

IN THE HIGH COURT OF TANZANIA

(Dar es salaam District Registry)

AT DAR ES SALAAM

CIVIL APPEAL NO. 3 OF 2015

(Originating from the decision of the District Court of Morogoro in Application No. 20 of 2014 delivered on 17th December 2014)

HAWA SAIDI NDWANGAAPPELLANT

VERSUS

ASHA OMARY MBARUKU.....RESPONDENT

04/09&27 /11/2015

JUDGMENT

MWANDAMBO, J:-

The Appellant has sought to challenge a decision of the District Court of Morogoro which dismissed her application for extension of time to appeal from a decision of the Primary Court, Morogoro Urban made on 15th November, 2012. Not unusual, Respondent strongly resists the appeal through "a reply to the petition of appeal" as well as her written submissions.

The facts relevant to the appeal may be stated in brief as follows. The Respondent instituted a suit against the Appellant before the Primary Court for recovery of a loan plus interest amounting to Tshs 4,790,000/=. At the end of the trial, the Primary Court entered judgment for the Respondent in the sum of Tsh 2,220,000/= in a judgment dated 15th November, 2012. According to the proceedings of the Primary Court, the Appellant is recorded to have requested the trial court to allow her to liquidate the decretal amount by 31 January,

2013. The trial Court acceded to the Appellant's prayer and ordered her to pay the said amount on the date indicated failing which execution was to proceed. Since the Appellant had not yet paid the decretal sum in full on the due date, on 28th February 2013, the trial Primary Court ordered execution to proceed by way of attachment and sale of the Appellant's house No. 331 situated at Mafisa Area, Morogoro. Eventually, the Appellant's house was attached and sold on 6th July 2013. In a bid to salvage the situation, the Appellant resorted to filing an application for extension of time to appeal against the judgment of the trial Primary Court. The application relevant to this appeal was filed on 9th May 2014 before the District Court and upon hearing it, the lower court dismissed the said application and hence this appeal.

In her petition of appeal, the Appellant has preferred six (6) grounds of appeal against the ruling of the District Court. In essence all grounds boil down to only one ground namely; whether the District Court correctly exercised its discretion in dismissing the Appellant's application for extension of time within which to appeal.

Ms. J. Jackson learned Counsel for the Appellant filed her written submissions which by and large criticize the District Court for failure to evaluate the affidavit evidence properly which evidence showed that the trial primary Court had allowed the Appellant to pay the decretal sum by installments only to change its position later after the time to appeal had already expired. According to the learned Counsel, in so far as the Appellant had started paying the decretal sum by way of installments and indeed a sum of Tshs. 310,000/= had been paid, it was wrong for the trial Court to order execution of the decree. Furthermore, the learned Counsel argued that the Appellant was no longer bound by the thirty days' period within which to appeal by reason of the trial Court's acceptance of payment of the decretal sum by way of installments more so because the trial

Court did not fix any time frame for payment of such installments. Alternatively, the learned Counsel contended that the District Court should have found that the Appellant who is a lay person was misled by the trial Court when it accepted three installments only to disregard them later and order execution of the decree.

Not amused, the Respondent strongly resisted the Appellant's submissions arguing that the reasons behind the delay to lodge an appeal did not suffice to extend the period and the District Court was justified in dismissing that application on the authority of ***Samson KishoshaHabba V. Charles KingongoHabba*** [1990] TLR 133.

Upon reading the submissions by the learned Counsel for the Appellant in the light of the ruling of the District Court, it becomes glaringly clear that the attack against that ruling is farfetched. Firstly, the record of the trial Court tells it all in relation to what transpired after the judgment sought to be appealed. The Appellant never expressed any intention to appeal against that judgment and the reason for that is not far to seek. The decision of the trial primary Court did not aggrieve the Appellant and thus she had no reason to appeal. Had it been otherwise, there is no evidence on record to show why she did not express that intention after the delivery of judgment. On the contrary, she [the Appellant] pleaded with the trial Primary Court to liquidate the decretal amount by 31 January, 2013. The record shows (at page 7) that the trial Court acceded to the Appellant's request to pay the decretal sum on the date indicated failing which, execution would proceed. The record shows further that upon the Appellant's failure to pay the decretal sum on the date ordered, on 28 February 2013, the said Court ordered execution to proceed by way of attachment and sale of her house. The trial Court made that order in the presence of the Appellant and the Respondent. Had the Appellant been keen to appeal, she could have applied for

extension of time to appeal immediately after 28th February, 2013. The Appellant has not accounted for that period in her affidavit before the District Court.

Secondly, the Appellant's allegation in relation to payments of the decretal sum by installments is not supported by any evidence on record. The record is very clear that at no time did the trial Court allow payment of the decretal amount to be made by way of installments. Quite the opposite, the record indicates that after the Appellant had failed to pay the decretal sum on the date ordered, the trial Court ordered execution to proceed per the Respondent's application which has been filed earlier. Accordingly, the alleged belief that the payment was to be by way of installments could not have been a reason for delay in appealing neither was it a reason for delaying in seeking extension of time because the Appellant had not adduced sufficient cause for the delay appealing. In her submission, the Appellant's Counsel boldly submits that because of the trial Court's order to pay the decretal sum by way installments, the Appellant was not bound by the law of limitation to appeal within thirty days. With respect, if that was so, it is surprising why the Appellant seeks to appeal against the judgment rather than the order for execution which is what aggrieved her to support an application for extension of time. It is for that reason the District Court dismissed the application on the authority of ***Samson KishoshaHabba V. Charles KingongoHabba*** (supra) because the reasons behind the delay were less than convincing.

In the final analysis, in the absence of any order for payment of the decretal amount by way of installments, it is hard to believe how the Appellant could fault the District Court for the alleged failure to evaluate evidence which is not part of the record. Likewise it is inconceivable to understand how the Appellant through her Advocate could be so bold to criticize the District Court for exercising its discretion against the Appellant because the only evidence before

the District Court was too weak and insufficient to support her application. In my view, the District correctly directed its mind to the facts and the law and properly exercised its discretion against the application before it. I have not seen any reason to differ with the ruling of the District Court neither has the Appellant succeeded in assailing the ruling of the lower court.

In the event and for the foregoing reasons, I find no merit in the appeal which must be and is hereby dismissed with costs.

Order accordingly.

L.J.S Mwandambo

JUDGE

14/11/2015

Judgment delivered in court in the presence of Appellant and the Respondent this 27th day of November 2015.

L.J.S MWANDAMBO

JUDGE

27/11/2015