of Appeal decision in **Fadhili Yahaya Vs. DPP Criminal Application No. 1 of 2008** where Court of Appeal cited with approval a restatement of law contained in its earlier decision in **China Henan International Cooperation Group vs. Salvand K.A. Rwegasira, Civil Reference No. 22 of 2005**:

"It now settled law that wrong citation of a provision of the law or rule under which the application is made renders the application incompetent."

The learned State Attorney concluded his submission by inviting this Court to seek the guidance of the settled position of law by striking out the application that was filed under a wrong provision of the law.

Although conceding that the application was brought under a wrong provision of the law, Mr. Gonzi maintained that this error should not lead to striking out of this application. The learned Advocate advanced three reasons to exhort this Court to acquiesce the wrong citation in the spirit of advancement of substantive justice. The first reason according to Mr. Gonzi is that courts; when dealing with criminal cases endeavour to

attain substantive justice by disregarding minor errors. Mr. Gonzi referred to the Court of Appeal decision in **Republic vs. Yona Kaponda and 9 Others 1985 TLR 84** where Makame, JA (as he then was) disregarded an error in an affidavit to attain substantive justice.

As his second reason why this Court should disregard citation of inapplicable provision to move this Court Mr. Gonzi cited Article 107A (2) (e) of the **Constitution of the United Republic of Tanzania** which cures the error of wrong citation. For his third reason, the learned Advocate drew my attention to section 388 of the **CPA** as a provision that can cure an irregularity of wrong citation.

From the submissions of the two learned Counsel, I should perhaps begin by pointing out that wrong citation of law applicable to civil matters instead citation of law applicable to criminal matters is not a minor error as portrayed by the learned Advocate for the Applicant. Since the **CPA** through its section 361 has prescribed for criminal matters its own specific statutory limitation period of ten days for giving notice of intention to appeal, a person seeking to appeal cannot be allowed to employ other general laws which may provide also for limitation period. An Applicant contending that he can show a good cause to enable this Court to exercise its discretion to admit his appeal out of the ten days period prescribed for filing his Notice of Intention to Appeal must cite section 361-(2) of the **CPA**. Section 14-(1) of the **Law of Limitation Act** which the Applicant has cited does not apply in situations where specific limitation periods have been prescribed by law. And in any case I am in

full agreement with Mr. Mkakatu in his submission that the **Law of Limitation Act** governs limitation of actions in civil proceedings but not in criminal proceedings.

Having restated the law, I should address myself to the submissions which the learned Advocate has advanced to save this application from being struck out. Mr. Gonzi has canvassed article 107A (2) (e) of the **Constitution** and section 388 of **CPA** to cure the defect of moving this Court under inapplicable section 14-(1) of the **Law of Limitation Act**. I do not with due respect agree with Mr. Gonzi the defect of citing a wrong provision of the law is curable. Once section 361-(2) of **CPA** has specifically provided how for good cause, courts can admit an appeal after the period of limitation has elapsed; applicants have no liberty of wondering about and seek a cure under section 388 of **CPA** which deals with when finding or sentence passed by a court may be reversible by reason of an error.

Even article 107A (2) (e) of the **Constitution** cannot be resorted to replace provisions of section 361-(2) of **CPA** which should have been cited to seek an extension of time to file a notice of intention to appeal. The Court of Appeal in **Ahmed Mabrouk and Najma Hassanali Kanji Vs. Rafiki Hawa Mohamed Sadik, CIVIL REFERENCE No. 20 of 2005 (Unreported) DSM** noted that Article 107A (2) (e) of the **Constitution** directs that in dealing with criminal or civil cases the courts should administer substantive justice without undue regard to technicalities. But the scope of this provision of the Constitution does not extend to

disregarding specific directions given by statutory provisions. The Court of Appeal elaborated the scope of Article 107A (2) (e) by reiterating a stand it earlier took in **Zuberi Musa v Shinyanga Town Council, Civil Application No. 100 of 2004 (unreported)**: that:-

*"...article 107 A (2) (e) is so couched that in itself it is both conclusive and exclusive of any opposite interpretation. A purposive interpretation makes it plain that **it should be taken as a guideline for court action and not as an iron clad rule which bars the courts from taking cognizance of salutary rules of procedure which when properly employed help to enhance the quality of justice. It recognizes the importance of such rules in the orderly and predictable administration of justice.** The courts are enjoined by it to administer justice according to law only without being unduly constrained by rules of procedure and/or technical requirements."*

In other words, as a guide, Article 107A (2) (e) of the **Constitution** does not take away the duty of courts take cognizance of clear statutory provisions like section 361-(2) of **CPA**. In **Ahmed Mabrouk and Najma Hassanali Kanji (supra)** citing its other decision in **1. Loswaki Village Council 2. Paresoi Ole Shuaka v Shibeshi Abebe, Civil Application No. 23 of 1997 (unreported)**, the Court of Appeal insisted that the requirements of the law (like requirements under section 361 of **CPA**) must be followed with diligence:

"Those who seek the aid of the law by instituting proceedings in a court of justice must

file such proceedings within the period prescribed by law, or where no such period is prescribed, within a reasonable time... Those who seek the protection of the law in a court of justice must demonstrate diligence. - 1. Loswaki Village Council 2. Paresoi Ole Shuaka v Shibeshi Abebe (supra).

With due respect to Mr. Gonzi, there is no technicalities in interpretation of section 14 (1) of the **Law of Limitation Act** which exclusively prescribes limitation periods for civil cases and civil applications only. There is similarly no technicality in the interpretations of section 361-(2) of **CPA** which is a special provision governing application of extension of time to lodge a notice of intention to appeal in criminal matters. What was expected of the applicant was diligence in choosing proper provision to move this Court. And that proper provision was section 361 of CPA as correctly pointed out by Mr. Mkakatu, the learned State Attorney

From the foregoing, I see no reason to depart from the settled position of law that if a party fails to cite a specific provision of the law upon which his/her application is based and/or cites a wrong provision of the law the matter concerned becomes incompetent as the court will not have been properly moved. The Applicant having failed to properly move this court by appropriate provision of the law this **Misc Criminal**

Application Number 44 of 2011 is hereby struck out.



**I.H. Juma,
JUDGE
24-11-2011**

Delivered in presence of the Applicant and Mr. Mkakatu (State Attorney)
for the Respondent.



**I.H. Juma
JUDGE
24-11-2011**