IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MBAROUK, J.A., LUANDA, J.A., And MUSSA, J.A.)

CIVIL APPEAL NO. 3 OF 2015

GODFREY NZOWA.....APPELLANT
VERSUS
SELEMAN KOVA .....1ST RESPONDENT
TANZANIA BUILDING AGENCY.....2ND RESPONDENT

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

(Masengi, J.)

Dated 20th day of September, 2013
in
Land Case No. 12 of 2008

RULING OF THE COURT

17th & 26th February, 2016.

MBAROUK, J.A.:

When the appeal was called for hearing, it transpired that there was a preliminary objection made under Rule 107 (1) of the Tanzania Court of Appeal Rule, 2009 (the Rules) lodged earlier on 12th February, 2016 by the learned State Attorney representing the 2nd respondent. The objection is to the effect that the appeal is incompetent and bad in law for being time barred.

Arguing in support of the preliminary objection, Mr. Sylvester Mwakitalu assisted by Mr. Haruni Matagane, both learned Senior State Attorneys representing the 2nd Respondent submitted that the appeal is time barred having contravened the provisions of Rule 90(1) of the Rules. Mr. Mwakitalu based his argument on the issue that the certificate of delay found at page 597 of the record of appeal is problematic. He simply said that, taking into account the contents of the certificate of delay in this appeal, the appeal is time barred.

On his part, Mr. Dilip Kesaria, learned advocate for the 1st Respondent from the outset supported the preliminary objection relying on the argument that, the certificate of delay signed by the District Registrar in this case is problematic. This is because, he said, the certificate of delay refers to the letter dated 3rd October, 2013 written by the learned advocate for the appellant requesting the District Registrar of the High Court of Tanzania at Arusha to supply them with copies of proceedings and decree, which was wrong. Mr. Kesaria further submitted that, the appropriate letter which should have been referred to in the

certificate of delay should have been the letter dated 20th September, 2013 which was the original letter which applied for copies of proceedings, judgment and decree for appeal purposes. He urged us to find that the letter dated 3rd October, 2013 be considered as a reminder of the letter dated 20th September, 2013 as the same was not the original letter which applied for those copies. He further urged us to find that the record of appeal did not include the proper certificate of delay under Rule 90(1) of the Rules. For that reason he said, the consequences of such an error render the certificate of delay incorrect and hence invalid. In support of his argument he cited to us the decision of this Court in the case of **NATIONAL SOCIAL SECURITY FUND VERSUS NEW KILIMANJARO BAZAAR LIMITED** [2005] TLR 160 and **KANTIBHAI M. PATEL VERSUS DAHYABHAI F MISTRY** [2003] TLR 437. He added that, as the certificate of delay is invalid, hence it should not be relied upon. In the final analysis, Mr. Kesaria prayed for the preliminary objection to be sustained and the appeal to be struck out with costs.

Arguing against the preliminary objection, Mr. Mpaya Kamara assisted by Ms. Neema Mutayangulwa, learned advocates for the appellant vehemently opposed the preliminary objection. Mr. Kamara first submitted that, the preliminary objection has failed to state grounds as required under Rule 107 (1) of the Rules. He further submitted that, the advocates for the respondents argued differently in support of preliminary objection but they reached to a same conclusion that the certificate of delay was problematic. He was of the view that it was improper for the advocates for the respondents to differ in their arguments from the same preliminary objection.

On the issue of the certificate of delay, Mr. Kamara was of the view that in terms of Rule 90(1) of the Rules, the Registrar has been conferred with discretion. After all, he said, the letter dated 3rd October, 2013 which appears in the certificate of delay was a reminder of the letter dated 20th September, 2013. He was of the view that there is a need to have more facts so as to exactly know as to why the Registrar of the High Court used the letter dated 3rd October, 2013, instead of the letter dated 20th

September, 2013 in the certificate of delay. He therefore urged us to find that the preliminary objection has no merit as it is not based on a pure point of law. To buttress his assertion the counsel for the appellant cited a case of **KARATA ERNEST AND OTHERS VERSUS ATTORNEY GENERAL CIVIL REVISION NO. 10 OF 2010** (unreported) which reiterated principles governing preliminary objection enunciated in **MUKISA BISCUIT MANUFACTURING CO. LTD. VERSUS WEST END DISTRIBUTORS LTD** [1969] E.A. 696 that preliminary objection should be raised only on a pure point of law and not on matters which needs to ascertain facts.

