

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

(CORAM: MJASIRI, J.A., JUMA, J.A., And MUGASHA, J.A.)

CIVIL APPEAL NO. 86 OF 2015

SHAFEE TAHERALIAPPELLANT

VERSUS

MOHAMED ENTERPRISES (T) LTDRESPONDENT

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

(Mkuye, J.)

**Dated the 29th day of May, 2013
in
DC Appeal No. 7 of 2009**

JUDGMENT OF THE COURT

25th & 28th July, 2016

MUGASHA, J.A.:

The appellant worked as Manager of the Respondent's Company at Iringa Branch and he was mandated to employ subordinate staff. After the respondent conducted the audit of cash sales, stock and debtors and made a physical verification, the appellant failed to establish who had purchased items on credit therefore indicating that there was a loss. This led the Respondent to institute Civil Case No. 14 of 2004 before the District Court of Iringa claiming against the appellant Tshs.35,593,550 which constituted

shortages/loss and misappropriation of funds. The appellant partly admitted the claim. He however, raised a counter claim that, he had worked for the respondent's Company for fifteen (15) years without being paid salaries and allowances. As such, he sought to be paid arrears due and owing to him for the last six years, plus interest on the liability at commercial rate. The counter claim was not only dismissed but the judgment was entered in favour the respondent.

Aggrieved, the appellant unsuccessfully appealed to the High Court which dismissed his appeal hence this appeal faulting the decision of the High Court.

When the appeal was called on for hearing the appellant was unrepresented whereas Dr. Masumbuko Lamwai learned counsel represented the respondent. The Court *suo motu* required parties to address it on the propriety of the appeal since the certificate of delay is not in the record of appeal. Instead, the appellant brought a loose piece of paper purporting to be the certificate of delay and asked the Court to treat it as part of the record and then proceed to hear the merits of the appeal.

On the other hand, Dr. Lamwai learned counsel submitted that since the certificate of delay is not in the record of appeal, the present appeal filed on 10/7/2015 is time barred because its notice of appeal was lodged on 5/6/2013 and the record of appeal should have been filed sixty days thereafter.

He urged the Court to disregard the loose certificate of delay because it is not part of the record of appeal. He argued that, even if the Court was to rely on the loose certificate of delay, the said certificate is defective because it is not dated and it refers to DC Civil Appeal NO. 7 of 2013 and not DC Civil Appeal No 7 of 2009 which is a subject of the present appeal.

He concluded that, since there is no valid certificate of delay, the appeal is not competent and he urged the Court to strike out the appeal. However, he did not press for costs since the anomaly has been raised *suo motu* by the Court.

The issue for our determination is whether the appeal is properly before the Court.

In terms of rule 83 (1) (2) of the Tanzania Court of Appeal Rules, whoever desires to appeal to the Court shall lodge a written notice

within thirty (30) days from the date of the decision sought to be appealed against. Subsequently, Rule 90 (1) of the Court of Appeal Rules, requires:

"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 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 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**"[***Emphasis supplied***].*

In terms of the underlined expression, where the intending appellant has written to the Registrar seeking to be supplied with the proceedings in the High Court, the period of waiting to be supplied with requisite proceedings shall be excluded in the computation of time to file an appeal as may be certified by the Registrar. The certificate of delay must constitute part of the record of appeal in order to enable the Court to determine if the

appeal is filed within the required time. Since the purported certificate of delay presented by the appellant at the hearing of the appeal is indeed not part of the record, for that reason we would not wish to determine the propriety of such certificate.

The Court has on several occasions said that, where there is no valid certificate of delay, the appellant is not entitled to benefit from the exclusion of the period of waiting to be supplied with proceedings from the High Court which makes the appeal to be time barred and not properly before the Court. (See **ALI CHAMANI VS KARAGWE DISTRICT COUNCIL & ANOTHER, CIVIL APPEAL NO 75 OF 2012; RAMADHANI BAKARI & 106 OTHERS VS AGAKHAN HOSPITAL CIVIL APPEAL NO 100 OF 2013** (all unreported)).

In the present matter, the notice of appeal was filed on 5/6/2013 and the appeal was filed more than two years later on 10/7/2015. Since there is no valid certificate of delay, the appeal was lodged beyond the sixty (60) days and hence contrary to rule 90 (1) of the Court of Appeal Rules.

In view of the aforesaid, we agree with Dr. Lamwai that the appeal is incompetent and it is accordingly struck out. We make no order as to costs since the issue of incompetence was raised *suo motu* by the Court.

DATED at **IRINGA** this 26th day of July, 2016.

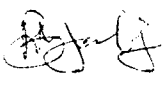
S. MJASIRI
JUSTICE OF APPEAL

I. H. JUMA
JUSTICE OF APPEAL

S. MUGASHA
JUSTICE OF APPEAL

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




B. R. NYAKI
DEPUTY REGISTRAR
COURT OF APPEAL