

**IN THE COURT OF APPEAL OF TANZANIA  
AT DAR ES SALAAM**

**(CORAM: KAIJAGE, J.A., MMILLA, J.A., And MZIRAY, J.A.)**

**CIVIL APPEAL NO. 115 OF 2012**

**VICTORIA MBOWE..... APPELLANT  
VERSUS**

**1. CHRISTOPHER SHAFURAEI MBOWE  
2. ROSE MAHIMBO ..... RESPONDENTS**

**(Appeal from the decision of the High Court of Tanzania  
at Dar es Salaam.)**

**(Mwarija, J.)**

**dated the 6<sup>th</sup> day of December, 2010  
in**

**Probate and Administration Cause No. 39 of 1999**

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**RULING OF THE COURT**

3<sup>rd</sup> June, & 22<sup>nd</sup> July, 2016

**KAIJAGE, J.A.:**

This was supposed to be an appeal against the decision of the High Court (Mwarija, J., as he then was) dated 6<sup>th</sup> December, 2010 given in favour of the respondents in Probate and Administration Cause No. 39 of 1999.

When the appeal was called on for hearing on 3/6/2016, Mr. Godwin Muganyizi, learned advocate who appeared for the respondents rose to

argue the following points of objection, notices of which were earlier given under Rule 107 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules):-

*(i) That as per Rule 90 (1) of the Court of Appeal Rules, 2009, this appeal is time barred;*

*(ii) That the Certificate of Delay at page 272 of the record of appeal, which is a vital document in the process of institution of an appeal is incorrect and erroneously certified.*

Submitting on the 1<sup>st</sup> ground of objection, Mr. Muganyizi pointed out that the appellant lodged her notice of appeal on 17/12/2010, but the record of appeal as lodged does not contain a letter applying for copies of proceedings in the High Court written by the appellant, copied and served on the respondents pursuant to the provisions under Rule 90(1) and (2) of the Rules. On that account, the present appeal which was instituted on 11/12/2012 was time barred and should be struck out with costs to the respondents, he contended.

In response, Mr. Francis Mgare, learned advocate who appeared for the appellant conceded to the non-incorporation, in the record of appeal, of the appellant's letter applying for copies of proceedings in the High Court. He nevertheless alleged that a letter to the Registrar of the High Court applying for copies of proceedings was written on behalf of the appellant on 10/12/2012 and that its copy was served on the first and second respondents, respectively, on 13/12/2010 and 14/12/2010. Moreover, he maintained that it was through inadvertence that a copy of the same letter was not incorporated in the record of appeal.

We propose to begin our brief discussion by examining Rule 90 (1) of the Rules which reads:-

*R. "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."*

It is provided under Rule 90 (1) of the Rules that an appeal to the Court must be instituted within 60 days of the date when the notice of appeal was lodged. In the matter at hand, the appellant lodged her notice of appeal on 17/12/2010. Apart from mere allegations fronted by Mr. Mgare in his submission, we have found nothing in the record showing or suggesting that

the appellant ever applied for the copy of the proceedings within the time and in a manner provided under Rule 90 (1) of the Rules. Similarly, Rule 90 (2) lays it down that an appellant cannot rely on the exception clause in Rule 90(1) unless his application for a copy is in writing and served on the respondent. Again, there is nothing in the record upon which compliance with the provisions of the said Rule 90 (2) of the Rules could be ascertained.

As matters stand, we are in agreement with Mr. Muganyizi that in the absence of a letter applying for the copy of proceedings, the appellant was supposed to institute her appeal within sixty (60) days reckoned from 7/12/2010 when she lodged her notice of appeal. Thus, we are settled in our minds that the present purported appeal which was instituted on 11/12/2012 in violation of Rule 90 (1) of the Rules is, unarguably, time barred.

We wish to say, however, that even if we were to assume that the appellant complied with Rule 90 (1) and (2) of the Rules, we would still have found the present appeal incompetent on account of the uncontroverted violation of Rule 96 (2) of the Rules, the appellant having not incorporated, in the record of appeal, a letter applying for the copy of proceedings in the

High Court. The letter in question could only be excluded from the record of appeal in a manner provided under Rule 96 (3) of the Rules.

Having found on the 1<sup>st</sup> ground of objection that the present appeal is time barred and, therefore, incompetent, there is no practical need for us to consider and determine the second point of objection. Accordingly, we sustain the 1<sup>st</sup> ground of objection and strike out the incompetent appeal with costs to the respondents.

It is so ordered.

**DATED** at **DAR ES SALAAM** this 13<sup>th</sup> day of July, 2016.

S. S. KAIJAGE  
**JUSTICE OF APPEAL**

B. M. MMILLA  
**JUSTICE OF APPEAL**

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

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



T. K. SIMBA  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**