

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

(CORAM: BWANA, J.A., MANDIA, J.A., And ORIYO, J.A.)

CIVIL APPEAL NO. 33 OF 2013

**1. ANTHONY NGOO
2. DAVIS ANTHONY NGOO** }APPELLANTS
 VERSUS

KITINDA KIMARO.....RESPONDENT

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

(Sambo, J.)

dated the 12th day of October, 2012

in

Civil Case No. 17 of 2010

RULING OF THE COURT

7 & 17 March, 2014

ORIYO, J. A.:

When the appeal was called on for hearing, Mr. Kamara Mpaya, learned counsel, who appeared for the respondent, raised three points of preliminary objections notice having been filed earlier on, under rule 107(1) of the Court of Appeal Rules, 2009. The objections which were lodged separately in two sets were as hereunder:-

1. Objections lodged on 18/6/2013 were

- (a) The appeal is anchored on a purported **Certificate of Delay issued on 6th May, 2013 under rule 83(1) of the revoked Court of Appeal Rules,**

1979, hence no validly issued and legally effective Certificate of Delay at all.

(b) In the absence of a validly issued and/or legally effective Certificate of Delay, the Appellant's appeal is time-barred.

2. Objection lodged on 27/6/2013

That the Notice of Appeal was wrongly lodged and in contravention of Rule 83(1) of the Tanzania Court of Appeal Rules, 2009.

The first set of objections (a) and (b) challenges the competency of the Certificate of Delay found at page 157 of the record of appeal, which we find appropriate to reproduce as hereunder:-

“IN THE HIGH COURT OF TANZANIA
AT ARUSHA
CIVIL CASE NO. 17 OF 2010
KITUNDA KIMARO.....PLAINTIFF
VERSUS
ANTHONY NGOO.....1ST DEFENDANT
DAVIS ANTHONY NGOO.....2ND DEFENDANT

CERTIFICATE OF DELAY
UNDER RULE 83(1) OF THE

COURT OF APPEAL RULES 1979

“This is to certify that 180 days, from the day of 8th November, 2012 to 6th May, 2013 were required for preparation and delivery of proceedings, judgment, ruling and decree in the High Court to the plaintiff.”

(Signed)

DISTRICT REGISTRAR
HIGH COURT
ARUSHA

Issued this 6th day of May, 2013.”

In support of the objections, Mr. Mpaya Kamara, learned counsel, submitted that the certificate of delay is defective in two aspects. One is that it was issued under the repealed Court of Appeal Rules, 1979 (old rules), instead of being issued under the new Court of Appeal Rules, 2009, which replaced the old rules, vide GN No. 36 of 2010. He contended that the Certificate of Delay issued under the old rules, on 6/5/2013, is defective for being issued under non-existent law (the old rules). The learned counsel argued that in the absence of a valid certificate of delay, the appeal is rendered time barred and hence incompetent.

Submitting in response, Mr. Sang'ka and Mr. Michael Ngalo learned counsel for the appellants, jointly conceded that there were some

“discrepancies” in the Record of Appeal but they were minor. They contended that the discrepancies were not occasioned by the appellants but by Court officers. The learned counsel urged the Court not to penalize the appellants for a fault which they did not occasion.

Admittedly the defects in the certificate of delay are obvious and conspicuous and the learned counsel for the appellants have readily conceded. In view of the concession on the defects, Mr. Kamara, made a further prayer that in the absence of a valid certificate of delay, we make a finding that the appeal is time barred and therefore incompetently in Court.

Rule 90(1) of the Court Rules provides; inter alia:-

*“90 – (1) Subject to the provisions of Rule 128, an appeal shall be instituted by lodging in the appropriate registry, **within sixty days** of the date when the notice of appeal was lodged with -*

(a) a memorandum of appeal in quintuplicate.

(b) The record of appeal in quintuplicate;

(c) Security for the costs of the appeal ... (Emphasis ours).

In terms of rule 90 (1) of the Court Rules, the appeal ought to have been instituted within sixty days of the lodging of the notice of appeal on 17/10/2012. By simple calculations, a competent appeal ought to have been filed by 18/12/2012. In fact, this appeal was instituted on 28/5/2013 which is almost six months after the limitation period of sixty days had expired.

This state of affairs has strenuously exercised our minds; but we are of the firm opinion that what Mr. Sang'ka and Mr. Ngalo learned counsel referred to as "minor discrepancies", are not minor, because they go to the root of the competency of the appeal in court. Had the learned counsel taken time to verify on the correctness of the certificate of delay or any other documents for that matter before incorporating them in the record of appeal, the conspicuous defects in the certificate of delay would have been attended to before certifying on the correctness of the record, in terms of Rule 96(5) of the Rules.

The Court has reiterated time and again on the duty of counsel to be diligent in ensuring that the papers filed in Court do not contain errors – see, **Umoja Garage versus National Bank of Commerce** [1997] TLR

109; The **Attorney General versus Jackson s/o Ole Nemetemi @ Ole Saibul @ Mdosi @ Mjomba and 19 Others**, Consolidated Civil Appeal No. 35 and 41 of 2010, (unreported).

In the event and for the reasons stated we strike out the appeal for being time barred. We make no order for costs, in the circumstances.

Having upheld the objections on the certificate of delay, we see no useful purpose to be served to consider the objection on the notice of appeal. -

It is ordered.

DATED at ARUSHA this 14th day of March, 2014.

S. J. BWANA
JUSTICE OF APPEAL

W. S. MANDIA
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

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


M. A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL