

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
DISTRICT REGISTRY OF MBEYA
AT MBEYA
PC. CIVIL APPEAL NO. 11 OF 2019.

**(From Civil Application No. 11 of 2018, in the District Court of
Mbozi District, at Vwawa, Originating in Civil Case No. 54 of 2018,
in the Primary Court of Mbozi District, at Vwawa-Urban).**

JULIAS YAPWANA MWAPULE.....APPELANT

VERSUS

SELFINA CO. LTD (SAID HAMIS)..... RESPONDENT

ORDER

11/11/2020 & 10/02/2021.

Utamwa, J.

This is a ruling on a preliminary objection (PO) raised by the respondent, SELFINA CO. LTD (SAID HAMIS), against the appeal filed by the appellant, JULIAS YAPWANA MWAPULE. The PO was heard by way of written submissions in the absence of the appellant.

Before going far, it is incumbent to narrate, albeit briefly, the background of this matter. The same goes thus: the appellant lodged this appeal against a ruling (the impugned ruling) of the District Court of Mbozi

District, at Vwawa (the District Court), in Civil Application No. 11 of 2018. In that application, the appellant herein had moved the District Court for an extension of time to file an appeal before it (the same District Court) against a decision of the Primary Court of Mbozi District, at Urban (the Primary Court) in Civil Case No. 54 of 2018. In the impugned ruling, the District Court struck out the application for being incurably defective due to some reasons which are irrelevant in this ruling.

Now, the appellant is appealing against the impugned ruling preferring three grounds of appeal. I will not however, reproduce them since they are not so necessary in this ruling. The respondent in the appeal at hand, objected the appeal. She also lodged the PO mentioned above through her learned counsel, one Ms. Beatrice Aloyce Rukamilwa. The PO stood on a single limb that the appeal was time barred.

Upon lodging this appeal on the 18th March, 2019, the appellant disappeared in thin air. The hearing of the appeal was adjourned four times, but the appellant neither appeared in court nor sent a notice to the court showing cause why the same had to be adjourned further. Being fed up with the conduct of the appellant, on 20th May, 2020 (which was more than a year from the date when the appeal was lodged in this court), the learned counsel for the respondent, moved this court to determine the PO without the appellant following her unfounded disappearance. She did so through another counsel one, Ms. Cilvia Mwalwisi. The court granted the prayer made by the respondent's counsel on the reasons recorded in the order dated 20th May, 2020. It directed the counsel to argue the PO by way of written submissions.

The reasons for granting the prayer by the respondent's counsel for the determining the PO in the absence of the appellant were essentially these; that, the appellant had neither appeared in court nor sent notice to the court on the reasons for adjourning the appeal since when he had lodged the appeal. The appellant was also delaying the appeal unnecessarily. He was thus, taken to have lost interests in the appeal. The court also granted the respondent's prayer because, in law, cases are adjourned for good reasons only, but such good reasons were lacking in the appeal at hand. This course of granting the respondent's prayer was also aimed at avoiding further delays of the appeal.

In fact, this court still firmly believes that it has rightly taken that course in proceeding with the PO without the appellant. This is because, though it was the appellant who had filed the appeal, he does not enjoy any right to delay it by suspending the determination of the PO raised by the respondent. He cannot cause the respondent incur unnecessary costs for attending this court for that purpose while he (appellant) is in his unknown hideouts. This view is based on the principle of overriding objective which was recently underscored in our laws vide the Written Laws (Miscellaneous Amendments Act) (No. 3) Act, No. 8 of 2018 (Act No. 8 of 2018). The doctrine/principle essentially requires courts to deal with cases justly, speedily, to have regard to substantive justice and to avoid unnecessary costs of cases to parties; see section 6 of Act No. 8 of 2018 that amended the Civil Procedure Code, Cap. 33 R. E. 2019 (the CPC). The amendments added new sections 3A and 3B to the statute. The principle was also underscored by the CAT in the case of **Yakobo Magoiga**

Kichere v. Peninah Yusuph, Civil Appeal No. 55 of 2017, CAT at Mwanza (unreported) and its many other decisions.

