IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 123 OF 2021

(Arising from Civil Case No. 227 of 2017 in the Resident Magistrate Court of Dar es Salaam at Kisutu before Hon. H.A. Shaidi, PRM)

GONDO ENTERPRISES ---------- APPLICANT

VERSUS

ASHA SAIDI AWADH----------1st RESPONDENT

CHAI AUCTION MART----------2nd RESPONDENT

RULING

Date of Last Order *04/10/2021*
Date of Ruling: *15/11/2021*

ITEMBA, J;

In this matter, the above-named applicant has lodged an application for an extension of time within which to file an appeal out of time. The application arises from the decision rendered by the Resident Magistrate Court of Dar es Salaam at Kisutu in **Civil Case No. 227 of 2017**. In respect of the said suit which this instant application emanates, the applicant was the plaintiff and sued both respondents for unlawful invasion to her business premises and unlawful possession of cash and various hardware materials used to be traded by the plaintiff. Among other things, the applicant claimed for payment of **Tshs. 51,**

780,000/= for the hardware materials alleged to have been unlawfully taken by the respondents, return of **Tshs. 45,632,000/=** alleged to have been stolen by the respondents from the applicant's premises and general damages of not less than **Tshs. 50,000,000/=**. The trial Court delivered the judgement to the effect that it had no jurisdiction to determine the said suit and proceeded to dismiss the same.

Upon being aggrieved and in the course of initiating the appeal, the applicant has lodged this application under section 14 (1) and 19 (1) and (2) of the Law of Limitation Act [Cap 89 R.E: 2019].The application is supported with the affidavit sworn by the applicants' learned advocate, one, Elisa Abel Msuya and in opposition thereof there is a Counter affidavit sworn by the 1st respondent's learned advocate, John James Ismail.

Under paragraph 6.0 and 7.0 of the affidavit in support of the application, it has been averred that the Judgement and Decree were delivered on 25th November, 2020 and the applicant on the very same date requested to be supplied with the certified copies of judgment, decree, proceedings and exhibits tendered in court for purpose of appeal vide a letter with reference **TMA/09/Letter-4/IRM/20.** The said letter has been attached as **annexure "TMA-2"** of the affidavit.

The 1st respondent on the other hand has conceded to all these facts under paragraph 5 of the Counter affidavit.

Again, under paragraph 8.0, 9.0 and 10.0 of the affidavit in support of the application, it has been averred that the applicant was supplied with the copies of Judgement and on 17th February, 2021. It has been further averred that the appeal was to be filed within 90 days counting from the date when the decision was rendered, that to say on

25th November, 2020 as the deponent believes that, the time to be supplied with a copy of judgement and decree is not automatically excluded but only when leave is sought and granted.

The respondent on the other side did not dispute the applicant's assertion that, the time to be supplied with a copy of judgement and decree is not automatically excluded but only when leave is sought by the applicant and granted by the Court. This can be evidenced under paragraph 8 of the 1st respondent's counter affidavit in which the deponent has "noted" the contents of the respective paragraph of the applicant's affidavit. [see the case of **The Hellenic Foundation of Tanzania Ltd t/a ST. Constantine's International School vs. Commissioner General, TRA,** Civil Appeal No. 255 of 2020, CAT at Dodoma (Unreported) from which the Apex Court had position that the expression "noted" suggests that the averments are not disputed but save where there are other indications which creates a different interpretation. I am also mindful of the principle that parties are bound by their own pleadings as reiterated in many cases. [See for instance the case **Pauline Samson Ndawavya vs. Theresia Thomas Madaha**, Civil Appeal No. 45 of 2017 (Unreported)]. In the case at hand, I do not see any deviation but rather a consensus of both applicant's and respondent's counsels that exclusion of time spent to collect copies of judgment and decree is not automatically but it is upon the applicant making an application after realising that the time has lapsed.

Under those parameters, when the matter came for hearing, Ms. Mchau, learned advocate for the applicant submitted to effect that the trial Court decision was rendered on 25th November, 2020 and upon her request to be supplied with the copies of the judgment and decree, she

was then supplied with the same on 17th February 2021. The learned sister contended that from the date of decision to 17th February 2021, only 10 days were remaining for her to file an appeal. Moreover, the fact that the applicant is the is the Ltd Company and one of the director was in Moshi at a time, his authorization for her to handle the matter was only procured on 5th March 2021, hence she decided to lodge the instant application on 16th March 2021. It was Ms. Mchau contention that the applicant was duty bound to make this application of extension of time since the exclusion of time spent to procure the relevant documents for purpose of appeal is not automatically but upon application to the Court. To bolster her preposition, she cited the case of **Kenya Airways Ltd vs. Nyanda Mgwesa Nyanda,** Civil Appeal No. 23 of 2012, HCT at Dar es Salaam (Unreported).

In rebuttal, Mr. James for the respondent did not contest on the notion that the applicant's necessity to apply for extension of time on the similar reason that exclusion of time spent to obtain necessary documents is not automatically. The learned brother only contested on the grounds for delay given which for him were not sufficient enough to warrant extension. From his submission's point of view, he believed that the applicant was out of time at the time when the instant application was lodged.

Upon realising the above consensus notion by the learned counsels, I took both courtesy and caution to pause here and ascertain as to the competency of this application, if at all the application is maintainable before even going to the merit of the application. This move was in parallel with the principle of ***abundance cautela non nocet*** which entails that there is no harm done by great caution.

In my understanding and appreciation of the record and the law, it is apparent in the records that the judgement of the trial Court was delivered on 25th November 2020. Ms. Mchau, for the applicant wrote a letter to the trial Court applying for certified copies of judgment, decree, proceedings and tendered exhibits with a view to preferring an appeal to the High Court. The letter was received by the trial Court on the very same date of the decision that to say on 25th November, 2020. Indeed, it has not been disputed by the respondents that the applicant was supplied with the copies of judgment and decree on 17th February, 2021. This is specifically under paragraph 8.0 in the affidavit deponed by Ms. Mchau in support of the application and paragraph 6 of the Counter affidavit deponed by the 1st respondent's counsel.

In this case, with reference to appeals from the Resident Magistrate's Courts, there is no dispute that under **item 1** of **Part II** of the **Schedule** to the **Law of Limitation Act,** [Cap 89 R.E: 2019], the applicant ought to have filed an appeal within the period of ninety (90) days. The provisions of **section 19 (2)** of the Law of Limitation Act are very clear that the period spent by a person on obtaining the copy of the decree is excluded when computing the period of limitation.

In ***ex tenso*** the provision reads;

> *(2) 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 is added]

In the decision by the Court of Appeal of Tanzania of **Registered Trustees of the Marian Faith Healing Center @ Wanamaombi vs. The Registered Trustees of the Catholic Church Sumbawanga Diocese**, Civil Appeal No. 64 of 2007 (Unreported); the High Court of Tanzania at Sumbawanga had dismissed the appeal on the ground that it was time barred, however the Court of Appeal upon perusal to the records it ended up quashing such a decision on the reason that when the appeal was lodged before the High Court, it was timely filed as the period of obtaining a copy of decree ought to have been excluded. The **Court** held that;

> *"...the period between 2/5/2003 and 15/12/2003 when the appellants eventually obtained a copy of the decree ought to have been excluded in computing time."*

In the recent decision by the Court of Appeal of **Valerie Mcgivern vs. Salim Farkrudin Balal,** Civil Appeal No. 386 of 2019, CAT at Tanga, (Unreported), in the similar circumstances of this matter at hand, upon appreciating the decision of **Registered Trustees of the Marian Faith Healing Center @ Wanamaombi** *(supra)*, it had this to say at page 11 of the typed Judgment, that;

> *"...Suffice to say, section 19 (2) of LLA and the holding of the decision cited above reinforce the principle that* ***computation of the period of limitation prescribed for an appeal, is reckoned from the day on which the impugned judgment is pronounced the appellants obtains a copy of decree or order appealed by excluding the time spent in obtaining such decree or***

order. *However, it must be understood that section 19 (2) of LLA can only apply* ***if the intended appellant made a written request for the supply of the requisite copies for the purpose of an appeal."*** [Emphasis is added]

From the above position, it is undisputed fact as evidenced under paragraph 7.0 of the affidavit and paragraph 5 of the Counter affidavit that the applicant did write a letter vide it's advocate to be supplied with the court of records among them being a decree for purpose of instituting an appeal. I believe, applicability of section 19 (2) of the Law of Limitation Act, is practicable and possible under these premises. Nevertheless, neither the statute nor the case law by the Apex Court requires the applicant who has adhered to the requirement of requesting the copies of the relevant documents for appeal to apply again for extension of time without considering excluding the time spent in procuring the said court's records. In simple terms, the exclusion of time is automatic. It is not necessary for applicant to apply to the Court to make exclusion as contented by both learned counsels herein. From this point I do not subscribe to the consensus notion by the learned counsels herein.

For jurisprudence purpose, the case of **Kenya Airways Ltd vs. Nyanda Mgwesa Nyanda**, *(supra)* cited by Ms. Mchau, which had a position that the exclusion of the period could only be done by the Court upon application of extension of time, is no longer good law. The Apex Court of the land both in **Registered Trustees of the Marian Faith Healing Center @ Wanamaombi** *(Supra)* and **Valerie Mcgivern vs. Salim Farkrudin Balal** *(Supra)* have resorted to the effect that the exclusion of time is automatic, which I fully subscribe to that position.

In the view of what I have endeavoured above, and in the light of section 19 (2) *(supra)*, it follows that, the period between 25th November 2021 when the judgment was pronounced and 17th February 2021 when the applicant eventually obtained a copy of decree, ought to be excluded in computing time. The period of limitation to institute an appeal, that is to say 90 days started to run from 17th February 2021. As it transpires from the records, this application for extension of time by the applicant was lodged on 16th March 2021 while the applicant still had an ample time of almost 60 days to lodge an appeal. On 10th March 2021, the applicant still was "*home and dry*", hence she was still within time to lodge her appeal up to 14th June, 2021. It is now prudent to state at this juncture that this application was lodged and got recognizance of this Court while it was totally premature.

For that reason, this application is misconceived and non-maintainable, henceforth it is hereby struck out in it's entirely. Given the circumstances that the determination of this application has to a large extent been a result of my own effort, each party bear its own costs.

It is ordered accordingly.

L. J. Itemba

JUDGE

15/11/2021

Rights of the parties have been explained.

L. J. Itemba

JUDGE

15/11/2021

Ruling delivered under my hand and seal of the court in chambers in presence of Ms. Irene Mchau and Ms Ndehorio Ndesamburo advocates for the applicant and respondent respectively and Ms E. Masilamba ,RMA

L. J. Itemba

JUDGE

15/11/2021