His line of argument is based on the day indicated in the certificate of delay when he was supplied on 5th November, 2014 with necessary documents requested for the institution of the appeal without regard to the exclusion of days i.e. 367 days stated in the certificate of delay issued on 20th November, 2014.

Mr. Kamara then referred us to the case of **GEORGE T. VARGHESE AND GEORGE T. THOMAS VERSUS FEDHA FUND LIMITED, INTERCHICK COMPANY LIMITED, AND**

TANZANIA BREEDERS AND FEEDMILLS LTD, Civil Application No. 10 of 2008, (unreported) and quoted the wording at page 3 to the effect that:-

> *"Be it as it may, errors on the certificate of delay cannot be imputed on the parties to the case because they were errors of the Court official who issued the certificate."*

Mr. Kamara therefore invited us to invoke Rule 2 of the Rules and Article 107A of the Constitution to overrule the preliminary objection with costs which we do not think is proper as there is a specific rule governing the matter in question. Be that as it may, in the alternative, he prayed that no order for costs to be imposed on his part, because if there is any error in the certificate of delay it was not his fault but of the officer of the court. He further contended that, in case the Court rules against him, then the person who is entitled to costs is only the second respondent because he was the one who raised this

preliminary objection, the first respondent was just a busy body acted *pro bono*.

In his rejoinder submission, Mr. Mwakitalu contended that, taking into account the number of days specified in the certificate of delay to be excluded as 367 days as from 3rd October, 2013, therefore, he was of the view that when the appellant lodged his appeal on 2-1-2015 it was already out of time.

In his rejoinder submission, Mr. Kesaria insisted that the appeal is out of time, because in the first premise, if the counting starts from **20th September, 2013** when the appellant requested for copies of proceedings, judgment and decree necessary for the institution of the appeal, the appeal was filed out of time. He urged us to find that, the appellant ought to have instituted his appeal not later than **5th October, 2014** and not **2nd January, 2015.**

In his second premise, Mr. Kesaria contended that if the Court finds that the certificate of delay is problematic then,

counting of days should commence on the day when the appellant lodged his notice of appeal i.e. on 3rd October, 2013, as such 60 days ends on 4th October, 2014. So when the appellant lodged his appeal on 2nd January, 2015 the appeal was already out of time.

Mr. Kesaria then distinguished the case of **GEORGE T. VARGHESE** (*supra*) because it was not the holding of the Court but it was the submission made by the counsel for applicant Mr. Rutabingwa to the Court as shown in the record of appeal. For that reason, he urged us to distinguish the case.

For the purposes of the determination of this preliminary objection in question, the issue is whether or not the appeal was filed in time. According to Rule 90 (1) of the Rules which is a provision governing the institution of an appeal, time prescribed by the law is sixty days from the date when the notice of appeal is lodged, but a Registrar of the High Court may exclude days required for the preparation and delivery of the copies of necessary documents for prosecuting an appeal where the

appellant applied in writing for those necessary documents within 30 days and served such a letter to the respondent. For clarity, Rule 90 (1) of the Rules provides as follows:

> *"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,*
>
> *save that where an application for a copy of the proceedings in the High Court has been made within thirty days of the date of the decision against which it is desired to appeal,* ***there shall, in computing the time within which the appeal is to be instituted be***

excluded such time as may be certified by the Registrar of the High Court as having been required for the preparation and delivery of that copy to the appellant.

(2) An appellant shall not be entitled to rely on the exception to sub-rule (1) unless his application for the copy was in writing and a copy of it was served on the Respondent."

[Emphasis added].

At this juncture it is pertinent to reproduce the certificate of delay featured at page 597 of the record of appeal which appears as follows:-

"THE HIGH COURT OF TANZANIA
AT ARUSHA

LAND CASE NO 15 OF 2008

GODFREY M. NZOA ..... PLAINTIFF
VERSUS
SULEIMAN KOVA ..... 1ST DEFENDANT

TANZANIA BUILDING AGENCY ..... 2ND DEFENDANT

CERTIFICATE OF DELAY

(Made under Rule 90(1) of the Court of appeal Rules 2009)

I certify that an aggregate of 367 days were required for preparation of and deliver of the copy of the proceedings and other documents applied for by the appellant in his advocate latter dated 3rd October 2013

And on 5th November 2014 the said documents were supplied to the appellant's Advocate.