Though appeals of this nature are not guided by the CPC mentioned above, the principle of overriding objective underscored under the provisions of such statute are basically intended to promote fair trials. The principle can thus, apply to this appeal for the same purposes of promoting fair trial. This view is based on the following grounds: that the right to fair trial is a fundamental right for parties to court proceedings as enshrined under article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977, Cap. 2 R. E. 2002. These provisions do not discriminate matters guided under the MCA from those guided by the CPC as far as promoting fair trials is concerned.

In my view, therefore, by virtue of the principle of overriding objective, courts are enjoined to give stern orders against parties to court proceedings who offend that principle the way the appellant herein acted. The courts should thus, exercise their inherent powers, the way I acted in determining the PO in the absence of the appellant, so as to bring the proceedings to an end and against the defaulting party. In law, court proceedings have to come to an end as quick as possible unless, there are pressing reasons to act otherwise, which said reasons do not exist in the matter at hand as I hinted earlier. The above demonstrated conduct of the appellant was not thus, incompatible with the requirements of the principle of overriding objective.

Now, upon this court granting the respondent's prayer for disposing of the PO in the absence of the appellant, the learned counsel for the

respondent accordingly lodged her written submissions supporting the PO, hence this ruling.

I will thus, proceed to consider the PO in the manner and basing on the principles highlighted above. In her written submissions supporting the PO, the learned counsel for the respondent basically contended that, the time limitation for filing appeals of this nature to this court is 30 days computed from the date of the impugned decision. He supported this legal position by section 25(1)(b) of the Magistrates' Courts Act, Cap. 11 R. E. 2002 (Now R. E. 11), henceforth the MCA. The learned counsel further submitted that, in the matter at hand the impugned ruling was made on the 9th January, 2019, but the appellant filed the appeal at hand on the said 18th March, 2019. This was after a lapse of 69 days. The appeal was thus, file out of the 30 days prescribed by the provisions of the MCA just cited above. The appellant did not however, firstly seek and obtain extension of time from this court to file that appeal out of time under section 14 (1) of the Law of Limitation Act, Cap. 89 R. E. 2002 (Now R. E. 2019), hereinafter called the LLA.

The learned counsel further argued that, the remedy for this time barred appeal is to dismiss it as guided under section 3(1) of the LLA. He supported the contention by the decision in the case of **Seif Chande Manyanga v. Majid Hussein Teikwa, Land Appeal No. 149 of 2018, High Court of Tanzania (HCT), at Date s Salaam** (unreported). The learned counsel also submitted that, upon this court dismissing this appeal, the appellant will have no right to refile the same in this court. He supported this particular argument by the decision of the Court of Appeal

of Tanzania (CAT) in the case of **Mohamed Nassoro Mbulu v. Tatu Ally Nkumba, Civil Application No. 257 of 2017, HCT at Dar es Salaam** (Unreported) that followed a decision of the CAT in **East African Development Bank v. Blue Line Enterprises, Civil Application No. 47 of 2010, CAT at Dar es Salaam** (Unreported).

I have considered the unopposed arguments by the learned counsel for the respondent, the record of this matter and the law. Before I proceed to consider the merits or otherwise of the PO, I find it necessary to clearly remark that, though the appellant abandoned his appeal as demonstrated above, in spite of the fact that the PO has been argued in his absence, this court will still decide this matter according to the law, the absence of the appellant notwithstanding. This follows the fact that, it has been our firm and trite judicial principle that, courts of law are enjoined to decide cases according to law and the constitution. This is indeed the very spirit underscored under article 107B of the Constitution of the United Republic of Tanzania, 1977, Cap. 2 R. E. 2002. The principle was also underscored in the case of **John Magendo V. N.E. Govan (1973) LRT n. 60**. It follows therefore that, even where parties to court proceedings do not make effective arguments in addressing the issues before the court, it will still decide the issues according to the law, and not according to the passive reaction of the parties.

Owing to the above reasons, the issue before me in the present matter is whether or not the appeal at hand is time barred. In my view, the arguments advanced by the learned counsel for the respondent carry sense. This view is based on the following reasons; in the first place, as

rightly argued by the respondent's counsel, section 25(1)(b) of the MCA guides that, appeals of this nature are filed before this court within 30 days from the date of the impugned decision. It is also clear from the record that the impugned ruling was made on the 9th January, 2019, but this appeal was filed in this court on the 18th March, 2019 (which was more than 30 days from the date of the impugned ruling). Moreover, the record does not indicate in any way, that the appellant had applied and obtained extension of time to file this appeal after the expiry of the 30 days prescribed by law. Now, in the absence of any contradictory explanation from the appellant following his deliberate non-appearance, this court is bound to believe that the appeal was filed out of time.

Indeed, it is the general law that, an appellant who delays to file an appeal applies for extension of time to do so if he/she has good cause. This was also the emphasis of the CAT in the case of **East African Development Bank v. Blue Line Enterprises, Civil Appeal No. 101 of 2009, CAT at Dar es Salaam** (Unreported). It must be noted that, this case is different from the one cited by the respondent's counsel (supra) though the parties are the same and both of them were decided by the CAT. Now, for purposes of differentiating the two cases the one cited by the respondent's counsel (supra) will hereinafter be called the **EADB-1 case** and the one just cited above as the **EADB-2 case**. In fact, the provisions of the MCA cited supra also guides that, this court can extend time to a belated appellant in appeals of this nature.

It follows thus, that, since the appellant in the case at hand did not seek for and obtain any extension of time before filing the appeal at hand

and as required by the law, the hands of this court are tied by the law and I must therefore, answer the issue posed above affirmatively in favour of the respondent. I consequently answer the issue positively that, the appeal at hand is time barred.

The sub-issue at this juncture is this; which is the legal remedy for this time barred appeal? Indeed, the MCA which guides appeals of this nature (originating from primary courts) does not provide for any remedy. Resort must thus, be made to the LLA. Section 3(1) of that Act guides, as rightly argued by the learned counsel for the respondent, that, an appeal or application filed out of time must be dismissed. Again, the CAT in the **EADB-2 case** (and not in the **EADB-1 case** as contended by the respondent's counsel), underscored that, the remedy under section 3(1) of the LLA is to dismiss the matter which is filed out of time, and the appellant cannot seek extension of time after such dismissal. The course available for him/her is only to seek for a review before the same dismissal court, or to appeal or to apply for revision before a higher court.

Owing to the above reasons, I agree with the decision of this court in the **Mohamed case** (supra). Indeed, this case cited the **EADB-1 case** as an authority for the position of the law highlighted above. However, this was, in my view, done inadvertently. In my view, my brethren-Judge of this court who decided the **Mohamed case** had intended to cite the **EADB-2 Case**, but unfortunately and unintentionally he cited the **EADB-1 case**. This vies is based on the fact that, it is the **EADB-2 Case** (not the **EADB-1 Case**) which underlined that stance of the law highlighted by the said Judge in the **Mohamed case**. However, I distinguish the **Seif case**

(cited by the respondent's counsel herein above) from the matter at hand since it did not dismiss the matter before it which was time-barred. It only struck it out.

Actually, I would have opted to the dismissal of the appeal for want of prosecution. Nevertheless, I will not take that course on the ground that, in law and according to the practice pertaining in our jurisdiction, such remedy is available to a competent appeal and where there is no PO challenging its competence for any reason including time limitation.

Having observed as above, I dismiss the appeal at hand with costs for being time barred as prayed by the respondent's counsel. It is thus, upon the appellant to follow the law highlighted above in case he still wishes to pursue his rights (if any). It is so ordered.



J.H.K. UTAMWA
JUDGE

10/02/2021.

10/02/2021.

CORAM; JHK. Utamwa, J.

Appellant: absent.

Respondent: Mr. Alexander Dalu (accountant for the respondent).

BC; Mr. Patrick, RMA.

Court: Order pronounced in the presence of Mr. Alexander Dalu (accountant for the respondent), in court, this 10th February, 2021.

JHK. UTAMWA.
JUDGE.

10/02/2021.