

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MWANZA DISTRICT REGISTRY

AT MWANZA

MISCELLANEOUS CIVIL APPLICATION No. 73 OF 2021

CLEMENT MUSSA NSIYANTEMU.....APPLICANT

VERSUS

RASHID SADICK KUHANZIBWA.....RESPONDENT

**(Arising from the decision of the High Court, Hon. Rumanyika, J, in Civil
Application No. 04 of 2021)**

RULING

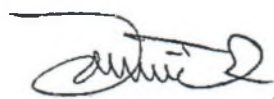
30th September & 29th October, 2021.

TIGANGA, J.

This ruling is in respect of the preliminary objection raised by the counsel for the respondent in which he is contesting the competence of the application for leave by the applicant to appeal to the Court of Appeal of Tanzania, the substance of which is to the effect that;

- i. The applicant's application is time barred contrary to Rule 45 of the Tanzania Court of Appeal Rules, G.N No. 368 of 2009 as amended by G.N No. 362 of 2017.

Upon the said objection being raised, counsel for the applicant made a prayer that the arguments in respect of the preliminary objection be done by way of written submissions. The counsel for the



respondent supported the prayer thus it was ordered as prayed and both parties acted according to the schedule given for filing written submissions.

The applicant was represented by the learned counsel Ms. Martha whereas the respondent was represented by Mr. Liberatus John, also learned counsel.

In support of the preliminary objection, Mr. Liberatus John, counsel for the respondent, citing the provisions of rule 45(a) of the Tanzania Court of Appeal Rules, submitted that the application by the applicant is time barred in contravention with the said rule. He emphasized that the time allowed to file an application for leave to appeal to the Court of Appeal is thirty days from the date of the pronouncement of the impugned judgment. He submitted further that according to the records, the impugned decision wished to be appealed against was pronounced on the 5th of May 2021 and that the applicant's application for leave was lodged on 17th of June 2021 which means that the application was lodged after 42 days from the time the impugned decision was delivered and therefore time barred. To accentuate on that point, that the time frame within which to lodge an application for leave is 30 days from the date the impugned decision was delivered, he cited

the case of **PL Tanzania Multipurpose Investment Group vs Kwimba District Council & Another**, Misc. Civil Application No. 191 of 2018.

He held a strong view that, since the applicant was already late, he was supposed to first apply for extension of time before lodging an application for leave.

Making reference to the Written Laws (Miscellaneous Amendments) (No. 3) Act No. 8 of 2018 and the principle in the case of **Jeremiah L Kusindah vs Leila John Kusindah**, Civil Appeal No. 260 of 2017 (CA), counsel argued that, failure of the applicant to act according to the mandatory provisions of the law i.e. rule 45(a) (supra) cannot find refuge in the principle of overriding objective as the same was not brought to be an escape route to circumvent the mandatory provisions of the law. He was of the view that since the applicant was able to file the notice of appeal in time, his failure to file an application for leave within time should be taken as inactiveness and deliberate will to sleep on his rights thus this application deserves nothing rather than dismissal with costs.

Replying to the respondent's submissions, the counsel for the applicant stated on the outset that, he did abide by the procedure to file

the notice of appeal in time. However, since the judgment was pronounced in the absence of the parties, the applicant having been informed that the judgment was delivered on the 5th of May 2021, made efforts to get the copy of the said judgment which was supplied to her on 16th of June 2021 and that is when she was able to prepare the application for leave to appeal on point of law as the same was supposed to be gathered from the decision.

She submitted that according to the provisions of section 19(2) of the Law of Limitation Act [Cap 89 R.E 2019], the day on which the impugned decision was delivered and the time for obtaining the copies of the decision are to be excluded when computing the period of limitation. To buttress her contention, she cited the case of **Mustafa Kimaro vs Mariam Hamisi Maftaha**, Misc. Land Application No. 581 of 2018 HC- (Land Division) in which it was held that under section 19(2) of the Law of Limitation Act, the applicant was entitled exclusion of the period when he was waiting for the copy of the decision.

Regarding the issue of filing the notice of appeal, counsel contended that the same was filed within time because its preparation does not need perusal of the impugned decision, unlike the application for leave. She cited the case of **William Getari Kegege vs Equity**

Bank & Another, Civil Application No. 24/08 of 2019, CA-Mwanza, where on the issue regarding the duty of the court in the administration of justice, that the applicant cannot be punished by the failure of the court officer to supply the copy of the judgments upon being ready. She thus prayed that the preliminary objection be dismissed.

In his rejoinder, counsel for the respondent asked the court to find that; first, the claim by the applicant that he made efforts to obtain a copy of the impugned decision from 7th May to 16th June is doubtful as it has not been substantiated by any evidence especially considering the fact that the decision sought to be appealed against was dated 5th of May 2021. He was of the view that in the absence of any letter or reminder letters for a copy of the decision or any other proof that the said copy was supplied to him on the 16th of June 2021, it cannot be concluded that, the applicant was diligent enough to pursue his rights.