Given under my hand and the seal of the Court the 19th day of November, 2014

Signed

DISTRICT REGISTRAR

Issued 20th November, 2014."

Looking at the certificate of delay herein above, it seems to be misleading and problematic. This is because, after going through the submissions made by the counsels for the respondents and authorities cited to us, we are of the firm view that the certificate of delay issued on 20th November, 2014 is problematic and hence invalid.

The consequences of an invalid certificate of delay has been discussed in a number of cases including but not limited to those cited by the respondents. In the case of **NATIONAL SOCIAL SECURITY FUND** (*supra*) where at page 166 this Court held as follows:-

> *"... **A certificate under rule 83(1) of the Court Rules is a vital document in the process of instituting an appeal. It comes into play after the normal period of sixty days for filing an appeal has expired. We are of the view that there must be strict compliance with the rule.** ..."*
>
> *[Emphasis added].*

In the case of **KANTIBHAI M. PATEL** (*supra*) this Court had time to discuss Rule 83(1) of the then Court of Appeal Rules, which is now Rule 90(1) where it was held:-

"A proper certificate under rule 83(1) of the Rules of the Court is one issued after the preparation and delivery of the copy of proceedings to the appellant and certificate contained in the Record of Appeal was improper; it might have been an inadvertent error and no mischief was involved but the error rendered the certificate invalid. An error in a certificate is not a technicality which can be glossed over; it goes to the root of the document."

According **Kantibhai's case** *(supra)*, the consequences of an error in the Certificate of delay leads to render the certificate invalid. The Court further held that:-

"The very nature of anything termed a certificate requires that it be free from error and should an error crop into it, the certificate is vitiated. It

cannot be used for any purpose because it is no better than a forged document. An error in a certificate is not a technicality which can be conveniently glossed over but it goes to the very root of the document. You cannot sever the erroneous part from it and expect the remaining part to be a perfect certificate; you can only amend it or replace it altogether as by law provided."

[Emphasis added].

The above cited quotations tell it all. However, it has to be borne in mind that Rule 83 (1) referred therein was from the Old Court of Appeal Rules, 1979 which is in *pari materia* with Rule 90 (1) of the current Rules.

Having given the matter anxious consideration, we agree with Mr. Kesaria that the certificate of delay is invalid and cannot be relied upon to exclude the days specified therein. We are increasingly of the view that the appeal has been filed out of time prescribed by the law. We therefore uphold the preliminary objection.

Now we turn to the issue of costs. The appellant's counsel asked to waive costs. On the other hand, the respondents' counsels insisted to be awarded costs because they had took considerable time to argue the objection and has put considerable effort to do a research. We should, perhaps, reiterate that it has long been settled by the courts that, as a general rule, costs follow the event; unless the awarding court in its discretion, finds good reasons for ordering otherwise. (See, **NJORO FURNITURE MART LTD V TANESCO** [1995] TLR 205). In the situation at hand, there can be no doubt that the respondents incurred expense and time for research. We are satisfied that the mere fact that the invalid certificate caused by court cannot constitute sufficient reason enough to depart from

the general rule, because the appellant had enough time to correct the defect, he also did not conceded to the preliminary objection raised by the advocate for the 2nd Respondent. In the result, we respectfully decline the invitation by the learned counsel for the appellant and, accordingly, we strike out the appeal with costs to both respondents.

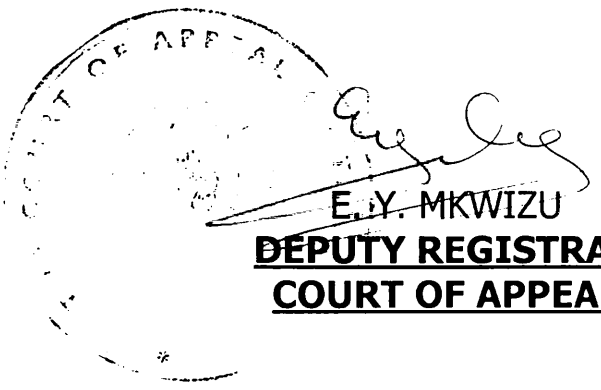
DATED at **ARUSHA** this 22nd day of February, 2016.

M. S. MBAROUK
JUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

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



E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL