

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CIVIL APPEAL NO. 143 OF 2007

(Originating from Samola Ilala DM Court in Civil Case 206/02
Before Ndesaruwa Resident Magistrate)

MARTIN PEMBAAPPELLANT

VERSUS

NGIKA MALEWO.....RESPONDENT

Date of last Order – 5/5/2009

Date of Ruling - 15/5/2009

RULING

Mwarija, J.

The respondent has raised a Preliminary objection to the appeal. The point of objection raised centres on the competence of the appeal. The respondent was represented by Mr D.S.Ngalo learned counsel while the appellant was represented by Mr Mhango, learned counsel.

I ordered that the preliminary objection be argued by way of written submissions. The respondent duly filed his written submissions but the appellant, whose counsel was duly served with a copy of the respondent's written submissions did not file any replies there to as per the scheduled order. The preliminary objection was thus rendered unopposed.

In his notice, the respondent raised four grounds:-

1. *That the appellant has failed and or ignored to file a notice of appeal to be served on the respondent.*
2. *That the appeal is hopelessly out of time due to one and half year lapse and has not applied for leave to file and serve a notice of appeal out of time.*
3. *That the honourable court has no jurisdiction to entertain this appeal.*
4. *That there is no justification or excuse for setting aside valid exparte judgment order (sic) warrant of execution and proclamation of sale."*

From the four grounds above, ground No 4 cannot be decided at the preliminary objection stage because the point raised goes into the merits of the appeal. Again, as to ground No. 1, the respondent has not cited any authority which supports the position that the appellant was required to file a notice of appeal before the institutions of his appeal. I had the opportunity of considering that point in the case of Ibrahim Kasamali & 2 Others V. Theodica Mselle, Misc. Civil Application No. 110 of 2008 (HC) (DSM District Registry). There is no requirement under O. XXXIX r . 1 (1) of the Civil Procedure Code that an appeal to the High Court from a decision of a

district court should be preceded by a notice of appeal. Notice is only necessary in respect of an appeal under the Land Registration Act. For that reason therefore, that ground is misconceived and cannot succeed.

With regard to the point that the appeal is hopelessly out of time, it was submitted for the respondent that since the decree was extracted and a copy was collected by the appellant on 25/7/2006 vide exchequer receipt No. 28397520, the appeal which was filed on 6/9/2007 is time barred. The learned counsel for the respondent cited the cases of Amina Rashid V Mohinder Singh (1986) TLR 196 and Halais Pro- Chamie Industries Ltd V. Wella A.G (1996) TLR 269 as authorities.

Perusal of record of the district court reveals that the ex-parte judgment intended to be appealed against was delivered on 9/5/2006 and as submitted by the learned counsel for the respondent, the appellant collected a copy of the extracted decree on 25/7/2006. By filing this appeal on 6/9/2007, a period of over a year, the appeal was obviously filed out of time as under part I, item (2) of the schedule to the Law of Limitation Act, Cap.89, the appeal ought to have been filed within ninety days from the date of judgment.

The appeal having been filed out of time ought, under S.3 of the said Act, to be dismissed. Accordingly, the appeal is hereby dismissed with costs.

A.G. Mwarija

JUDGE

19/5/09

19/05/09

Coram: Hon A.G. Mwarija, J

For the Applicant –

For the Respondent -

Absent

CC: Yasinta

Ct: Ruling delivered. Parties to be notified of the ruling.

A.G. Mwarija

JUDGE

19/5/09