Referring this court to the case of **Aswile K. Mwanjelile vs Kaloti Kilanga**, Misc Land Application No. 14 of 2020, counsel contended that the applicant should not rely on the 16th of June when he claims to have received the copy but from 5th of May when the said decision was delivered. That for whatever reason for delay, the applicant must first apply for and obtain extension of time as held in **Isamilo**

Plaza Co. Ltd & Another vs Mwajuma Mussa, Land Appeal No. 39 of 2019.

Regarding the applicability of section 19(2), the counsel cited the case of **HTT Infranco t/a Helios Towers Tanzania vs Juliano Charles Mikongomi & Others**, in which it was stated that the time spent in procuring the copy of the judgment and decree may be excluded but it cannot be automatically assumed by parties unless an application for enlargement is sought and sufficient cause availed.

He distinguished the authorities in the cases cited by the applicant in that in **Mustapha Kimaro**, (supra) the applicant had sought for extension of time unlike in this application. Moreover, in the case of **William Getari**, (supra) the court dealt with apparent mistakes on face of records committed by a judicial officer unlike in this matter at hand. He maintained his view that this application is time barred and therefore should be dismissed.

After all the submissions in support and against the preliminary objection have been considered, the only question that needs answer is whether this application is competent before this court.

As far as the records are concerned, this application emanates from the decision of this court in Civil Appeal No. 04 of 2021 which did

not please the applicant; he is now seeking for leave to appeal to the Court of Appeal of Tanzania. Under the provisions of rule 45(a) of the Court of Appeal Rules (supra), the applicant has moved this court to grant the application.

According to said rule, it is provided that;

"Notwithstanding the provisions of rule 46(1), where an appeal lies with the leave of the High Court, application for leave may be made informally, when the decision against which it is desired to appeal is given, or by chamber summons according to the practice of the High Court, within thirty days of the decision"

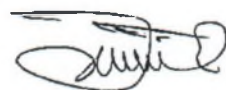
Now, it is undisputed that this application was filed on 17th of June 2021 while the decision intended to be appealed against was delivered on the 5th of May 2021 thus the instant application was filed after 44 days instead of being filed within 30 days as provided by the above rule.

The learned counsel for the respondent submitted strongly that this application is time barred because it was lodged after the lapse of 30 days contrary to the provisions of rule 45(a) (supra).

The applicant's counsel on the other side contended that the application is not time barred as the applicant was supplied with the copy of the decision on the 16th of June 2021 and filed it on the 17th of June 2021. He contended further that the provisions of rule 19(2) of the Law of Limitation Act (supra) excludes the time the applicant spent in obtaining a copy of the decision.

As already stated herein above, this application was lodged after 44 days from the date of the pronouncement of the decision to be appealed against. It means therefore that, it was lodged out of time. The counsel for the applicant has contended, which this court acknowledges, that under section 19(2), the Law of Limitation Act (supra) allows exclusion of 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.

It has however been held several times that the application of section 19(2) of the Law of Limitation Act (supra) is not automatic. For example, this court, Hon. Khaday, J, in the case of **The Headmaster of Forest Hill Secondary School vs Robert R. Mluge**, Land Appeal No. 52 of 2010, (unreported) held that;



"the application of section 19(2) of the Law of Limitation Act [Cap 89 R.E 2002] is not that automatic. The same has to be applied through formal application to be brought to court under section 14(1) of the same Act. Had things go that automatic there would have been no need to have Limitation Act to regulate times for actions by parties"

Also, the East African Court of Appeal in the case of **Abdul Shariff vs Kampala General Agency Ltd** (1934) EACA Vol. Part II at page 23 held that;

"in computing the period for filing appeals in civil case, the time requisite for obtaining a copy of the decree and of the statement given by the judge be excluded, does not in itself create a right to file an appeal out of time, without an application for leave to appeal out of time"

From the foregoing, it can safely be concluded that regardless of the provisions of section 19(2) (supra) allowing certain periods of time to be excluded, the exclusion is not automatic unless the applicant

lodges an application for extension of time and cites whatever reasons he has for delay.

I agree with the learned counsel for the respondent that this application was lodged out of the prescribed period and thus what was required of the applicant was to first make a formal application to this court to have the time extended so that he could lodge his application for leave out of time.

Having said as above, I conclude that this application is incompetent before the court for being filed out of time without there being an extension of time sought and granted. The preliminary objection stands and the application is, under section 3 of the Law of Limitation Act (supra) dismissed with costs.

It is accordingly ordered

DATED at MWANZA on this 29th day of October 2021




J.C TIGANGA

JUDGE

29/10/2021