

**IN THE COURT OF APPEAL OF TANZANIA
AT BUKOBA**

(CORAM: MWARIJA, J. A., SEHEL, J.A And MAIGE, J.A.)

CIVIL APPEAL NO. 374 OF 2021

BUKOPA MUNICIPAL COUNCILAPPELLANT

VERSUS

NEW METRO MERCHANDISE.....RESPONDENT

**(Appeal from the Ruling of the High Court of Tanzania at Bukoba)
(Mlacha, J.)**

dated the 9th day of March, 2019

in

DC. Civil Appeal No. 15 of 2017

.....

JUDGMENT OF THE COURT

5th & 11th July, 2022.

SEHEL, J.A.:

This appeal is against the decision of the High Court of Tanzania (the High Court) that sustained the respondent's preliminary objection that the appeal against the decision of the District Court of Bukoba lodged by the appellant was time barred.

The brief facts leading to the present appeal are such that; the respondent successfully sued the appellant in the District Court of Bukoba at Bukoba (the District Court) for breach of contract. In

its judgment delivered on 27th September, 2016, the trial court found that the appellant was liable for wilful breach of the fundamental conditions and terms of the contract. It therefore awarded the respondent general and punitive damages to the tune of TZS. 60,000,000.00 and 10,000,000.00, respectively. It further ordered the appellant to pay the respondent the costs of the suit. Aggrieved by that finding, on 3rd July, 2017 the appellant lodged its appeal in the High Court.

The appeal by the appellant was encountered by a preliminary objection that it was time barred as it was contended that it was filed over and above ninety (90) days period prescribed under item no. 1 of Part II of the Schedule to the Law of Limitation Act, Cap. 89 R.E. 2002 (now R.E. 2019) (the LLA). In opposing the preliminary objection, the appellant argued that in terms of section 19 (2) of the LLA, the time spent in obtaining a copy of the judgment of the District Court is excluded in computing the 90 days period. It was submitted that since a copy of the judgment was certified and supplied to the appellant on 15th May, 2017 then the appeal was filed in time. The respondent did not dispute the date of certification

rather he argued that the same could have been good ground for seeking an extension of time to lodge an appeal out of time. In other words, the argument by the respondent was that section 19 (2) of the LLA is subject to an order of the court for an application for extension of time. It does not provide automatic exclusion of time. In deliberating as to whether section 19 (2) of the LLA provides for an automatic exclusion in computation of time, the High Court held:

"...The appellant ought to have lodged an application for extension of time before lodging the appeal and plead that they did not delay out of negligence or any inaction on their side but for the delay of the issue of the copy of the judgment. In an application of that nature, section 19 (2) of the Law of Limitation Act can be invoked to assist the applicant. But it cannot come as a defence once an objection is lodged. With that in mind, and much respect to Mr. Mujahidi, the appeal found to have been lodged out of time and dismissed with costs."

That decision of the High Court displeased the appellant. After obtaining leave of the High Court to appeal to this Court, the appellant lodged the present appeal advancing one ground in the Memorandum of Appeal that the High Court erred in law for dismissing the appeal filed within time as per the law.

At the hearing of the appeal before us, Mr. Hangi Chang'a, learned Principal State Attorney assisted by Messrs. Gerald Njooka and Urso Luoga, both learned State Attorneys appeared for the appellant whereas Mr. Stephen Mosha, learned advocate represented the respondent. Suffices to point out here that both parties filed their respective written submissions pursuant to Rule 106 (1) and (7) of the Tanzania Court of Appeal Rules, 2009 as amended which they adopted in their oral submissions.

Arguing the appeal, Mr. Chang'a began his submission on the mode of instituting an appeal to the High Court from the District Court. He submitted that Order XXXIX rule 1 (1) of the Civil Procedure Code, Cap.33 R.E. 2019 (the CPC) requires an intended appellant to file a memorandum of appeal accompanied with a copy of the impugned judgment and decree. However, such a provision

of the law does not stipulate the limitation period for institution of such memorandum of appeal. In that respect, he contended that where there is no period prescribed by the law, item number 1 of Part II of the schedule to the LLA comes into play which prescribes a period of ninety (90) days from the date of judgment. He pointed out that the judgment of the District Court was delivered on 27th September, 2016 but it was certified and supplied to the appellant on 15th May, 2017. In computing the limitation period, he argued, section 19 (2) of the LLA automatically excludes the day on which the judgment was delivered and the period of time requisite for obtaining a copy of the judgment and decree. For that reason, he contended that the appellant's appeal which was filed on 6th July, 2017 was filed in time, that is, within the prescribed 90 days period. To cement his argument that section 19 (2) of the LLA automatically excludes the period of securing a copy of the judgment and decree, the learned Principal State Attorney cited the cases of **Registered Trustees of the Marian Faith Healing Centre @ Wanamaombi v. The Registered Trustees of the Catholic Church Sumbawanga Diocese**, Civil Appeal No. 64 of 2006 and **Alex**

Senkoro & 3 Others v. Eliambuya Lyimo (as administrator of the estate of Frederick Lyimo, deceased), Civil Appeal No. 16 of 2017 (both unreported). At the end, he urged the Court to set aside the ruling of the High Court, declare the appellant's appeal was filed in time and allow the appeal with costs.

Mr. Masha readily conceded to the position of the law that the appeal arising from the District Court to the High has to be filed within 90 days from the date of judgment and that the memorandum of appeal ought to be accompanied with a copy of the judgment and decree. He also agreed that section 19 (2) of the LLA provides for exclusion of time in computing the limitation period. Nevertheless, he argued that the same is not automatic since the case laws have laid down tests for an intended appellant to rely on such exception. Such tests, he argued, are three critical dates as elucidated in the case of **Alex Senkoro & 3 Others v. Eliambuya Lyimo (as administrator of the estate of Frederick Lyimo, deceased)** (supra) which are the date of the impugned judgment, the date on which a copy of the decree or judgment was requested

and the date of the supply of the requested document, which an intended appellant ought to prove them.

Mr. Mosha contended that the record of appeal does not have proof as to when the appellant requested for the copy of the judgment and decree of the District Court and when the same were supplied to him. The only proof present in the record, he said, is the date of judgment. Since the critical events for reckoning the prescribed limitation period have not been proved, Mr. Moshi argued, the appellant is not entitled to rely on the exclusion provided under section 19 (2) of the LLA. For that reason, he argued that the High Court was justified to dismiss the appellant's appeal and urged the Court to uphold that finding with costs.

Mr. Chang'a briefly rejoined that the two issues raised by the learned counsel for the respondent that there is no proof of a letter requesting for copies of the judgment and decree and the date as to when the appellant was supplied with the same were not contentious matters before the High Court. Applying the principle that the Court can only look at matters of fact which were initially

raised, deliberated and determined in the lower court, Mr. Chang'a urged the Court to refrain from deliberating on them.

We have duly considered the parties' submission and noted that it is not disputed that the judgement of the District Court was delivered on 27th September, 2016 and the appellant filed the memorandum of appeal in the High Court on 6th July, 2017. It is further not in dispute that the provisions of Order XXXIX rule 1 (1) of the CPC does not provide a time limit in filing an appeal to the High Court against the decision of the District of Court. That being the position, in terms of item number 1 of Part II of the Schedule to the LLA, a ninety days limitation period is prescribed for lodging an appeal under the CPC. Such period is computed from the date on which the judgment, decision, award, decree or order appealed against was delivered (see section 6 of the LLA). Nevertheless, as rightly submitted by the counsel for the parties, section 19 (2) and (3) of the LLA excludes a period spent in securing copies of judgement and decree in computing time prescribed for lodging an appeal, an application for leave to appeal, or an application for

review of judgment. For ease of reference, we reproduce hereunder the whole of section 19 of the LLA:

"19. (1) In computing the period of limitation for any proceeding, the day from which such period is to be computed shall be excluded.

*(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 appealed from or sought to be reviewed, shall be excluded.***

*(3) Where a decree is appealed from or sought to be reviewed, **the time requisite for obtaining a copy of the judgment on which it is founded shall be excluded.**"*

[Emphasis added]

The Court considered the import of the above provision of the law in the case of **Alex Senkoro & 3 Others v. Eliambuya Lyimo (as administrator of the estate of Frederick Lyimo, deceased)** (supra). In that appeal, one of the grounds of appeal

and the argument of the counsel for the appellants was that, in terms of section 19 (2) and (3) of the LLA, the respondent was not entitled to an automatic exclusion of the period of time requisite for obtaining a copy of the decree or judgment appealed from the District Court to the High Court. That such an exclusion had to be made pursuant to an order of the court in a formal application for extension of time. Having revisited the provision of the law, the Court held:

*"We entertain no doubt that **the above sub-sections expressly allow automatic exclusion of the period of time requisite for obtaining a copy of the decree or judgment appealed from [in computing] the prescribed limitation period. Such an exclusion need not be made upon an order of the court in a formal application for extension of time.**" [Emphasis added]*

It further held that:

"...the exclusion is automatic as long as there is proof on the record of the dates of the critical events for the reckoning of the prescribed limitation period. For the purpose

of section 19 (2) and (3) of the LLA, these dates are the date of the impugned decision, the date on which a copy of the decree or judgment was requested and the date of the supply of the requested document.”

In the present appeal we have shown herein that the crucial issue before the High Court was whether an exclusion of time provided under section 19 (2) of the LLA is subject to an order of the court. Given the clear position of the law that section 19 (2) and (3) of the LLA provides for an automatic exclusion of time requisite for obtaining a copy of the decree or judgment appealed from when computing the period of limitation for lodging an appeal, the High Court ought to have automatically excluded the period between the date of judgment and the date of obtaining a copy of the impugned judgment which according to the appellant it was on 15th May, 2016.

We are aware of the submission of the counsel for the respondent that there was no proof of the date the appellant applied for a copy of the judgment. On our part we find that such argument, which is based on matters of fact, was not raised before

the High Court. It is trite law that, this Court can only look into matters that came up in the first appellate court and were decided upon and not matters that were neither raised nor determined by the court from which the appeal emanates, unless they are points of law.

Furthermore, according to the record of appeal, the counsel who appeared for the respondent in the High Court conceded that the copy of the judgment was certified on 15th May, 2017 but argued that such a date could have been a good ground for seeking extension of time to lodge an appeal (see page 78 of the record of appeal). We are therefore satisfied that, in the High Court, there was no dispute as to when the appellant was supplied with a copy of the judgment. In any event, we wish to reiterate what we said in the case **Alex Senkoro & 3 Others v. Eliambuya Lyimo (as administrator of the estate of Frederick Lyimo, deceased)** (supra) that the date of certification is the date of reckoning the prescribed ninety days limitation period for lodging an appeal to the High Court.

It should be kept in mind the rationale behind such automatic exclusion was to avoid multiplicity of, and delay in disposal of cases (see the **Director of Public Prosecutions v. Mawazo Saliboko @ Shagi & 15 Others**, Criminal Appeal No. 384 of 2017 (unreported)).

It follows then that the High Court erred when it held that the appellant was supposed to lodge an application for extension of time under section 19 (2) of the LLA to plead that their delay was caused by belated supply of the copy of judgment. Here, we, once again, stress that the exclusion under section 19 (2) and (3) of the LLA is automatic and it is not subject to a court order. Therefore, the period between 27th September, 2016 when the judgment was delivered to 15th May, 2017 when the copy of the judgment was supplied is automatically excluded in computing the ninety days period prescribed under item number 1 of the Schedule to the LLA. Counting the period from 15th May, 2017 to 6th July, 2017, the appeal was lodged on the twenty third day. That is, it was well within the prescribed ninety days period. Accordingly, we find that the appellant's appeal was lodged in time.

At the end, we hereby find that the appellant's appeal has merit. Accordingly, we allow it. Further, we remit the file back to the High Court and direct it to expeditiously determine DC. Civil Appeal No. 15 of 2017 on merit. Costs to abide the outcome of the appeal.

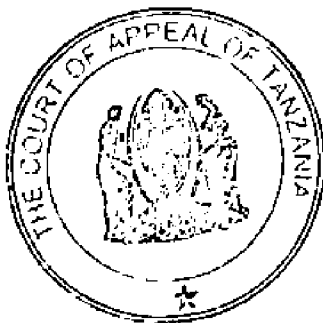
DATED at BUKOBA this 11th day of July, 2022.

A. G. MWARIJA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Judgment delivered this 11th day of July, 2022 in the presence of Mr. Njoka Gerald, Senior State Attorney assisted by Mr. Athumani Msosole, State attorney for the appellant and Mr. Salumu Hamisi Umande Changa, Manager of New Metro Merchandise appeared for the respondent is hereby certified as a true copy of the original.



DR
D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL