

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

**(CORAM: MUSSA, J.A., MZIRAY, J.A., AND NDIKA, J.A.)**

**CIVIL APPEAL NO 36 OF 2012**

**CHIRIKO HARUNI DAVID .....APPELLANT**

**VERSUS**

<b>1. KANGI ALPHAXARD LUGORA</b>	}	.....RESPONDENTS
<b>2. THE RETURNING OFFICER FOR MWIBARA CONSTITUENCY</b>		
<b>3. THE HON. ATTORNEY GENERAL</b>		

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

**(Chocha, J.)**

**dated the 21<sup>st</sup> day of November, 2011**

**in**

**Miscellaneous Civil Cause No. 7 of 2010**

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**RULING OF THE COURT**

**15<sup>th</sup> & 19<sup>th</sup> May, 2017**

**MZIRAY, J.A.:**

The appeal is against the judgement of the High Court of Tanzania at Mwanza (Chocha, J.) in Miscellaneous Civil Cause No. 7 of 2010 delivered on 21<sup>st</sup> November 2011 whereby the appellant's election petition against the results of 2010 Parliamentary Election pronouncing first respondent the Member of Parliament for Mwibara Constituency was dismissed.

When the matter was called on for hearing on 10<sup>th</sup> February 2014, the Court and learned Counsel representing the parties were

of the same view that the appeal was out of time in terms of section 115(3) of the National Elections Act, Cap 343 as amended by Act No.7 of 2010. However, upon application by Mr. Nyange the Court agreed to adjourn the matter to afford the parties time to reach settlement on the issue of costs involved in the appeal.

Before ascertaining the issue of settlement as agreed, Mr. Nyange wrote a letter to this Court seeking for directions whether the Order made by this Court on 10/2/2014 stating that the appeal was time barred was appropriate in the circumstance of the case.

The matter was again fixed for hearing on 15<sup>th</sup> May, 2017, in which, Mr Herbert Nyange represented the appellant, whereas Mr. Melchizedek Lutema, learned Advocate, represented the 1<sup>st</sup> respondent and Mr. Vincent Tango, learned Principal State Attorney represented the 2<sup>nd</sup> and 3<sup>rd</sup> respondents respectively.

Mr. Nyange started by submitting that, upon reflection, he has realised that the Order of the Court dated 10<sup>th</sup> February, 2014 was wrongly made as it did not go further to strike out the appeal so that the matter is conclusively determined. He pointed out that by declaring the appeal time barred without an order of striking it out

could mean that the appeal is still pending in Court. He asked this Court to revisit that order and give directions as to the way forward.

The arguments advanced by the learned counsel did not receive blessings whatsoever from his counterparties. In reply submissions, both learned Counsel Mr. Lutema and Mr. Tango were of unanimous view that the course taken by Mr. Nyange is an abuse of court process and that the same is calculated to bring a review through the back door without formal application to the Court. The two learned counsel maintained that the appeal is time barred by operation of the law and what is left now is to strike it out with no order as to costs.

In rejoinder submission, Mr. Nyange had nothing more to add. He reiterated what was submitted in the submission in chief.

Having considered the nature of the prayer sought and the submission made to that effect, on which it is being vigorously opposed, with respect, we are of the considered view that in the circumstances and facts appearing, it is obvious that the appellant is trying to challenge the decision of this Court dated 10/2/2014 which reads as follows: -



*"When the appeal was called on for hearing it was discovered and conceded by all parties that the hearing is barred by S. 115(3) of the National Elections Act, Cap 343 as amended by Act No. 7 of 2010. Mr. Herbert Nyange, learned advocate for the Petitioner, prayed for an adjournment to enable the parties engage in serious discussions with a view to reaching a settlement out of court. Both Mr. Melckizedeck Lutema, learned advocate for the 1<sup>st</sup> respondent and Mr. Obadiya Kameya learned Principal State Attorney for the 2<sup>nd</sup> and 3<sup>d</sup> respondent's while emphasizing that the Court has no jurisdiction to hear the appeal, had no objection to Mr. Nyange's prayer.*

*On our part, we have no flicker of doubt in our minds that the unambiguous provisions of s. 115(3) of Cap 343, strictly bar the Court from hearing the appeal which, though lodged in time, could not for reasons beyond the control of the parties be heard within twelve (12) months (i.e. by 9/4/2013). In the circumstances, we hereby accede to Mr. Nyange's prayer and adjourn the matter to be fixed for another date for the purposes*

*suggested by Mr. Nyange. We may go further and add that if the Attorney General is minded to amend the Elections Act in order to bring it in line with the amendment introduced into the Local Government (Elections) Act, Cap 292, by Act No. 2 of 2013, he may as well commence this process now, in the interests of justice.*

*It is so ordered."*

No doubt that the Order was conceded by all the parties that the appeal was time barred. Mr. Nyange is challenging that Order saying that the same was wrongly made. Basically, the learned counsel is seeking for review of that Order. However, there is no formal application to that effect in terms of Rule 48 of the Court of Appeal Rules, 2009. With great respect, this Court cannot entertain such a cause. It is impracticable to entertain review brought through the back door. On that basis therefore, we outright reject the application seeking directions of the Court on a simple reason that it is misleading and at the same time calculated to move the Court to review its order without a formal application.

On the issue of settlement of the costs, we are of the view that it is no longer a concern of this Court taking into consideration that

the parties were given sufficient time to work on it but they have failed to come up with a concrete proposal for such settlement. The concern of this Court now under the circumstance is on the fate of this appeal.

Since the appeal is already declared by this Court to be time barred, now then, the usual consequence which follows thereon is to strike it out of the register, as we hereby do. We make no order as to costs.

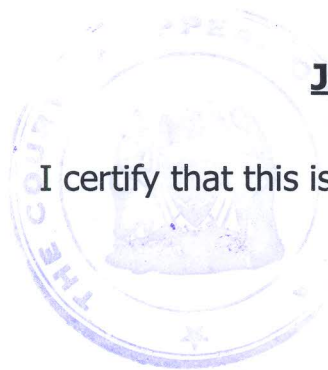
**DATED** at **MWANZA** this 17<sup>th</sup> day of May, 2017.


K.M. MUSSA  
**JUSTICE OF APPEAL**

R.E.S. MZIRAY  
**JUSTICE OF APPEAL**

G.A.M. NDIKA  
**JUSTICE OF APPEAL**

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



  
P.W. BAMPIKYA  
**SENIOR DEPUTY REGISTRAR**  
**COURT OF APPEAL**