IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MBAROUK, J.A., NDIKA, J.A. And MWAMBEGELE, J.A.)

CIVIL APPEAL NO. 140 OF 2016

KISIOKI EMMANUEL ..... APPELLANT

VERSUS

ZAKARIA EMMANUEL ..... RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania at Arusha)

(Mwaimu, J.)

dated the 11th day of July, 2014
in
PC Civil Appeal No. 20 of 2012

JUDGMENT OF THE COURT

4th & 11th July, 2018

NDIKA, J.A.:

This is a third appeal. It seeks to challenge the decision of the High Court of Tanzania at Arusha in PC Civil Appeal No. 45 of 2011 on a matter originating from Enaboishu Primary Court.

We find it crucial, at the outset, to go into the background of this matter, albeit briefly. Before the Enaboishu Primary Court in Probate Cause No. 20 of 2011, the parties to this appeal along with their two siblings, Baraka Emmanuel and Samwel Emmanuel, were jointly granted letters of administration of the estate of the late Emmanuel Kokai, their departed

father. In the course of distributing the assets of the estate to the beneficiaries a disagreement arose. After a full trial on the dispute, the Primary Court entered judgment in favour of Kisioki Emmanuel, the appellant herein. Discontented, Zakaria Emmanuel, the respondent herein, appealed to the District Court of Arusha (Civil Appeal No. 45 of 2011). The appeal came to naught as it was dismissed on 10th October 2012. Undeterred, the respondent appealed to the High Court of Tanzania on 7th December, 2012, which happened to be the fifty-eighth day since the delivery of the impugned judgment of the District Court.

Before the High Court, the appellant raised a preliminary objection on the ground that the appeal was hopelessly time-barred. Having heard the parties on the objection, the High Court, on 19th February, 2014, overruled it and, thereafter proceeded to hear and determine the appeal on the merits. On 11th July, 2014 the High Court handed down its judgment, allowing the appeal on the ground that the District Court had erred in law and in fact in framing its own issues and abandoned consideration and determination of grounds of appeal before it. On the basis of that finding, the High Court nullified and set aside the District Court's judgment and decree. It was further ordered that the record be remitted to the District

Court for the appeal to be heard afresh before another Resident Magistrate of competent jurisdiction.

Before us the appellant assails the High Court's judgment on two grounds as follows:

> *"1. That, the learned Judge erred in law and in fact in holding that PC Civil Appeal No. 20 of 2012 was not time-barred.*
>
> *2. That, the learned Judge erred in law and in fact in holding that the first appellate court framed its own issues when deciding Civil Appeal No. 45 of 2011."*

At the hearing of the appeal before us, Mr. John Materu, learned counsel argued the appeal on behalf of the appellant. He contended that the appeal before the High Court was lodged on 7th December 2012, which happened to be the fifty-eighth day after the District Court's decision was rendered on 10th October 2012. Citing the provisions of section 25 (1) (b) of the Magistrates' Courts Act, Cap. 11 RE 2002 (MCA) prescribing a period of thirty days for such appeals to the High Court, the learned counsel, argued that the appeal inescapably time-barred. To facilitate the appreciation of the position put forward by the learned counsel, we extract the aforesaid provisions as hereunder:

"25 (1) Save as hereinafter provided: -

(a) [Omitted]

(b) in any other proceedings any party, if aggrieved by the decision or order of a district court in the exercise of its appellate or revisional jurisdiction may, ***within thirty days after the date of the decision or order, appeal therefrom to the High Court****:*

Provided that the High Court may extend the time for filing an appeal either before or after such period of thirty days has expired." [Emphasis added]

Mr. Materu particularly faulted the learned appellate Judge for relying on two decisions rendered by the High Court in **Mary Kimaro v. Khalfani Mohamed** [1995] TLR 2002 and **National Bank of Commerce v. Lucia Sixbert Chuwa**, Land Appeal No. 51 of 2010, HC Moshi Registry (unreported). These decisions were taken to form the proposition that copies of proceedings, judgment and decree being necessary for the purpose of framing and filing a sound memorandum of appeal, then the computation of the prescribed limitation must exclude the period necessary for preparation and collection of the said copies. The learned counsel submitted that **Mary Kimaro** (supra) was about an application for extension of time and that the learned appellate Judge applied it out of

context. As regards **Lucia Sixbert Chuwa** (supra), he submitted that it was inapplicable because it concerned a matter originating from the District Land and Housing Tribunal, which, for purposes of limitation, was governed by the Law of Limitation Act, Cap. 89 RE 2002 (LMA). He recalled that the matter under consideration was governed, for the purposes of limitation, by the provisions of the Magistrates' Courts (Limitation of Proceedings under Customary Law) Rules, Government Notice No. 311 of 1964.

Mr. Materu contended further that the impugned appeal before the High Court ought to have been lodged within thirty days in accordance in with section 25 (3) of the MCA. That subsection requires the appeal to be made by way of petition filed in the District Court. In accordance with section 25 (4) of the MCA, the District Court would forthwith dispatch the petition, together with the record of the proceedings in the Primary Court and the District Court, to the High Court. Relying on the decision of this Court in **Sophia Mdee v. Andrew Mdee & 3 Others**, Civil Appeal No. 5 of 2016 (unreported), the learned counsel argued that the applicable procedure envisages no exemption of time for preparation and delivery of proceedings, judgment and decree as an intending appellant has no

obligation of attaching any such documents for lodging his appeal by way petition of appeal in the District Court. It was his conclusion that the appeal ought to have been held time-barred and, therefore, dismissed under section 3 of the LMA.

Mr. Materu, then, argued the second point, as an alternative ground of appeal. He submitted that in dealing with the appeal before it the District Court did not frame new issues or abandon consideration and determination of grounds of appeal before it. Referring to page 139 of the record of appeal, he said that in considering the appeal the learned Resident Magistrate condensed eleven grounds of appeal before the court into two main issues for determination. That course, he argued, was proper. For this point, he relied on this Court's decision in **Melita Naikiminjal & Loishilaari Nakiminjal v. Sailevo Loibanguti**, [1998] TLR 120. In this case, it was held that as long an appellate court has full grasp of the case, it has discretion to summarise the case and the grounds of appeal in its judgment and need not separately deal with them seriatim. He added that the High Court wrongly applied the ratio in the decision of this Court in **Scan-Tan Tours Ltd v. The Registered Trustees of the Catholic Diocese of Mbulu**, Civil Appeal No. 78 of 2012.

On the other hand, Mr. Kipanga Kimaay, learned counsel for the respondent, denied that the appeal to the High Court was time-barred. While acknowledging that the appeal was, indeed, lodged on 7th December, 2012, he claimed that on the date the thirty days' limitation period had not elapsed after the period in which the respondent waited for copies of proceedings, judgment and decree was excluded. He referred to **Mary Kimaro** (supra) and **Lucia Sixbert Chuwa** (supra) for support. Without elaborating, he contended that **Sophia Mdee** (supra) was different from the instant case.

On the second ground, Mr. Kimaay supported the course taken by the learned Judge on the reasoning that the two issues drawn by the learned Resident Magistrate did not reflect the whole thrust of the eleven grounds of appeal the respondent had lodged. He also backed the High Court's reliance on **Scan-Tan Tours Ltd** (supra) where this Court held a judge is duty bound to decide a case on the issues on the record and that other new questions can only be considered if they are placed on the record and the parties given an opportunity to address the court on them.

In a brief rejoinder, Mr. Materu insisted that the facts in **Sophia Mdee** (supra) are similar to those in the instant case. He thus reiterated his stance that the appeal before the High Court was time-barred.

Having heard and considered the learned submissions on both sides, we wish to remark, at first, that it is common cause that the impugned appeal to the High Court was lodged on 7th December, 2011, which was the fifty-eighth day after the District Court had rendered its decision. It is apparent that by that time the thirty days prescribed by section 25 (1) (b) of the MCA as the limitation period for appeals from the District Court in its exercise of appellate and/or revisional jurisdiction been overshot. Nonetheless, in its decision, the High Court relying on the decisions in **Mary Kimaro** (supra) and **Lucia Sixbert Chuwa** (supra) held that section 19 (2) of the LMA was applicable. It then proceeded to exclude from the computation of the prescribed period the number of days the respondent needed to wait for the copies of the proceedings, judgment and decree before lodging his appeal. It should be noted that section 19 (2) provides that:

> *"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 added]

In justifying exclusion of the requisite time for obtaining copies of the proceedings, judgment and decree for an appeal under section 25 of the MCA the learned Judge reasoned as follows:

"I am at one with F.S.K. Mutungi, J. in what he found in National ***Bank of Commerce versus Lucia Sixbert Chuwa*** *(supra) when he held that in some occasions procedural intervention is done by excluding the days from the time/date of requesting for copies of essential documents to the date of being supplied with the same. Although section 25 of the Magistrates' Courts Act does not make it a mandatory requirement for a party to attach a judgment and or a decree on his petition of appeal, it is necessary for him as held in* ***Mary Kimaro's*** *case (supra) to obtain those documents to enable him to file a sound petition or memorandum of appeal. Mary Kimaro's case was dealing with a similar situation like the instant preliminary objection as the appeal before the High Court originated from a primary court. The decision of the court is a product of written document. It would be illogical to assume that an aggrieved party can extract the grounds of*

appeal from the air. ***In these circumstances, I agree with the appellant that as long as the appellant asked for the relevant documents the time he spent in waiting to be furnished with them should be excluded. In doing so, I find the appeal to be within time.***" [Emphasis added]

In the circumstances, we think the bone of contention in this matter hinges on a very narrow issue. It is whether the procedure for appealing from a District Court in its appellate and/or revisional jurisdiction to the High Court lodged in accordance with the provisions of section 25 (1) (b), (3) and (4) of the MCA envisages exclusion of the period necessary for the preparation and delivery of the proceedings, judgment and decree of the District Court from which an appeal is intended.

Perhaps, we should start with **Sophia Mdee** (supra), cited to us by Mr. Materu. In that case, the Court discussed the applicable procedure for the appealing to the High Court on matters originating from the Primary Court. Having considered section (3) and (4) of the MCA, the Court held that:

"... it is clear that if one intends to appeal to the High Court the decision or order of the District Court in matters

originating from the Primary Court, he has to lodge his petition of appeal in the District Court which handed down the decision and the District Court shall immediately forward the same to the High Court."

Then, after referring to Rules 2 and 4 (1) and (2) of the Civil Procedure (Appeals in Proceedings Originating in Primary Courts) Rules, 1963, Government Notice No. 312 of 1964, the Court concluded that attachment of a copy of judgment (or decree) along with the petition of appeal is not a legal requirement in instituting appeals to the High Court on matters originating from the Primary Court. However, the Court did not go as far as determining the issue we are now confronted with.

Admittedly, even though attachment of a copy of the impugned judgment or decree is not a pre-condition for appealing to the High Court, it is logical that a glance at the judgment appealed from would assist in framing a sound petition of appeal. However, we do not agree with the learned Judge, with respect, that the need to access the judgment intended to be appealed to the High court so as to frame a plausible and comprehensive appeal can in itself be the basis for exclusion of the time requisite for obtaining the judgment. Limitation periods being a creature of principal or subsidiary legislation can only be subject to exemption or

exclusion on the basis of the law. We are aware that the provisions of the LMA are not applicable to matters originating from the Primary Court and that such matters are, instead, governed by the provisions of Government Notice No. 311 of 1964. In the premises, we have no hesitation to hold that the learned Judge erred in law in extending and applying the provisions of section 19 of the LMA in favour of the respondent to exclude the period of time requisite for obtaining a copy of the judgment and/or decree. The High Court, we think, ought to have applied Government Notice No. 311 of 1964, which, unfortunately, has no provisions that mirror section 19 of the LMA. Accordingly, we hold that there was no legal basis for excluding the time the respondent herein waited for a copy of judgment or decree to lodge his petition of appeal to trigger the appellate process to the High Court. His appeal, lodged on the fifty-eighth day after the impugned judgment was delivered on 10th October 2012, was time-barred as the thirty days' limitation period prescribed by section 25 (1) (b) of the MCA had elapsed. He ought to have sought and obtained enlargement of time under the proviso to the aforesaid provisions instead of lodging the appeal without leave. We thus find merit in the first ground of appeal.

As the foregoing outcome is sufficient to dispose this appeal, we find not need to deal with the second ground of appeal, which Mr. Materu argued in the alternative to the first ground.

All said and done, we allow the appeal with costs. Accordingly, we quash the judgement of the High Court and proceed to restore the decision of the District Court.

DATED at **ARUSHA** this 10th day of July, 2018.

M. S. MBAROUK
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

I certify that this is a true copy of the Original.

THE COURT OF APPEAL OF TANZANIA

E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL