IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MUGASHA, J.A., KEREFU, J.A. And KIHWELO, J.A.)

CIVIL APPEAL No. 266 OF 2019

METHUSELA ENOKA.....APPELLANT

VERSUS

NATIONAL MICROFINANCE BANK LTD.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania, at Mwanza)

(Maige, J.)

dated the 29th day of February, 2016

in

Civil Appeal No. 46 OF 2015

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JUDGMENT OF THE COURT

15th & 19th July, 2022

KIHWELO, J.A.:

This appeal arises from the judgment of the High Court at Mwanza (Maige, J. as he then was) in which he dismissed the appellant's appeal against the National Microfinance Bank Ltd (NMB), the respondent, on 29.02.2016 for being time barred. Feeling that justice was not rendered, and in the further quest for justice, the appellant now appeals to this Court.

The brief background facts of the case are as follows: The appellant has been an esteemed customer of the respondent since 1976, maintaining and operating a savings Bank Account No. 3112500134. On 17.12.2012, the appellant visited the respondent's Kenyatta Branch at Mwanza City to check his bank balance and was informed that his balance was TZS. 4,597,549.72. However, on 31.01.2013, the appellant went to the respondent's Kenyatta Branch once again to check his bank balance and was informed that his balance was TZS. 714,549.72 and not TZS. 4,597,549.72 as it was on 17.12.2012. This news came as a bombshell to him and he formally complained to the respondent's Branch Manager at Mwanza who informed him that the amount of TZS. 3,783,000.00 were withdrawn from the appellant's bank account using mobile phone number of an unidentified person. Following this response, the appellant held the respondent's liable for failure to exercise duty of care which led to the unlawful withdraw of the appellant's money from his savings bank account mentioned above. Subsequently, the respondent closed the appellant's bank account and following which the appellant instituted a Civil Case No. 25 of 2013 at the Resident Magistrate's Court of Mwanza at Mwanza (the trial court) claiming among other things, payment of TZS. 3,783,000.00, general damages to be

determined by the court, immediate opening of the appellant's closed account, interest and costs of the case.

In defence, the respondent refuted the appellant's claim contending that it was not in existence in 1976 when the appellant alleged to have opened the bank account, but the respondent admitted that, on 17.12.2012 the appellant's bank balance was TZS. 4,597,549.72 and went on to aver that, on different occasions prior to 31.01.2013, the appellant inquired the bank balance and was accordingly charged inquiry fee by the respondent. The respondent, in further reply, averred that, the appellant's money alleged to be stolen was withdrawn from his account using the NMB Mobile services which could only be done by the appellant himself who had access to his Personal Identification Number (PIN) or someone else authorised by him, because such service is operated by using ATM Card PIN Number.

Before trial, the trial court framed a number of issues for determination and in particular the central issues were, whether the appellant's lost his money at the tune of TZS. 3,783,000.00 and whether the loss of the said money was occasioned due to the defendant's negligence. In order to prove its case, the appellant was the lone witness who testified as PW1 and produced one documentary exhibit, the appellant's bank statement which

was admitted in evidence as exhibit P1. On his part, the respondent produced one witness Daniel Kabugumila (DW1) and there was no documentary exhibit produced in evidence. At the height of the trial, the trial court found that the appellant did not prove his case to the hilt and therefore dismissed the suit with costs.

Undeterred, the appellant knocked the doors of the High Court seeking to challenge the decision of the trial court. On 17.02.2016 the matter was fixed for hearing, but before hearing of the appeal could commence in earnest, the learned High Court Judge invited the counsel for the parties to address him on the propriety of the appeal considering that, the judgment of the trial court was pronounced on 21.04.2015 but the appeal was lodged on 22.09.2015. The counsel dutifully complied whereby, Mr. Kisigiro, learned counsel for the appellant, addressed the court to the effect that, the impugned judgment was pronounced on 21.04.2015 and on the same day the counsel for the appellant applied to be supplied with a copy of judgment and decree. On 30.04.2015 the appellant lodged a notice of appeal and since then, the appellant was making close follow up of the said documents but in vain. Mr. Kisigiro went on to state that, it was on 11.09.2015 when the appellant was supplied with certified copies of judgment and decree vide

exchequer receipt No. 6847305 dated 11.09.2015. Mr. Kisigiro therefore, prayed that, the court should hold that the appeal was within time. On his part, Mr. Kange, learned counsel for the respondent did not have anything to comment and left upon the court to determine the fate of the appeal before it. Consequently, the High Court judge set 29.02.2016 as the date for the delivery of the ruling.

In his ruling, the learned High Court Judge found that the appeal was time barred and declined the invitation by Mr. Kisigiro to exclude the period between 21.04.2015 when the appellant applied for a copy of judgment and decree to 11.09.2015 when the appellant was supplied with those copies. The learned High Court Judge assigned reasons for declining to the invitation to be; **one**, there is no factual statement in the memorandum of appeal to the effect that the appellant applied for a copy of judgment on the alleged date and as to when copies were made available to him, **two**, assuming that such factual statement featured out in the memorandum of appeal, the letter applying for a copy of judgment has not been attached to the memorandum of appeal, **three**, the attached copy of the judgment does not suggest that it was made available on the alleged date because ordinarily, there would have been a certificate certifying the date when the judgment became

available for collection; and **four**, even the exchequer receipt was not attached in the memorandum of appeal. He therefore, found that the appeal did not fall within the exception set out in section 19 (2) of the Law of Limitation Act, [Cap 89 R.E. 2002] (the Act) and consequently, dismissed it. This is what precipitated the appeal before us.

The appellant has filed this appeal which is grounded upon one (1) sole point of grievance:

1. *That, the trial court (sic) erred in law for dismissing the appeal without the trial court record to satisfy itself whether the appeal was within time or not.*

When the appeal was placed before us for hearing on 15th July, 2022 Mr. Innocent Kisigiro and Dr. George Mwaisondola, both learned counsel appeared for the appellant and respondent respectively. The counsel for the appellant prayed and was granted leave to adopt the written submission which he lodged earlier on 1.11.2019 in terms of Rule 106 of the Tanzania Court of Appeal Rules, 2009.

Mr. Kisigiro prefaced his submission by recounting what transpired and which in fact led to the instant appeal. In his brief and focused submission, he contended that the impugned judgment was pronounced on 21.04.2015 and that the appellant, dissatisfied with the dismissal of his appeal, on that

very day he wrote a letter dated 21.04.2015 requesting for a copy of judgment and decree. He referred us to pages 74 to 86 as well as pages 105 and 106 of the record of appeal. He further submitted that, the copy of judgment and decree were not ready until on 11.09.2015 when the appellant was supplied as evidenced through the exchequer receipt No. 6847305 found at page 107 of the record of appeal and that this fact was not disputed by the respondent's counsel before the learned High Court Judge.

In further supporting the appeal, the learned counsel referred us to page 79 of the record of appeal and contended that, the appellant prepared the memorandum of appeal which was lodged on 23.09.2015. It was the learned counsel's further submission that, on 17.02.2015 parties appeared before the learned High Court Judge who requested them to address him on the propriety of the appeal which they complied by addressing the court. He referred us to page 89 of the record of appeal.

Elaborating further, the learned counsel while referring us to pages 91 and 96 of the record of appeal, argued that, on 29.02.2016 the High Court disposed the appeal by dismissing it on account of being time barred.

The learned counsel, faulted the High Court Judge for dismissing the appeal while the record of the trial court was yet to be transferred to the

High Court and therefore placed before him so that he could look at them before dismissing the appeal. He contended that, had the learned High Court perused at the record of appeal, he would have arrived at a different conclusion by invoking section 19 (2) of the Act, to exclude the period of time requisite for obtaining a copy of the judgment and decree which are essential documents to accompany the appeal in terms of Order XXXIX Rule 2 of the Civil Procedure Code, [Cap 33 R.E. 2019] (the CPC). He stressed that, the appellant could not lodge the appeal before 23.09.2015 because he was yet to be supplied with the necessary documents and therefore, in terms of section 19 (2) of the Act, he was entitled to exclusion of those days he was waiting for the documents. To support his proposition, he referred us to the cases of **African Marble Co. Ltd v. Tanzania Saruji Corporation** [1999] TLR 306 and **Gregory Raphael v. Pastory Rwehabula** [2005] TLR 99. He rounded up his submission by beseeching us that, the appeal be allowed with orders as the court will deem appropriate to grant.

The respondent's learned counsel, in reply was very brief, he argued that, since the appeal was from the Resident Magistrate Court to the High Court the appellant was obliged to lodge the appeal within ninety (90) days

from the date of the judgment which is on 21.04.2015 and therefore, the last day was on 22.07.2015 but the appellant lodged the appeal on 23.09.2015 which is more than sixty (60) days beyond the time prescribed by law. He contended that, there was no way the learned High Court Judge could have known that the appellant delayed for the reasons the appellant is advancing now.

When prompted by the Court on whether the learned High Court Judge had sufficient material before him upon which to decide whether the appeal was time barred or not, the learned counsel insistently contended that, the learned High Court Judge was right and justified to arrive at the conclusion that he did and impressed us that the appeal should be dismissed.

In rejoinder submission the learned counsel for the appellant was brief and reiterated what he had earlier on submitted in chief, and went ahead to submit that, there was no legal requirement to do what the learned High Court Judge held. He once again, implored us that, the appeal be allowed and the matter be remitted back to the High Court for determination of the appeal on merit.

After listening to the rival submissions by the parties and having scrutinized the records of appeal together with the submission, the central

issue for determination before us is a narrow one and that is whether the appeal before us is meritorious.

We think we should first appreciate what the provision of section 19(2) (3) of the Act provides:

> *"(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 or order 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."***

Quite clearly, the provisions above are not ambiguous in the sense that it excludes all those days on which the intended appellant or applicant was waiting for a copy of the decree, order or the impugned judgment. The wisdom behind this provision is not to punish the intended appellant or applicant for something beyond their control. The terms the period of time requisite for obtaining a copy of the decree or order appealed from or sought to be reviewed and the time requisite for obtaining a copy of the judgment

on which it is founded shall be excluded presupposes that the intended appellant or applicant has requested for those documents and was not sleeping on his rights. It goes without saying therefore that, the exclusion clause only benefits those who have applied for the said copy and not those who were sleeping on their rights. The next question is, did the appellant sleep on his rights? The answer to this question lies in the subsequent part of our judgment.

In the instant appeal, the appellant wrote a letter on 21.04.2015 the same day the impugned judgment was pronounced (page 106 of the record of appeal) requesting to be supplied with a copy of judgment, decree and proceedings and on 30.04.2015 (page 105 of the record of appeal) the appellant lodged a notice of appeal. As rightly argued by the learned counsel for the appellant, the requested documents were not supplied to the appellant, up until on 11.09.2015 as evidenced by the Exchequer receipt found at page 107 of the record of appeal. We therefore, find considerable merit in the submission by the counsel for the appellant that the appellant had nothing they could have done in the absence of the requested documents and this is the essence of excluding those days. This answers the above question in the negative.

Luckily, the Court has had an occasion to pronounce itself on the essence of exclusion of period under the above provisions. In the case of **Mohamed Salimini v. Jumanne Omary Mapesa**, Civil Appeal No. 345 of 2018 (unreported) in which we stressed that, the provisions of section 19 (2) and (3) of the Act, expressly allow automatic exclusion of the period of time requisite for obtaining a copy of the decree or judgment appealed from the computation of the prescribed limitation period.

Furthermore, this Court in the case of **Alex Senkoro and Others v. Eliambuya Lyimo**, Civil Appeal No. 16 of 2017 (unreported) emphasised 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 Act, 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.

Our view, is further based upon the fact that, these documents were essential for purposes of lodging the appeal in terms of Order XXXIX Rule 1 (1) and (2) of the CPC. We find it appropriate to digress a bit the provisions

of Order XXXIX Rule 1 (1) and (2) of the CPC which is also relevant in the determination of this appeal:

> *"1- (1) Every appeal shall be preferred in the form of a memorandum signed by the appellant or his advocate and presented to the High Court (hereinafter in this Order referred to as "the Court") or to such officer as it appoints in this behalf and the memorandum* ***shall be accompanied by a copy of the decree appealed from*** *and (unless the Court dispenses therewith) of the judgment on which it is founded.*
>
> *(2) The memorandum shall set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative; and such grounds shall be numbered consecutively."*
>
> [Emphasis added]

Looking critically at the provisions above, it seems clear to us that, a memorandum has to be accompanied with a copy of the impugned decree and judgment without which the appellant would have risked to have his appeal axed for being incompetent. It will be presumptuous to expect the appellant to attach documents other than the ones which are expressly stated by the law which is the impugned decree and judgment. If the drafters

of the law had in mind any other documents which ought to be accompanied with the memorandum they would have expressly stated in clear terms.

Admittedly, the record of the trial court was not before the High Court Judge when the appeal came before him for hearing on 17.02.2015 or else, the learned High Court Judge would have been in a position to ascertain from the record whether the appeal was time barred or not and particularly, bearing in mind that, the appellant had lodged in court the memorandum of appeal along with the documents envisaged under Order XXXIX Rule 1 (1) of the CPC.

We, therefore, firmly believe that the learned High Court Judge was duty bound to satisfy himself with the correctness of the record by looking at the original record before disposing of the appeal. We hasten to state that, the appellant's counsel is undeniably right to argue that, the appellant was entitled to exclusion under section 19 (2) and (3) of the Act without necessarily attaching any document to the memorandum of appeal or stating the factual statement constituting the exception which in any case would have been contrary to the requirement of Order XXXIX Rule 1 (2) of the CPC which requires the memorandum of appeal to set forth, concisely and under distinct heading the grounds of objection to the decree appealed from

without any argument or narrative. We have equally, considered the submission by the learned counsel for the respondent that, the appeal was time barred but on account of what we have stated above, his argument is unfounded.

In view of the aforesaid, we find merit in the appeal and allow it. We quash the ruling and set aside the subsequent orders of the High Court and direct that the case file be remitted back to the High Court for expedited hearing of the appeal before another Judge. Costs to follow the event.

DATED at **MWANZA** this 18th day of July, 2022.

S. E. A. MUGASHA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The judgment delivered this 19th day of July, 2022 in the presence of Mr. Innocent Kisigiro, learned advocate for the Appellant and Mr. George Mwaisondola, learned advocate for the respondent, is hereby certified as a true copy of the original.

H. P. Ndesamburo
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL